



**Republic v Jane Muthoni Mucheru & Isaack Ng'ang'a Wambui alias Gikuyu
(Criminal Case 45 of 2018) [2021] KEHC 7647 (KLR) (22 April 2021) (Judgment)**

Republic v Jane Muthoni Mucheru & another [2021] eKLR

Neutral citation: [2021] KEHC 7647 (KLR)

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

CRIMINAL CASE 45 OF 2018

JM NGUGI, J

APRIL 22, 2021

BETWEEN

REPUBLIC PROSECUTOR

AND

JANE MUTHONI MUCHERU 1ST ACCUSED

ISAACK NG'ANG'A WAMBUI ALIAS GIKUYU 2ND ACCUSED

JUDGMENT

1. On Monday, November 7, 2016, Mr Solomon Mwangi Mbuthi, then Principal of Kiru Boys High School (“Kiru Boys”) in Murang’a, (hereinafter, the “Deceased”) was expected to pick up national examination papers at the Murang’a County Education Officer’s offices at around 5:00am in the morning. He did not show up. This triggered a series of phone calls and consultations about his whereabouts. Eventually, the Ministry of Education officials reached his wife, Jane Muthoni Mucheru, the 1st Accused Person herein, with the news.
2. After more than five days of searching, the body of the Deceased was discovered. It was found at Karakuta Coffee Estate. It was discovered in a thicket, covered in soiled gunny bags, by a worker at the Karakuta Coffee Estate, Mukabi Karanja, on November 11, 2016. Mr Karanja called the head of the local Police Post (Karamaini Police Post), Corporal Samuel Kabui and informed him of the grim finding. Corporal Kabui, who testified in the trial as PW14, went to the scene with his colleague, Richard Boit. He found the body of an African male lying on its back with gunny bags over his head and upper torso. The body was already decomposing. The body had no shoes on. There was a rope around the neck. The rope was tied to a tree. At the time, Corporal Kabui did not know that the body was that of the Deceased. He called the Officer Commanding Police Station, Ruiru who sent a Police Vehicle to pick up the body and took it to the City Mortuary. It was only later – on November 16, 2016 – that Corporal Kabui came to learn, through the Ruiru OCS, that the body was that of the Deceased.



3. Subsequently, investigators formed the opinion that the two Accused Persons together with one, Joseph Kariuki Njuguna (known by the popular alias “Karis” which will be used hereinafter) and Nelson Njiru Magati (who is a fugitive of justice and is hereinafter referred to as “Njiru”)) jointly planned and executed the murder of the Deceased. The two Accused Persons together with Karis were originally jointly charged with the murder of the Deceased. However, subsequently, Karis accepted a plea agreement in which he pleaded guilty to the lesser crime of manslaughter. The two Accused Persons herein remained charged with the murder of the Deceased.
4. The Prosecution theory is that the 1st Accused Person, who is the wife of the Deceased, became disenchanted with what she suspected was her husband’s infidelity with a certain woman referred to as MWK (or “Mpesa Lady”). After initial attempts to eliminate MWK by murder by hired killers, the Prosecution theory goes, the 1st Accused Person conspired with Njiru and enlisted the assistance of the 2nd Accused Person and Karis to kill her husband.
5. The Prosecution sought to prove its case through a combination of direct evidence and circumstantial evidence. It called twenty-one witnesses to prove its case. The direct evidence was from Karis – a self-confessed accomplice in the crime. As aforesaid, Karis entered into a plea agreement with the State in which he pleaded guilty to the offence of manslaughter in the death of the Deceased. I sentenced him to seven years imprisonment in a ruling dated March 9, 2017. As part of the plea agreement, Karis agreed to testify against his two accomplices upon whom he placed the most culpability for the homicide of the Deceased.
6. The central issue for my determination in this trial is whether the two Accused Persons jointly committed the murder of the Deceased.
7. The offence of murder is defined by section 203 of the [Penal Code](#) as follows:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
8. In order to reach a guilty verdict in a case of murder, the Prosecution is required to tender proof beyond reasonable doubt of the following three crucial ingredients:
 - i. That death of the victim occurred (actus reus);
 - ii. That the death was caused by an unlawful act(s) or omission(s) by the Accused Persons; and
 - iii. The unlawful act or omission was actuated by malice aforethought (mens rea).
9. On the other hand, under section 206 of the [Penal Code](#), malice aforethought is established, when there is evidence of:
 - i. Intention to cause death of or grievous harm to any person whether that person is the one who actually died 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 actually killed or not;
 - iii. Intent to commit a felony; or
 - iv. 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.
10. There is no contestation about the death of the Deceased. Undisputed evidence was led by Corporal Samuel Kabui of Karamaini Police Post (PW14) that the Deceased’s body was found by Mr Mukabi



Karanja near the Karakuta Coffee Estate on November 11, 2016. Mr Karanja called Corporal Kabui who went to the scene that same evening and arranged with the Ruiru OCS to remove the body to City Mortuary. The body was eventually identified by Simon Mbuthi, the brother of the Deceased on November 16, 2016. Simon testified as PW15. He also identified the body to the pathologist, Dr. Peter Mwaniki Ndegwa who testified as PW11.

11. Dr. Ndegwa examined the body on November 16, 2016 and filled out a post-mortem form which he produced as Exhibit 9 in the case. Dr. Ndegwa concluded that the cause of death was asphyxia neck compression due to manual and ligature strangulation. Though the body was slightly decomposed at the time of examination, Dr. Ndegwa noted several other injuries including on the occipital region and frontal scalp, upper arms and knees. In any event, the fact of death of the Deceased and the cause of death are not in any doubt.
12. The bulk of the Prosecution case was focused on presenting evidence aimed at demonstrating that it was the two Accused Persons who committed the homicide; and that they harboured malice aforethought in doing so.
13. Karis, the self-confessed accomplice, testified as PW4. He gave a detailed account of his dealings with the two Accused Persons, Njiru (who remains at large); and one Damaris (who testified as PW5) and how those dealings ended up in the strangulation murder of the Deceased. It was this evidence of Karis which formed the contours of the narrative which the Prosecution attempted to marshal corroborative evidence to confirm its veracity. Since the evidence of Karis is accomplice evidence, as I will discuss later in this judgment, this corroborative evidence to independently establish the facts, is a legal requirement under our precedents.
14. Karis testified that while the plans to murder the Deceased started at an earlier date (discussed below), the execution started in earnest on November 4, 2016. By this time, Karis said, both he and the 2nd Accused Person had been recruited by Njiru on behalf of the 1st Accused Person for the “job”. Indeed, according to Karis, both he and the 2nd Accused Person had already, in June, 2016, been paid Kshs 50,000/- each in advance for the task. That money had been paid, Karis testified, at Tree Shade Hotel by the 1st Accused Person in the presence of Njiru. The advance payment, according to Karis, was to keep the two hired killers interested in the task. Indeed, Karis testified, Njiru would call him occasionally to inform him that the “job” was still on.
15. Later on, the date appointed for the “job” was communicated to be November 4, 2016. Karis testified that Njiru called him and informed him that they were all to meet at Texas Bar. The rest of the narrative, as told by Karis, was as follows.
16. Karis and the 2nd Accused Person arrived earlier at Texas Bar. They ordered drinks. Later on, the 1st Accused Person and Njiru joined them. They arrived together in Motor Vehicle Registration No KCF 405R, a White saloon car of the make, Toyota Sienta (hereinafter, the “Toyota Sienta”) with the 1st Accused Person driving. They sat together with Karis and the 2nd Accused Person at Texas Bar where the 1st Accused Person outlined the plan she had. She announced that she had “Mchele” which she would find a way to administer in order to intoxicate her husband. The 2nd Accused Person and Karis would then kill the Deceased using a rope which the 1st Accused Person also announced was in the Toyota Sienta. “Mchele” is a colloquial term used to describe stupefying or coma-inducing drugs which are often used by criminals to render their victims unconscious so that they can easily overpower them and commit their crimes unhindered.
17. The plan was for all four: the two Accused Persons; Njiru and Karis – to travel in the Toyota Sienta to Kiriaini where Kiru Boys is located and at which the Deceased was the Principal. It was there where the murder plan would be executed. The 1st Accused Person was to sneak in the 2nd Accused Person



- and Karis into the compound of Kiru Boys in the Toyota Sienta and have them remain hidden in the vehicle while the 1st Accused Person administered the Mchele on her unsuspecting husband. When the drug took effect, the 1st Accused Person would then call the 2nd Accused Person and Karis to come with the rope to “finish the job” by strangling the Deceased.
18. With the plan in place, the four headed to Kiriaini in the Toyota Sienta. They dropped Njiru at Kiriaini town before the three proceeded to Kiru Boys. They arrived at around 10:00pm. The 2nd Accused Person and Karis were in the back seat of the vehicle safely hidden by the tinted windows of the vehicle. At the gate of the School, the 1st Accused Person briefly chatted with David Kimuya (PW6), the Security Guard, who let her in.
 19. According to Karis, the 1st Accused Person parked the Toyota Sienta at the Principal’s residence and left the 2nd Accused Person and Karis safely hidden in the back seat. They were waiting for communication from her that the Deceased was sufficiently intoxicated so that they could move in and strangle him. However, after about two hours, Karis testified, the 1st Accused Person emerged from the Deceased’ house and informed them that the plan was not working; that the Deceased was not reacting to the Mchele as expected; and that, therefore, they needed to change course.
 20. A short while later, Karis testified, the 1st Accused Person came into the Toyota Sienta and drove them to Kiriaini town for them to find their way back to their homes, the initial plan having aborted. Karis testified that the 1st Accused Person told them that she had told the Deceased that she needed to go out and buy some food. The 1st Accused Person reportedly drove them to Othaya where the 2nd Accused Person and Karis took a matatu back to Kenyatta Road and Murera respectively. It was already 3:00am (on November 5, 2016) by the time they boarded the matatu.
 21. Karis further testified that the following day he got a call from Njiru to call a certain telephone number of someone who was to sell some Mchele to them. However, Njiru called later to report that the seller had declined to sell to him. By that time, however, Karis had travelled to the specific location in Juja where he was to collect the contraband. Karis said while at that location in Juja, he saw the 1st Accused Person sitting in the Toyota Sienta while a stranger opened the front door, and left. Karis assumed that a transaction involving Mchele had taken place between the 1st Accused Person and the stranger.
 22. The following day – Sunday, November 6, 2016 – Karis says he received another call from Njiru telling him that there was “work” to be done on that day. Njiru told him to go to Kenyatta Road. He did. He then says that he got a call from the 1st Accused Person who instructed him to meet her at Ndarugwo at Uriithi Plots. He proceeded there as instructed. He arrived first. Shortly thereafter, Karis testified, the 1st Accused Person arrived driving the Toyota Sienta. The Deceased was on the front passenger seat. The 1st Accused Person asked Karis to “maliza kazi” which he understood to mean to complete the task of killing the Deceased. When Karis hesitated, the 1st Accused Person got angry and said to him in Kiswahili: “Kwanini humalizi kazi? Kwani wewe in muoga?”
 23. Karis says that he retorted to the 1st Accused Person that she may as well kill her own husband. The 1st Accused Person angrily went back to the car and sped off but then drove back after some time. Karis says that when she came back, she told him that the Deceased was already drugged and she could not go back with him in that state. She, therefore, asked Karis to call the 2nd Accused Person and find out how far away he was. Karis did this. The 2nd Accused Person informed him that he was not too far from where they were; and true enough, he arrived shortly thereafter.
 24. Karis says that the 1st Accused Person told the Deceased that he and the 2nd Accused Person were the persons who would show them “the plots” but that they needed to first drive to a particular location to get the property documents. They, then, all got into the Toyota Sienta with Karis and the 2nd Accused Person seated in the back passenger’s seats. The 1st Accused Person drove the Motor Vehicle towards



- Karakuta Coffee Estate. She drove for some time then stopped and announced: “ni hau!” (“It is here!”). With that announcement, and apparently on cue, Karis said that the 2nd Accused Person suddenly took the rope which was in the vehicle, put it round the Deceased’s neck and pulled it. Karis says he tried to open the door but it jammed. The 2nd Accused Person asked him to hold the rope as he went round the car and opened the door from the outside.
25. Together, Karis and the 2nd Accused Person removed the Deceased from the vehicle. The 1st Accused Person asked the 2nd Accused Person to get the Deceased’s cell phone. He complied and handed it over to the 1st Accused Person. Then, Karis and the 2nd Accused Person walked the Deceased for about 100 metres off the car track, into a small thicket. They instructed him to sit down. The 2nd Accused Person tied his hands with the rope and fastened them. He then tied the rope around a tree. The 2nd Accused Person, then, took some three soiled gunny bags which he had come with and used them to cover the head, upper body and legs of the Deceased. Karis testified that the 2nd Accused Person, then, removed the Deceased’s shoes and exchanged them with the gumboots he was wearing. The 2nd Accused Person left his gumboots at the scene and walked away in the Deceased’s shoes.
 26. Karis and the 2nd Accused Person left the Deceased in the thicket and walked back to where they had left the 1st Accused Person inside the Toyota Sienta. They did not find it. She had left. Karis said they then walked, using a short-cut, to Kenyatta Road and went their separate ways. Karis said that he never saw Njiru or the 1st Accused Person again although he tried to collect the remainder of his “fees” but to no avail.
 27. Abby Njeri, a 16-year old daughter of the Deceased testified as PW1. She was duly sworn after the Court administered voir dire. She remembered the Deceased arriving at their home at Icaciri Secondary School together with the 1st Accused Person on Saturday, November 5, 2016 in the evening. She then went to the office with the 1st Accused Person for a brief while and then back to the house. Nothing unusual happened. The following morning, she and her siblings went to church, leaving the parents behind. When they got back home after 1:00pm, the parents had left. Her mother, the 1st Accused Person, came back in the evening and said that she had dropped the Deceased around Thika. Abby never saw her father again.
 28. The testimony of Susan Almai, a House Manager employed by the 1st Accused Person, as well as that of June Valentine Muthoni, another daughter of the 1st Accused Person and the Deceased, were of similar nature. They testified as PW2 and PW3 respectively. June testified that she tried to call her dad that evening but the phone had been switched off.
 29. The 5th witness to the stand was Damaris. Damaris requested that her full name be redacted for security reasons. She testified that she was good friends with Njiru. She testified that sometime in 2016 she received a call from Njiru asking that they meet a client to discuss how they could “help” her. When they finally met at Ikon Hotel along Kenyatta Road, the client turned out to be the 1st Accused Person. Damaris had not known the 1st Accused Person before. During the meeting, Damaris learnt that the 1st Accused Person’s needed help: she wanted to trace some messages she thought were exchanged between the Deceased and a lady the 1st Accused Person suspected of having an affair with the Deceased. Damaris said that the 1st Accused Person told them that she had quarrelled with the woman and the matter had been reported to Murang’a DCI. The 1st Accused Person promised to pay Kshs 200,000/- for the messages. Though Damaris said she was sceptical she could find the information the 1st Accused Person wanted, she promised to try and they exchanged phone numbers.
 30. The following day, Damaris received a call from Njiru who said that he had the messages the 1st Accused Person wanted. She met with Njiru at Kimbo and he gave her an envelope to deliver to the 1st Accused Person. Njiru reportedly told her that the envelope contained the messages the 1st Accused



Person wanted and that she, Damaris, should deliver it to the 1st Accused Person at Icaciri Secondary School and collect the Kshs 200,000/- the 1st Accused Person had promised. Damaris testified that she drove to Icaciri Secondary School and when she got to the gate, she made a call to the 1st Accused Person who instructed the Security Guard to open the gate for her vehicle. She then drove in and met the 1st Accused Person in her office. She gave her the envelope but when the 1st Accused Person opened it, she gave Damaris Kshs 100,000/-. Damaris said she shared the amount equally with Njiru.

31. Two days later, Damaris said that she got a call from the 1st Accused Person who told her that the messages she had delivered were not sufficient to confront the husband; and that she wanted more detailed messages. She kept calling Damaris for more messages to the extent that Damaris started avoiding her calls.
32. Around the same time, Damaris testified, Njiru called her and asked for contacts for Karis. Damaris had known Karis for about five years when she owned a matatu plying Ruiru-Nairobi route and Karis was a tout on that route. She told Karis that Njiru was looking for him and on the day the two had agreed to meet, Damaris gave him a lift and dropped him at Kimbo where he met with Njiru.
33. The lady who the 1st Accused Person allegedly suspected was having an affair with the Deceased is MWK. She also requested that only her initials or pseudonym be used because she is afraid for her safety. She testified as PW10. She denied that she was having an affair with the Deceased but admitted that the Deceased was his long term customer at the Mpesa shop she used to operate. She testified that on January 12, 2016, she received a call from the 1st Accused Person (on phone number 0707-xxxx) asking her to “keep off” her husband. Thereafter, the 1st Accused Person started sending her abusive and threatening messages to her number – 0723-xxxx. She decided not to engage but she called the Deceased about it. The Deceased promised to “sort it out.”

However, the 1st Accused Person was still sending her abusive messages by the following day. MKW also testified that the 1st Accused Person also forwarded to her Whatsapp messages from the Deceased confessing his love for the 1st Accused Person – apparently to demonstrate that the Deceased loved her (1st Accused Person) and MKW was interfering with their family.

34. Then, MWK got a call from the OCS, Kiria-ini summoning her to the Police Station. When she went, she found the 1st Accused Person and the Deceased at the Police Station. Later on, the OCS released her to go stating that that was a family dispute between the 1st Accused Person and the Deceased.
35. However, on January 21, 2016, some officers from the DCI Murang’a office went to MKW’s place of work and purported to arrest her for being a member of “Mungiki” on the allegations that she had “stolen someone’s husband.” The officers took her to the DCI offices in Murang’a where they tried to force her to admit, in the presence of the 1st Accused Person, that she was having an affair with the Deceased. She refused. They made her record a statement; and confiscated her phone – model Infinix. She was asked to report back the following day where she met the 1st Accused Person and the Deceased. The matter seemed to have died down and she told the Deceased she would rather he did not go to her shop again. The Deceased kept off until in August when he went and deposited some money to send to a certain Samuel Karanja. Later on, in early November, the Deceased went again to request for a print out to confirm that the earlier transaction to Mr Karanja had gone through. That is the last time MKW saw the Deceased.
36. The testimony by MKW regarding the text messages exchanged between her and the 1st Accused Person was corroborated by Inspector David Mwasia, a Cybercrimes expert who testified as PW17. Inspector Mwasia testified that he examined MKW’s phone – the Infinix – and extracted the SMS messages exchanged between MKW and the 1st Accused Person on January 12, 2016 and January 13, 2016. He produced the Report as Exhibit 7A. The Report reproduced the texts – and they mirrored



the messages MKW claimed the 1st Accused Person had sent to her on those dates. The first one, sent from phone number 0707-xxxx (which is registered in the 1st Accused Person's name) and sent to phone number 0722-xxxx (which is registered in MKW's name), at 9:33pm on January 12, 2016 read:

U r only 27 yrs I hear n wonder wish u cud respect itself as a lady. Maybe u r desperate 4 a husband bt having an affair with a man twice ur age is shameful. U seem 2 cheap.....

37. A second one read as follows:

U don't have 2 tell the whole kiriani ab tur immoral ways just cz u think uv hit a jackpoint....having an affair with a whole principal of a sec school! Since when did a thief own whats she's stolen?

38. A third SMS read as follows:

Uv been bragging to send mpesa to me, his sis, friends n collques saying u control his finances. That b4 u mpesa he must explain it use....My silence is over n plz note u r like my own dota if there's aota of personal n moral respect remaining, stay away. Lets imagine u never slept with my husband, u never hid in my car....bra bra. This Is A New Year 2016.

39. The other messages were of same tenor. There is no need to repeat all of them here.

40. Inspector Mwasia was also able to extract from MKW's phone two Whatsapp messages forwarded from the phone of the 1st Accused Person to MKW's phone. The first message reads as follows:

My beautiful wife, swt Jyn, always know u r special to me n luv u so much. Am your only I assure u n don't ever doubt that forever.

And the second message reads:

Swt Jyn, ave kept assuring u it's a ghost that has always been in my car, very insignificant in my life seeking 4 attention, association or anything. U r my life n my kids. Luv you always.

41. David Kamuya Gachoka, PW6, was the Security Guard at Kiru Boys. He confirmed that the 1st Accused Person went to Kiru Boys on November 4, 2016 at around 10:00pm driving a White vehicle which he identified as the Toyota Sienta (Exhibit 1). The 1st Accused Person requested the guard not let loose the dogs because she would be going out again. The vehicle, again driven by the 1st Accused Person, approached the gate at around 1:00am and he opened the gate for it to be driven out of the school compound. The vehicle was driven back at around 2:00am and he opened the gate again and noted that the 1st Accused was driving it. He confirmed that on all the four occasions he opened the gate for the vehicle, it was the 1st Accused Person was on the driver's seat but that the vehicle had tinted windows and he could not see if there were passengers on the back seat. Mr Gachoka explained that he was not required to do any intrusive interrogation or check-up since the 1st Accused Person was the wife of the Principal.

42. The other night guard on duty – John Peter Wachira – also testified as PW7. He confirmed that he saw the vehicle driven by the 1st Accused Person being driven into the compound of Kiru Boys on November 4, 2016 at around 10:00pm; and that the guard at the gate (PW6) had called him on the phone to tell him not to release the dogs because the Principal's wife (1st Accused Person) would be driving out again. He also testified that at around 12:30am, the Deceased called him and asked him to get some milk from the kitchen. He did as instructed but when he went to the Principal's house, he testified that he found the 1st Accused Person already inside the vehicle. The 1st Accused Person reportedly asked him to keep the milk inside the house; and he left it in the waiting room adjacent to



the main house. He corroborated the account of Mr Gachoka that the 1st Accused Person drove the vehicle out of the compound and returned about an hour later.

43. PW8 was Joyce Wairimu Njoya, a Government Chemist who performed the toxicological tests on the samples of kidney, liver and stomach harvested from the body of the Deceased. She testified that she received the samples at the Government Chemist laboratories in Nairobi with the request to determine if any chemically toxic substances were present in the samples. After testing, she concluded that Xylazine was detected in the samples. Xylazine (whose proprietary names include Rompun, Racoxyl; Xylapan; and Xylasol) is a strong sedative drug commonly used in veterinary treatments. Ms. Njoya testified that no other chemically toxic substances were detected in the specimens. She produced the report as Exhibit 5B. Ms. Njoya also produced another report as Exhibit 5A. It is near identical save for the name: In 5A, she said, there was a typographical error indicating the name of the Deceased as “Simon Mwangi” while in Exhibit 5B, the error was corrected to read correctly “Solomon Mwangi Mbuti.” For accountability, she said, she produced both reports. She said that she noticed the error immediately after and asked for another copy correcting the error to be typed.
44. Stephen Mwaura Macharia is a carpenter who, on Sundays, doubles up as a Security Guard at Icaciri Secondary School. He testified that he saw the 1st Accused Person driving the Toyota Sienta out of the school compound with the Deceased on the front passenger seat on Sunday, November 6, 2016 at around 11:30am. He, again, saw her driving the same vehicle back into the school compound at around 5:00pm before driving out again. He testified as PW9.
45. The Deputy Principal at Icaciri Secondary School, Pauline Wairimu Munyiri also testified as PW12. She confirmed the narrative of PW9 that the 1st Accused Person drove a White vehicle into the compound of the school on November 6, 2016. On November 9, 2016, the 1st Accused Person also borrowed her car at around 3:30am and returned it after 6:30am. Ms. Munyiri also testified that while CCTV cameras had been installed in the school, the controls for the CCTV were in the 1st Accused Person’s office. They were, Ms. Munyiri testified, installed by Njiru; and further that while Ms. Munyiri was the Chair of the Procurement Committee, the procurement for that installation did not follow the normal procurement process since it was not approved by her Committee. Ms. Munyiri testified that she had seen Njiru at the school many times as he used to come to see the 1st Accused Person.
46. Testifying as PW13, Bernard Karugia, a Sports Gear supplier, told the Court that he is the one that sold the shoes he identified in Court (Exhibit 3). The shoes were of the make CAT. Bernard recalled that he had known the Deceased since 2010 as a supplier. He had supplied goods and equipment to the Deceased’s previous school, Rogamano Secondary School and when he was moved to Kiru Boys, Bernard started supplying goods there as well. In March, 2016, Bernard testified, he got a call from the Deceased who ordered four pairs of sports shoes: one pair for himself; one pair for the Deputy Principal; and two pairs for two other teachers. Once he procured the shoes as per the descriptions given, he travelled to Kiru Boys to deliver them.
47. Bernard told the Court that when he got to Kiru Boys, the other three teachers accepted their pairs but the Deceased found his pair (a No 9 CAT shoes) a little tight. Bernard agreed with the Deceased to source a new pair and then contact the Deceased to arrange for the exchange. He did this once he got the correct pair from Nairobi Sports House and the Deceased came to Nairobi bearing the No 9 CAT shoes. He exchanged it with a No 10 CAT shoes. The shoes were, Bernard testified, the same ones he was shown in Court as Exhibit 3.
48. Bernard told the Court that he was particularly sure about the shoes because prior to selling them, he had taken photos of the shoes and sent them to the Deceased and his Deputy for approval. Those photos were still in his phone and when he handed his phone to the Police, they were extracted and



printed out. He identified those photos when shown to him in Exhibit 7A. The photos were extracted from the phone and printed by Inspector Mwasia who testified as PW17. Inspector Mwasia duly produced the Report which contained the photos as Exhibit 17A.

49. Robert Githu Kimani, a taxi driver, testified as PW16. Mr Kimani told the Court that his taxi is the Toyota Sienta Registration No KCF 405R. He used to hire it to Njiru when he needed it. On November 4, 2016, Njiru hired the Toyota Sienta from him. He was supposed to return it the following day but he kept changing the time he was to return it. Mr Kimani saw the vehicle being driven at a high speed at about 5:00pm as it was leaving Gatundu town. Njiru eventually returned it on Monday, November 7, 2016. He paid the amount he owed.
50. Two experts who are law enforcement officers associated with Safaricom and Airtel – the major mobile phone companies in Kenya testified and produced phone data for the phones registered in the names of the two Accused Persons, Karis, the Deceased, and Njiru. The two experts are Sergeant Faisal Juma is a Safaricom Law Enforcement Liason Officer and testified as PW18. Vincent Mbaabu is a Security Liason Officer embedded at Airtel. He testified as PW19.
51. Faisal produced phone data for four phone numbers as follows:
 - a. Exhibit 15A – Phone data for phone number 0722xxxx registered in the name of the Deceased.
 - b. Exhibit 15B – Phone data for phone number 0707xxxx registered in the name of the 1st Accused Person.
 - c. Exhibit 15C – Phone data for phone number 0721xxxx registered in the name of the 1st Accused Person.
 - d. Exhibit 15D – Phone data for phone number 0721xxxx registered in the name of Njiru.
52. On the other hand, Mbaabu produced phone data for two phone numbers as follows:
 - a. Exhibit 16A – Phone data for phone number 0750xxxx registered in the name of Karis (PW4).
 - b. Exhibit 16B – Phone data for phone number 0733xxxx registered in the name of the 2nd Accused Person.
53. Both Faisal and Mbaabu explained to the Court how to read the phone data they produced. The phone records produced contains the following information: the number of the subscriber (that is, the person to whom the phone is registered); the IMEI of the phone (that is the International Mobile Equipment Identity); the numbers which the subscriber communicated with; the record type – whether the communication is incoming or outgoing and whether it is an SMS or a call; the exact time of the call or SMS; the duration of the communication; the sub-loc (that is the telecommunication mast (location) used to process the communication); the name of the IMEI owner; the model of the phone; the roaming VPMN; the name and National ID number. They explained that the phone call data can be used to not only trace the different persons a subscriber communicated with; but also identify their location by looking at the sub-loc i.e. the cell towers (masts) which processed the signals from the cell phone.
54. Both Faisal and Mbaabu explained how the sub-loc data is used to approximate where a cell phone is located. Basically, in order to route calls or SMSes to a phone, cell towers (masts) “listen” for a signal sent from the phone and “negotiate” which tower is best able to communicate with the phone. As the phone changes location, the antenna towers monitor the signal, and the phone is “roamed” to an adjacent tower as appropriate. By identifying which cell tower a particular phone used to communicate, one is able to approximate the location of the phone. Both Faisal and Mbaabu further explained that there



are times when two nearby cell towers might pick up signals from the same phone. This means, for example, two cell phones in the exact same location might be “roamed” to two different cell towers which are near each other. Additionally, different Telecommunications Companies use different cell phone towers and name them differently. As a result, two cell phones at the exact same spot but which use different networks would have different sub-loc locations in their data depending on how each network has placed and named its cell towers.

55. From the evidence of the six sets of phone call data produced by Faisal and Mbaabu, the relevant data for the Prosecution case can be classified into three sets as follows:
- a. Calls and phone data related to the events of November 4, 2016;
 - b. Calls and phone data related to the events of November 6, 2016; and
 - c. Calls and phone data showing various communications between the key actors prior to November 4, 2016 and after November 6, 2016.
56. Regarding the alleged events of November 4, 2016, the phone data of the six sets of phone data show the following:
- a. Between 8:43am and 3:08pm on November 4, 2016, Karis (Exhibit 16A) spoke on the phone with the 2nd Accused Person (Exhibit 16B) six (6) times. There was no more communication between them on the phone on that day after 3:08pm.
 - b. Between 9:10am and 5:12pm, Karis (Exhibit 16A) spoke on the phone with Njiru (Exhibit 15D) fourteen (14) times. There was a lull in communication between the two between 5:12pm until 9:02pm when Njiru (Exhibit 15D) made a call to Karis (Exhibit 16A).
 - c. Between 9:12am and 7:54pm, Njiru (Exhibit 15D) had at least 7 phone conversations with the 1st Accused Person (Exhibit 15B). He also had a call with her on her other line (Exhibit 15C) at 7:00pm.
 - d. Njiru (Exhibit 15D) communicated with the 2nd Accused Person (Exhibit 16B) at 8:21pm.
 - e. Between 11:58pm and 1:03pm (on November 5, 2016), Njiru (Exhibit 15D) exchanged at least 18 SMS messages with the 1st Accused Person (Exhibit 15C).
 - f. The sub-loc data of Karis (Exhibit 16A) – which was subscribed to Airtel -- shows his movement in the evening of November 4, 2016 as follows:
 - i. At 5:29pm, he was in Ruiru Kimbo. This is in Kiambu County and about 95 Kms to Kiriaini.
 - ii. At 6:46pm, he was in Saba Saba. This is in Murang’a County near Makuyu. It is about 56 Kms to Kiriaini.
 - iii. At 7:18pm, he was in Muranga town. This is in Murang’a County and about 38 Kms to Kiriaini.
 - iv. At 8:40pm, he was in Gekoe near Gakuya. This is in Murang’a County and about 25 Kms to Kiriaini.
 - v. At 8:52pm, he was in Gatuya in Murang’a County. Gatuya is also about 25Kms from Kiriaini.
 - vi. At 2:12am (on November 5, 2016), he was in Tumu Tumu. Tumu Tumu is in Nyeri County and is about 32 Kms from Kiriaini.
 - vii. At 6:15am (on November 5, 2016), he was in Murera. Murera is in Ruiru in Kiambu County.



- g. On the other hand, the sub-loc data of the 2nd Accused Person (Exhibit 16B) – which was subscribed to Airtel - shows his movement in the evening of November 4, 2016 as follows:
 - i. Between 7:22pm and 7:43pm, he was in Muranga town.
 - ii. At 8:08pm, he was in Mugeka in Murang’a County which is about 25 Kms to Kiriani.
 - iii. At 8:21pm, he was in Gatuya which is also about 25 Kms to Kiriaini.
 - iv. At 8:21pm, he was around Kanunga which is also about 20Kms from Kiriaini.
 - v. At 8:46pm, he was around Gikoe in Murang’a County.
 - vi. At 6:14am (on November 5, 2016), he was back in Kalimoni, Kenyatta Road in Kiambu County.
 - h. The sub-loc data for the 1st Accused Person (Exhibit 15B)) – which was subscribed to Safaricom -- shows her movement in the evening of November 4, 2016 as follows:
 - i. At 8:34pm, she was in Kabati in Murang’a County.
 - ii. At 8:43pm, she was in Saba Saba in Murang’a County.
 - iii. At 10:34pm, she was in Kiriaini.
 - i. The sub-loc data for Njiru (Exhibit 15D) – which was subscribed to Safaricom -- shows his movement in the evening of November 4, 2016 as follows:
 - i. At 8:34pm, he was in Kabati in Muranga County.
 - ii. At 9:05pm, he was around Murang’a-Makuyu.
 - iii. At 9:52pm, he was in Gekoe in Murang’a County.
 - iv. Between 10:09pm and 10:31pm, he was around Kiriaini.
 - v. Between 10:32pm and 1:03am (on November 5, 2016), he was around the Gekoe-Gitugu area in Murang’a County.
 - vi. By 2:15am (on November 5, 2016), he was around Othaya, Nyeri County.
 - vii. By 6:55am (on November 5, 2016), he was back in Gatundu, Kiambu County.
57. Regarding the alleged events of November 6, 2016, the phone data produced in Court has the following relevant information:
- a. The Deceased’s phone (Exhibit 15A) received a call from the phone of the 1st Accused Person (Exhibit 15B) at 1:53pm and 1:54pm. This can be gleaned from both the data for Exhibits 15A and 15B. Both cell phones were in the Weiteithie-Ngoingwa area according to the sub-loc data.
 - b. The Deceased’s phone (Exhibit 15A) called the phone of the 1st Accused Person (Exhibit 15B) at 2:14pm. This can also be gleaned from both the data for Exhibits 15A and 15B. Both cell phones were in the Weiteithie-Ngoingwa area according to the sub-loc data.
 - c. On 06/11/2016, Karis made had the following relevant communications:
 - i. Between 8:13am and 9:24pm, Karis (Exhibit 16A) had at least 35 phone conversations with Njiru (Exhibit 15D).



- ii. Between 11:54am and 3:31pm, Karis (Exhibit 16A) had at least 24 phone conversations with the 2nd Accused Person (Exhibit 16B).
 - iii. Between 1:45pm and 2:32pm, Karis (Exhibit 16A) had eight (8) phone conversations with the 1st Accused Person (Exhibit 15C).
 - d. On November 6, 2016, Njiru (Exhibit 15D) had the following relevant communications:
 - i. Between 8:08am and 4:12pm, Njiru had at least 20 phone conversations with the 1st Accused Person (Exhibit 15C).
 - ii. Between 11:06pm and 11:31pm, Njiru had at least 4 phone conversations with the 1st Accused Person (Exhibit 15B).
 - iii. Njiru made two (2) calls to the 2nd Accused Person (Exhibit 16B) at 9:07am and 9:21pm.
58. The data for Njiru's phone (Exhibit 15D) and that of the 1st Accused Person (Exhibits 15B and 15C) further shows that the two communicated before November 4, 2016 and after November 6, 2016 at no less than two-hundred (200) times on both voice calls and SMS messages. Further, the data for November 3, 2016 shows the following relevant information:
- a. Between 9:10am and 9:27am, Njiru (Exhibit 15D) communicated with the 2nd Accused Person (Exhibit 16B) four (4) times;
 - b. Njiru (Exhibit 15D) communicated with Karis (Exhibit 16A) two times.
 - c. Njiru (Exhibit 15D) communicated with the 1st Accused Person (Exhibit 15B) two times: at 9:51am and 12:57pm.
59. The final two witnesses were formal witnesses. Sergeant Audson Meigiri Tabakai is a gazetted Scenes of Crime expert. He attended and took pictures of the Toyota Sienta at Murang'a Police Station; the two scenes of crime; at the mortuary during the post-mortem examination; and at Icaciri Secondary School. He produced all the photos as Exhibits in the case.
60. Detective (Inspector) Clement Mwangi was the final witness. He was the Investigating Officer in the case. He produced the gunny bags which were found covering the body of the Deceased (as Exhibits 10A, B and C). He also produced the rope which was found round the neck of the Deceased (Exhibit 2). He testified that he witnessed the post-mortem examination and took custody of the specimens harvested from the body of the Deceased before delivering them to the Government Chemist. He produced the inventory for the Government Chemist as Exhibit 17.
61. Detective Mwangi gave an account of the investigations and how he came to the conclusion that the two Accused Persons were responsible for the murder of the Deceased. He pointed out that when he analysed the phone data he had requested from Safaricom and Airtel and made certain key conclusions upon analysis:
- a. That there was persistent communication between Njiru (Exhibit 15D) and the 1st Accused Person (Exhibit 15C) between 11:58pm on November 4, 2016 and 1:03am on November 5, 2016. This was the time, Detective Mwangi said, the 1st Accused Person had claimed she had a bad headache due to side effects of medication she had taken and was at the Deceased's house at Kiru Boys Secondary School. The 18 SMS messages exchanged between the two, Detective Mwangi said, were evidence that there was conspiracy between Njiru and the 1st Accused Person.



- b. That on November 4, 2016, the phone data showed that Njiru (Exhibit 15D) left Gatundu at around 6:00pm and by 10:00pm he was in Kiriani where he remained until after 2:00am the following morning. This showed evidence of opportunity for Njiru to have met the 1st Accused Person at Kiriaini as claimed by Karis. Moreover, the data showed that at 8:34pm, both Njiru and the 1st Accused Person were both at Kabai.
 - c. The pattern of the communications showed that after Njiru would communicate with the 1st Accused Person, he would immediately communicate with Karis (Exhibit 16A) and the 2nd Accused Person (Exhibit 16B).
 - d. On November 6, 2016, at 4:02pm, the 1st Accused Person received an SMS which shows that she was at Mukurwe which is a shopping centre which is barely 500 metres from the scene where the body was found. This, Detective Mwangi said, was evidence of opportunity.
 - e. The telephonic conversations between the 1st Accused Person (Exhibit 15C) and Karis (Exhibit 16A) on November 6, 2016 corroborated the narrative by Karis about what happened at Uriithi Plots and at Karakuta Coffee Farm.
62. In addition, the Court also visited the two scenes – at Uriithi Plots where Karis said he, the 1st Accused Person and the Deceased first converged; and at the Karakuta Coffee Farm where the body was found and where Karis testified that the killing occurred.
 63. On November 11, 2019, having received all the Prosecution evidence and the Prosecution having closed its case, the Court found that the Prosecution had established a prima facie case and placed the Accused Persons on their defence.
 64. The 1st Accused Person opted to give sworn testimony and called one witness. The 2nd Accused Person gave an unsworn statement and did not call any witness.
 65. The 1st Accused Person denied that she in any way participated in the homicide of her husband. She testified that both she and her husband were victims of a “cartel” of Murang’a Head Teachers (“Teachers’ Cartel”) who had threatened to harm them because they refused to be part of them. She testified that she is highly suspicious that it was one Samuel Karanja who has association with the Teachers’ Cartel who had harmed her husband. She testified that she and her husband had imported two Motor Vehicles through Karanja but that after they had finished paying the full amount, Karanja refused to deliver and, instead, started threatening them. The 1st Accused Person said that she told the Police this angle but they did not bother investigating because they were obsessed with placing the blame for the murder of the Deceased on her.
 66. The threats by Karanja, the 1st Accused Person told the Court, were not new as she, her husband and their children had been threatened before – as early as 2014. She said that there had been attempts at their lives and attempted abductions on them and their daughter, June, and that they had reported them to Kiriaini Police Station. She said that they had taken time to investigate the threats on their own and that they found that the people doing it were Mungiki who had been sent to kill the Deceased so as to get him out of Kiru Boys Secondary School and hence out of the position of the Head of the Murang’a Head Teachers Association. She said that they had become entangled with the Teachers’ Cartel because they had wanted her husband transferred from Murang’a owing to their young marriage but that the Cartel demanded Kshs 1 Million to facilitate the transfer forcing them to withdraw from the deal. When the Deceased was eventually posted to Kiru Boys and the 1st Accused Person to Icaciri, she said, the Teachers’ Cartel became enraged because they had not gone through them to get their posts. This is what turned out, she said, the source of their trouble with the Teachers’ Cartel.



67. The 1st Accused Person testified that she loved her husband, who, in turn loved her and that they had no marital problems whatsoever. She further testified that the evidence that she suspected MKW to be having an affair with her husband was all fabricated. Instead, she said, MKW was part of the Teachers' Cartel and that she had fallen afoul of her husband when she tried to persuade him to buy a leaked KCSE exam paper. When the Deceased refused, the 1st Accused Person testified, MKW became vengeful and started spreading virulent rumours about him to the effect that the Deceased had participated in leaking exams; and further that the Deceased was embezzling money from the school through her cyber café.
68. The 1st Accused Person testified that when she discussed the issue with her husband, they decided to report the matter to the DCI Muranga in January, 2016; and that contrary to what MKW testified, when she was summoned by Mr Maingi at DCI Offices in Murang'a, that was the issue at hand and not the family dispute as she claimed. She said that the DCI arbitrated over the matter and, in the presence of her employer, Dr. Wanyika, MKW pledged to stop the rumours she was spreading about the Deceased.
69. As for the alleged SMS and Whatsapp messages the 1st Accused Person is alleged to have sent to MKW, she vehemently denied sending them and insisted that the messages were fabricated in order to frame her.
70. The 1st Accused Person told the Court that it is true that on November 4, 2016 she travelled to Kiru Boys Secondary School to see her husband arriving there late. She said that she had hired a motor vehicle – the Toyota Sienta – from Njiru since they had no family car at that time. She denied traveling with Njiru to Kiriaini and stated that she left him in Gatundu after picking up the vehicle. She also denied that she went to Kiru Boys with Karis and the 2nd Accused Person in the Toyota Sienta. Indeed, she insisted, when she got to the gate, she turned on the cabin light so that the security guard could see inside the vehicle. She also denied asking about dogs
71. She said that she had taken some medication which were having side effects because she had taken them on an empty stomach and because she was three months pregnant; that her husband asked for some milk from the kitchen but when the Security Guard was reluctant to deliver it, she asked her husband for permission to drive to Kiriaini to get something to eat. Her husband, she said, had suggested that she checks out Goshen Hotel but she found it closed. She, therefore, drove to the Police Canteen, bought a packet of milk and drove back to Kiru Boys.
72. When she came back from that short trip, the 1st Accused Person testified, her husband was communicating on her phone with Njiru since the sim card to his phone had been inserted to their laptop as he worked. That, she said, is what explains the many text messages between her phone and Njiru's between 11:58pm on November 4, 2016 and around 1:00am on November 5, 2016.
73. On November 5, 2016, the 1st Accused Person testified that they went back to Icaciri with her husband where they arrived in the evening at around 6:30pm. The 1st Accused Person further stated that she was expecting a parcel which she found had not been delivered. She therefore decided to go collect it from Muigai Inn and that her husband accompanied her. However, she said, her husband left his phone at home. As such, the call log data would only show her present around Muigai Inn at around 7:30pm. Afterwards, they went back home where they spent the night.
74. The following day – November 6, 2016 – the 1st Accused Person said that she ironed clothes for her husband. They agreed, she said, to go view their plots at Uriithi before the Deceased could proceed to Kiru Boys since KCSE Exams were to start the following day and he needed to pick up exam papers early in the morning. They left Icaciri at around mid-day and stopped by Gatundu town to fuel. They



then used Kenyatta Road – with the Deceased driving – to Weteithie. On the way, the 1st Accused Person said, they called William, an agent working at Uriithi Cooperative who had taken them to the plots earlier and who would know where the beacons to their plot were. Although William called them back after finding their missed calls, they had difficulties finding the plots and they eventually found themselves near Thika. They had to turn back but, the 1st Accused Person stated, they did not use the Ndarugo route (which is the route the Court used during the scene visit).

75. The 1st Accused Person testified that when they eventually got to the Uriithi plots, in order to more quickly find the plots, she and her husband split up with each going to the extreme end of the expansive land. The Deceased, the 1st Accused Person further testified, is the one who found the plots and at 2:48pm, he called her to tell her he had found them. All this time, she insisted, the Deceased was sober not intoxicated and they were the only two people in that expansive area.
76. The 1st Accused Person said that they left the Uriithi plots at around 3:00pm using the Weteithie route and with the Deceased driving. At Weteithie, the 1st Accused Person said, the Deceased took a matatu to Thika. She waited for him to board the matatu then drove off to Gatundu only stopping at Mukurwe to buy some greens. She said that she tried to call the Deceased at around 6:00pm but while the phone rang, he did not pick up the phone. She tried again at 9:00pm but it did not go through.
77. The following day, the 1st Accused Person narrated, he got a call from the Sub-county Director of Education in Mathioya informing her that the Deceased had not gone to pick up exam papers early in the morning as expected. After a series of other calls, the 1st Accused Person says that she confirmed the news and got permission from her superiors to leave her school and hand over to PW12. She also, she said, got a call from a Mr Kuria, the Chair of the Board of Management at Kiru Boys. They agreed to meet at Ruiru Police Station where she said they were informed that the Deceased’s phone was switched off at 8:40pm the previous day. She said they decided to go to Kasarani Police Station “for clarification of the Deceased’s last signal” and while there they, indeed, she said, confirmed that it was switched off at 8:40pm.
78. The 1st Accused Person told the Court that while at Kasarani Police Station she got a call from a reporter claiming that the Deceased’s body was at Thika Level 5 Hospital. She headed there but found it was a different body. She said she went back to Gatundu and reported at Gatundu Police Station. She said the Police there told her that her husband’s last phone signal was at 8:24pm. She said she informed all the Deceased’s relatives about the disappearance of the Deceased that evening. That same evening at around 8:00pm, the 1st Accused Person said she received a call from a lady who described herself as the Secretary to MP Sabina Chege who complained why she had reported the case to Kasarani Police Station.
79. The 1st Accused Person further testified that on November 8, 2016, she went to Kiru Boys with her relatives and senior Police Officers. From the look of things, she said, the Deceased had never gone to the house on November 6, 2016. While at Kiru Boys, she said, she was interviewed by the media about her missing husband but while being so interviewed, a Madam Zipporah told her she had an urgent call. She said she picked up the call. The person on the other end of the call, she said, told her that he and others were the ones who had abducted her husband on November 6, 2016. She said that out of shock she screamed and asked how she could be sure. She says that an Inspector Githae told her to put the call on speaker phone and ask the alleged abductors to put the Deceased on the phone. She testified that she did so and the Deceased spoke to her on speaker phone in the present of Inspector Githae and others; and that the Deceased told her to cooperate with the abductors so that he is not harmed. She said the phone which called her is Mobile No 0796-xxxx; and that the call first came at 15:57Hrs. She said that Exhibit 15B would be able to confirm this. She said that Inspector Githae started tracking the number and that she called the number at 15:59Hrs and they alleged abductors



said they would call back. She said that they eventually called back but only to give threats because, they said, she had reported them to the DCI.

80. The 1st Accused Person testified that although Inspector Githae was fully aware of this call, no investigation was done pursuing this angle; and that the data for Phone No No 0796-xxxx was maliciously not brought to Court. Further, the 1st Accused Person said that the same people attacked her daughter (June – PW3) the same day a she was going home from the university and robbed her phone. She said that the robbers warned her not to alight from the matatu she was in until she got to Kenyatta Road. The reason the robbers wanted that phone, the 1st Accused Person said, was because it would have shown that she called the Deceased on the day she disappeared. However, she said, June did not call Exhibit 15A but a different phone which the Deceased had. The 1st Accused Person rejected PW12’s account that she borrowed her vehicle on the night of November 8, 2016 to go somewhere.
81. Further, the 1st Accused Person testified that early in the morning of November 9, 2016, she got a call from the Deceased’s sister, Mary Njoki who told her that the Deceased’s phone was on on November 8, 2016 and that she (Mary Njoki) had sent him some Whatsapp messages on that day. Further, a Mr Ceaser, a Principal of a school in Murang’a said the same. She said she gave this information to the Police. She also, she said, gave the information to the Police that the alleged abductors called her on phone number 0726xxxx on November 9, 2016 at 8:24am; 8:31am and 8:36am. They also, she said, sent her an SMS which she said she shared with the DCI but no investigations were done. She further said that the DCIO Murang’a told her that the numbers which had called her were somewhere in Kiriaini and further that they had demanded a ransom.
82. The 1st Accused Person further complained that the post-mortem examination was done while she was in custody and without involving her family and that in the process many incriminating evidence was planted in order to frame her. She was tortured, she said, between November 16, 2016 and November 18, 2016 so much that she underwent a miscarriage while in custody. She insisted that the Deceased was still alive on November 8, 2016 and that he talked to him on that day in the presence of the Police; and further that his phone was on and picking up signals on that day. She denied that she was at the scene of crime on November 6, 2016 and denied ever meeting Karis or the 2nd Accused Person at Uriithi on that day.
83. On his part, the 2nd Accused Person gave an unsworn statement in which he flatly denied any involvement in the death of the Deceased. He said that he used to trade in Khat (miraa) in a kiosk until November 25, 2016 when he was arrested. He said that he was tortured by the arresting officers who wanted him to confess to the killing but he refused. The arresting officers also took away his shoes. He denied that he had known Karis since childhood and said that he only met him on November 3, 2016 for the first time. Karis was introduced to him on that day, the 2nd Accused Person said, by Njiru who wanted the 2nd Accused Person to assist Karis to set up a miraa business in Murang’a and Juja. The 2nd Accused Person said that Njiru was his miraa supplier.
84. The 2nd Accused Person said that on November 4, 2016, he went to Murang’a with Karis but they were not with Njiru who, he said, was in Meru town on that day. He said that when they got to Murang’a, he and Karis went their separate ways only agreeing on meet at Gekoe in the evening. When they met, the 1st Accused Person said, they called Njiru who was supposed to join them there and he came to join them. They shared a meal with Njiru and Karis and then he left the two together and he took a motor cycle to Murang’a town from where he boarded a matatu to Juja.
85. The 2nd Accused Person testified that the following day he called Karis who told him that he and Njiru had agreed to start the business in Murang’a in December. However, he said, Njiru requested him to give Karis a “stock” of miraa to sell. He said that he did so on November 6, 2016. However,



- he denied that he met Karis at Karakuta Coffee Estate on that day. On that day, he insisted, he was in Gatundu and not Karakuta. He said the call data produced in Court (Exhibit 16B) showed that he was in Gatundu the afternoon of November 6, 2016 when Karis says he was at Karakuta Coffee Estate.
86. The final defence witness was Esther Wambui Mucheru. Esther is the sister to the 1st Accused Person. She testified that she got a call from the 1st Accused Person on November 7, 2016 informing her that the Deceased was missing; that she decided to go be with her to be in solidarity with her; that she did not find the 1st Accused Person at her home in Icaciri but joined her at Kasarani Police Station where she had gone to report with the Chair of the Board of Management. Later on, Esther testified, she went to Icaciri with the 1st Accused Person but they stopped to buy some things at Mukurwe and then at the Gatundu Police Station to make a report.
87. Esther testified that the following day – November 8, 2016 – she and the 1st Accused Person spent most of the day in Murang'a and that at around 1:00pm they went to the Deceased's house at Kiru Boys. She testified that they met the investigating team there as well relatives and members of the media. Esther told the Court that as Jane was addressing members of the media, someone brought her phone to her and told her that it was urgent; that she picked the call and in the glare of the cameras and in the presence of the investigating team and the relatives she put the phone on speaker phone so that everybody could listen to the call. On the other end of the call, she said, were people who claimed that they had the Deceased and would not harm him if the 1st Accused Person cooperated with them. Esther testified that at Jane's request they put the Deceased on the phone and he told the 1st Accused Person to cooperate with the people in order to save him. The people on the phone, Esther said, told the 1st Accused Person not to report to the Police or authorities and to prepare to go to Nyeri. However, Esther testified, that the same people called almost immediately and told the 1st Accused Person that they had noted that they were being tracked and that the 1st Accused Person would regret it.
88. Esther further testified that when they got to the 1st Accused Person's home at Icaciri Secondary School, they found June (PW3) crying. She said that June explained to them that her phone had been robbed on her commute from school and that the woman who had robbed it had threatened her. She further testified that the following morning – on November 9, 2016 – the 1st Accused Person told her that she had received a call confirming that the Deceased's phone was going through but was not being picked up.
89. Esther told the Court that they later learnt that the Deceased's body had been discovered and that it was at the City Mortuary. She and the 1st Accused Person's other sister, Anne, went to the mortuary and they saw the body. However, she said, neither her nor any of the other relatives of the 1st Accused Person attended the post-mortem examination because they had been told that it was scheduled for the afternoon but the doctor performed it in the morning.
90. The questions left for determination are whether the evidence that emerged during the trial as summarized above established, beyond reasonable doubt, that it was the two Accused Persons who committed the homicide of the Deceased; and whether they harboured malice aforethought in doing so.
91. It is true that the structural scaffolding of the case against the two Accused Persons is constructed by the narrative and evidence of Karis who gave a detailed account of how the alleged planning and execution of the death of the Deceased occurred. As the Defence has properly pointed out and submitted at length, however, the testimony of Karis was that of an accomplice. That evidence must, therefore, be accepted and analysed only within the strictures and limitations imposed by our decisional law on the same.



92. I warned myself of the danger associated with accepting the evidence of an accomplice – especially in circumstances, such as the present one, where the accomplice has accepted a plea agreement which assured him of favourable treatment by the Prosecution. The correct judicial treatment of accomplice evidence in criminal cases was best summarized in *Waringa v Republic* [1984] KLR 617 where the Court of Appeal laid down the following three principles in considering accomplice evidence:
- a. When considering the evidence of an accomplice, the first duty of the Court is to decide whether the accomplice is a credible witness.
 - b. If the accomplice evidence is credible, the Court should consider if there is corroborating evidence. This step only follows if the Court finds the accomplice is a credible witness. The corroboration which should be looked for when considering the evidence of an accomplice is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.
 - c. The corroboration must be independent evidence which affects the Accused Person by connecting him or her or tending to connect him or her with the crime.

93. In a later case, *Karanja & Another v Republic* [1990] KLR, the Court of Appeal, while affirming the principles laid down in *Waringa* (supra), suggested that there may be circumstances where corroboration may be unnecessary:

Although there may be cases of an exceptional character in which an accomplice's evidence alone convinces the court of the facts required to be proved, the uncorroborated evidence of such a witness should generally be held to be untrustworthy for three reasons. The accomplice is likely to swear falsely in order to shift the guilt from himself. As a participator in the crime, he is an immoral person who is likely to disregard the sanctity of an oath. He gives his evidence either under a promise of a pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution

..... An accomplice is of course a competent witness but corroboration should be found for his evidence before a conviction can be based upon it.

94. Hence, the law and practice on accomplice evidence as it exists in Kenya today is that while an accomplice is a competent witness, accomplice evidence should be received with great caution, and where uncorroborated, should have little weight. As such, our decisional law has clarified that while a witness's status as an accomplice does not render his or her evidence unreliable per se, a Trial Court must exercise appropriate caution in assessing his or her evidence. In particular, when weighing the probative value of accomplice evidence, the Trial Court is obligated to carefully consider the totality of the circumstances in which the evidence was tendered. In particular, consideration should be given to circumstances showing that accomplice witnesses may have motives or incentives to implicate the accused person or to lie. This judicial treatment of accomplice evidence is based on the fear that an accomplice may be motivated to falsify his testimony in the hope of securing leniency for himself or herself. However, the dangers associated with accomplice evidence are greatly reduced or eliminated where the key aspects of the accomplice evidence are corroborated. The dangers are also substantially mitigated where, as here, the accomplice testifies after he has already accepted a plea bargain, has been sentenced, and is already serving his sentence.



95. As to what type of corroborative evidence would suffice, a pithy definition was given in *R v Taibali Mohamedbhai* (1943) 10 EACA 60 where the Court said:

What is required is that there should be independent testimony corroborative of the evidence of the accomplice in some material particular implicating the accused or tending to connect him with the crime with which he is charged. The principle is that if an accomplice is so corroborated not only may that part of his evidence which is corroborated be relied on but also that part which is not corroborated.

96. In *United States v Murphy*, 253 Fed. 404, 406 (N.D.N.Y. 1918), the US Supreme Court defined corroboration with respect to accomplice evidence thus:

Corroborating evidence is evidence which is independent of the evidence of an accomplice, and which, taken by itself, leads to the inference, not only that a crime has been committed, but that the person on trial was implicated in it; or it must be evidence which corroborates as to some material fact or facts which go to prove that the person on trial was connected with the crime.

97. With this position in our jurisprudence established, it is appropriate to begin with the observation that I found Karis – PW4 – overall, as a credible witness. This finding is based on at least six considerations:

- a. First, PW4 presented himself as a straightforward and open witness. He exuded quiet if shameful confidence in his testimony; shameful for his role in the sordid events. He gave his evidence in a straight-forward manner devoid of irrelevant details and self-serving statements typical of an untrustworthy witness.
- b. Second, there were no material discrepancies in his testimony which had a fair measure of internal coherence.
- c. Third, the testimony of PW4 was consistent with his earlier statements to the Police over which he was cross-examined at length by the Defence.
- d. Fourth, the witness remained unshaken under very robust cross-examination and his testimony remained un-impeached.
- e. Fifth, the narration of facts by this witness was in consonance with the testimonies of other witnesses including PW5, PW10 and PW13.
- f. Sixth, the testimony of the witness was backed up by documentary corroborative evidence in the form of the phone call logs as well as the phone forensic evidence produced by PW17.

98. The essential narration by Karis was that he and the 2nd Accused Person were approached by Njiru who introduced them to the 1st Accused Person. The Accused Person wanted them, first, to kill MKW on suspicion that she had an affair with her husband, the Deceased. When that plan failed ostensibly because the two would-be assassins told her that the murder would be too difficult to execute since MKW's shop was too close to Kiriaini Police Station, the 1st Accused Person changed plans and now wanted the Deceased murdered. The original plan in that regard was that the 1st Accused Person would ferry PW4 and the 2nd Accused Person to her husband's house in Kiriaini where she would drug the Deceased making it easy for the two to strangle him using a rope she had carried in her hired vehicle. That plan also failed because, apparently, the intoxicant she used on her husband failed to work optimally. The 1st Accused Person, then, moved to the third plan: drug the Deceased, persuade him to accompany her to meet some property agents who would turn out to be PW4 and the 2nd Accused



Person. The two would, then, strangle him using the rope in the hired vehicle. In the Deceased's intoxicated state, the team reckoned that it would be easy to accomplish the goal. This is the plan that, according to the narrative by PW4, succeeded.

99. As outlined in the fifth and sixth considerations in making a finding of the credibility and reliability of PW4 as a witness, this narrative was afforded significant corroboration by various other pieces of evidence tendered during the trial. The following five stand out:

- a. First, the cell phone communication and location evidence, when pieced together, corroborates in material particulars, the narrative by Karis. In particular, as analysed in detail above, the forensic phone data shows the following key information:
 - i. It backs up the narration by Karis that all four co-conspirators – the two Accused Persons; Karis himself; and Njiru travelled to Kiriaini on November 4, 2016 and were all around there on that night.
 - ii. It backs up the narration by Karis that on that same night of November 4, 2016 when the first plan to drug the Deceased failed, the 1st Accused Person had to leave the compound of Kiru Boys to ferry Karis and the 2nd Accused Person back to Kiriaini from where Karis and the 2nd Accused Person travelled back towards Nairobi using the Othaya route.
 - iii. It confirms that the 1st Accused Person was in constant SMS communication with Njiru late in the night of November 4, 2016 when she was in the house of the Deceased at Kiru Boys. The evidence showed that between 11:58pm and 1:03am (on November 5, 2016), Njiru (Exhibit 15D) exchanged at least 18 SMS messages with the 1st Accused Person (Exhibit 15C). I discuss and discount the 1st Accused Person's explanation for this persistent communication with Njiru.
 - iv. The phone data for the 1st Accused Person (Exhibit 15B) shows that she was along Kenyatta Road in the evening of November 5, 2016 when Karis said she had gone to pick up the Mchele (intoxicating drug) to be used to drug the Deceased.
 - v. The phone call log data shows that the 1st Accused Person called Karis on November 6, 2011 which tallies with Karis' account of that day.
 - vi. The phone sub-loc data of the 1st Accused Person, Karis, the 2nd Accused Person; and the Deceased show that they were all in the general vicinity Ndarugo which Karis identified as the first scene.
 - vii. The phone sub-loc data of the 1st Accused Person shows that she was at or near the scene of the murder at Karakuta Coffee Estate. The data shows that her cell phone (Exhibit 15B) picked up signals at Mukurwe cell phone towers which was described as being less than 500 metres from the actual scene where the Deceased was murdered.
 - viii. The phone communication data of Karis (Exhibit 16A) and the 2nd Accused Person (Exhibit 16B) confirms the narration by Karis that he (Karis) called the 2nd Accused Person several times on November 6, 2016 when he (the 2nd Accused Person) had delayed reporting at Ndarago/Uriithi when the 1st Accused Person urged him to make the calls.
 - ix. The phone call log data for Karis (Exhibit 16A) and the 2nd Accused Person (Exhibit 16B) confirms that on November 6, 2016 at around 3:00pm, both were at exactly the same place near Karakuta Coffee Estate as the signals to their cell phones were picked up by Gachororo mast.



- x. The phone call log data demonstrates that Njiru was in constant communication with Karis and the 2nd Accused Persons on the material dates between November 3, 2016 and November 7, 2016.
- xi. Similarly, the phone call log data demonstrates that Njiru was in constant communication with the 1st Accused Person on the material dates between November 3, 2016 and November 7, 2016.
- xii. The data for the phone belonging to the Deceased (Exhibit 15A) ends on November 6, 2016 at around 5:00pm.
- b. Second, the testimony of Damaris (PW5) played five critical roles in backing up the narration by Karis:
 - i. One, it connected the 1st Accused Person with Njiru and Karis (and thereby corroborating Karis' account in a material way).
 - ii. Two, it beefs up the Prosecution theory that the 1st Accused Person suspected that the Deceased was having an affair with the Mpesa Lady and that this provided her with a powerful motive to kill him. Hence, the testimony of Damaris independently corroborates the narration by Karis about the initial motive for the murder.
 - iii. Three, additionally, the testimony of Damaris corroborates Karis' story about how he linked up with Njiru and the 2nd Accused Person.
 - iv. Four, the testimony of Damaris crucially corroborates the testimony of Karis that he (Karis) met with the 1st Accused Person and Njiru at Kimbo since Damaris testified that he dropped Karis there to meet with Njiru and that Njiru called her immediately thereafter to confirm that he saw her dropping off Karis.
 - v. Five, the testimony of Damaris crucially demonstrates that Karis was creditworthy when he spoke of the dealings between the 1st Accused Person and Njiru.
- c. Third, the testimony of MKW (the Mpesa Lady) backs up the narration by Karis in two specific ways:
 - i. One, it confirms that the 1st Accused Person was aggrieved by suspected affair between MKW and the Deceased and that she was sufficiently aggravated to confront MKW both by phone and by actually using the Police to try and "resolve" the issue.
 - ii. Two, the evidence of MKW confirms the narration by Karis that he and the 2nd Accused Person went to her shop in Kiriaini for a "reconnaissance" survey. MKW remembered the two people who went to her shop and pretended to buy soda.
 - d. Fourth, there are four critical aspects of the testimony by Mr Gachoka (PW6) which tend to corroborate key aspects of the narration by Karis. They are the following:
 - i. One, it corroborates the timeline re-constructed by the Prosecution about what happened on November 4, 2016.
 - ii. Two, it is critical that the 1st Accused Person already knew that she would be going back out of the school compound when she drove in at 10:00pm on November 4, 2016 and even told Mr Gachoka not to release the dogs. This is a give-away that the 1st Accused person had other plans on that day.



- iii. Three, importantly, the testimony of PW6 indirectly corroborates the testimony of Karis that he and the 2nd Accused Person were in the vehicle and the plan was for them to commit the homicide on the night of November 4, 2016 but that the plan was foiled when the Deceased failed to succumb to the “Mchele” drug he was to be given.
 - iv. Four, it finally corroborates the account by Karis that they were driven out of the school compound at around 1:00am on November 4, 2016.
 - e. Fifth, the evidence by the Government Chemist (PW8) corroborates the narration by Karis that the 1st Accused Person had told them that she would use Mchele (intoxicating drug) to render the Deceased unconscious so that Karis and the 2nd Accused Person could accomplish the planned mission to kill him.
 - f. Sixth, the evidence by the Pathologist (PW11) as to the cause of death tallies with the narration by Karis about how the Deceased was killed.
 - g. Seventh, the evidence by Corporal Kabui (PW14) about the state in which the body was found – covered by gunny bags – fits in with the narration by Karis about what the 2nd Accused Person did to the body after strangling the Deceased. The three gunny bags were produced in evidence as exhibits.
 - h. Eighth, the combined evidence of Bernard Karugia (PW13) and Inspector Mwasia (PW17) confirms the key narration by Karis that after they killed the Deceased at Karakuta Coffee Estate on November 6, 2016, the 2nd Accused Person removed the shoes the Deceased had on, wore them, and went home with them. This is the same pair of shoes that the 2nd Accused Person had on when he was arrested. The shoes were of the brand CAT. PW13 confirmed that he had sold that pair of shoes to the Deceased in March, 2016. Prior to the sale, PW13 had sent pictures of the shoes to the Deceased to approve. These pictures were extracted from the phone belonging to PW13 by Inspector Mwasia (PW17). PW13 was able to positively identify both the actual shoes he sold to the Deceased (and which were found in the possession of the 2nd Accused Person) as well as the pictures extracted from his phone make Techno which was also produced as Exhibit 12. Under the doctrine of recent possession, this, in itself, would be sufficient to tie the 2nd Accused Person with the murder of the Deceased since he has not been able to offer any reasonable explanation how he came to be in possession of the Deceased’s shoes.
100. Given the analysis of the Prosecution evidence conducted above, there is no question that it succeeded in tendering evidence establishing that the Deceased was murdered; and tends to establish that the two Accused Persons were principal actors in the murder. The question that arises now is whether the Prosecution has been able to establish beyond reasonable doubt that the two Accused Persons did, indeed, participate in the murder of the Deceased.
101. As established in countless cases, this standard of proof required in criminal trial is a very high one. Proof beyond a reasonable doubt is the highest standard of proof possible. Because a person’s liberty is at stake, this high standard is required by our judicial system.
102. The best description of this standard was provided by Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 (King’s Bench):
- ... the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not



mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it's possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

103. Or as was described by Chief Justice Shaw over a century ago in quoting *Commonwealth v Webster*, 59 Mass. 295, 320 (1850), a formulation recently approved by the US Supreme Court in *Victor v Nebraska*, 114 S. Ct., at 1244 (1994) (quoting *Commonwealth v Webster*, 59 Mass. 295, 320 (1850) and discussing the Court's use of the Webster charge in *Sandoval v California*, 4 Cal 4th 155 (1992)) citing the famous Webster Jury Instructions thus:

For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt.

104. And what is “reasonable doubt”? Again Chief Justice Shaw in *Commonwealth v Webster*, 59 Mass. 295, 320 (1850) described it felicitously thus:

What is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of the law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proven guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal.

105. So from the cases we know that “reasonable doubt” is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is, as an author (Susan B. Jordan, *Raising a Reasonable Doubt*, 1995 NYL 462124) described, that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the Judge in that condition that s/he cannot say s/he feels an abiding conviction, to a moral certainty, of the truth of the charge. Or, as the US Supreme Court has variously pithily described it, “reasonable doubt” is a doubt that would cause a reasonable person to hesitate to act. See, for example, *Holland v United States*, 348U.S., at 140, 75 S.Ct. at 137.

106. Given this definition of “reasonable doubt”, can we say that the Prosecution evidence as seen together with the defence raised by the two Accused Persons leave “reasonable doubts” as to the charge the Accused Persons face?

107. As described in detail above, the 1st Accused Person raised the following defences:

- a. First, she denied that she was in any way involved in the murder of the Deceased. She dismissed outright the whole evidence of Karis and those of other Prosecution witnesses tending to connect her with the murder as falsehoods.



- b. Second, she denied that she ever knew or had any dealings with the 2nd Accused Person and Karis. She had never, she said, met either of them before she was charged with the offence she is presently facing.
 - c. Third, she described the forensic evidence suggesting that she suspected the Deceased of marital infidelity as concocted evidence and dismissed MKW, the woman she suspected her husband was having an affair with, as a liar and a member of the cartel which was out to harm her and her husband. In this regard, the 1st Accused Person dismissed the theory that she had a motive to kill her husband.
 - d. Fourth, she dismissed all the forensic phone evidence including the call log and sub-loc data as manufactured evidence meant to frame her and in furtherance of the intentions of the Murang'a Teachers' Cartel to harm her and her husband.
 - e. Fifth, the 1st Accused Person insisted that the Deceased was not killed on November 6, 2016 at Karakuta Coffee Estate but was, in fact, killed elsewhere after November 8, 2016. This is because, she said, she had communicated with the Deceased on November 8, 2016 in the presence of the Police, media and several relatives. Further, that the Deceased's cell phone had not been switched off until after November 8, 2016.
 - f. Sixth, the 1st Accused Person submitted that although the Police knew that the Deceased had been abducted by members of a cartel which could have involved one Samuel Karanja (who had allegedly received money from the Deceased and the 1st Accused Person but failed to deliver a promised vehicle) the Police maliciously refused to investigate that angle because they wanted to frame her with the murder.
108. On the other hand, the 2nd Accused Person's defence theory is simply one of denial: he insists that he did not commit the murder; that Karis is lying; that he only went with Karis to Muranga on November 4, 2016 because he was to help him establish a miraa business there; and that he is being framed for the murder.
109. In assessing whether the totality of the evidence now on record – both the Prosecution evidence as well as the evidence by the Accused Persons – proves the crime charged beyond reasonable doubt, it is important to recall that to raise reasonable doubt as defined above, the Accused Persons are not required to demonstrate that their versions of events are probable. Instead, their versions of events must only ultimately be reasonably possibly true. If so, the Accused Persons would be entitled to an acquittal even though their versions of events may be improbable. The test, therefore, is whether there is any reasonable possibility that the Accused Persons' versions may be true. See, for example, *Sv Phallo and Others* 1999(2) SACR 558 (SCA).
110. After due and conscientious assessment of the totality of evidence presented in the trial, I have come to the ultimate conclusion that the versions of defence presented by both the 1st and 2nd Accused Persons are so improbable that they cannot reasonably possibly be true. (See *Sv Shackell* (4) SA 1 (SCA)). In my view, it is not possible to say that the Accused Persons' versions of events has any reasonable inherent probability that they are true. I would raise at least twelve grounds for rejecting the Defence's narratives:
- a. First, as outlined and explained earlier in this judgment, I found the Prosecution witnesses who testified as to factual events to be truthful and credible, and their testimonies to be consistent and straightforward. As already explained, this includes the testimonies of Karis (PW4); Damaris (PW5); and MKW (PW10) which provide a steady narrative which is diametrically opposed to the version of events presented by the two Accused Persons. I find that the



Prosecution witnesses on the factual events sufficiently refuted the alternative stories provided by the Accused Persons.

- b. Second, I am persuaded by the integrity and reliability of the cell phone forensic and call log data that was produced as evidence. As analysed earlier in this judgment, that evidence psychedelically supports the narration by Karis (PW4) and the general Prosecution theory while completely refuting the version of events presented by the 1st Accused Person.
- c. Third, the reliability and credibility of the cell phone forensic and call log data is accentuated by the fact that there was “external” consistency among the various sets of data. For example, calls and SMSes made by one subscriber at a given time and appearing in the call log for that subscriber could be traced to the call log of the recipient. This level of harmonized detail would be impossible if all the call data sets were, in fact, “cooked” as alleged by the 1st Accused Person.
- d. Fourth, the theory by the 1st Accused Person that the forensic phone data by the two leading Telecommunications companies in Kenya are “cooked” in order to frame her is undermined in part by her own defence since at various points during her testimony she sought to rely on the self-same data. This attempt to blow both hot and cold is an indicator that her allegations are not credible. For example, the 1st Accused Person relied heavily on the call log data (Exhibit 15A) to make her claim that the alleged abductors called her on November 8, 2016.
- e. Fifth, the 1st Accused Person was unable to satisfactorily explain the numerous phone and SMS interactions with Njiru – many of them around the key dates of between November 3, 2016 and November 7, 2016. The only explanation the 1st Accused Person attempted was for the 18 SMSes exchanged between her phone (Exhibit 15A) and Njiru’s phone (Exhibit 15D) between 23:58Hrs and 1:03Hrs on November 4, 2016. That explanation was that it was the Deceased who was allegedly communicating with Njiru.

The explanation further ran that the Deceased was using the 1st Accused Person’s phone because the sim card to his phone was inserted in his laptop in order to supply them with Internet. This explanation is highly improbable: while the 1st Accused Person was categorical that it was a laptop that the Deceased was using into which he had inserted his sim card, laptops do not, of course, have sim card compartments. It is highly improbable that the 1st Accused Person meant an iPad because there was no evidence at all that the Deceased owned one. Further, the incredulity of this explanation is accentuated by the fact that there is absolutely no communication whatsoever between the Deceased and Njiru either before or after this alleged intense SMS conversation which involved 18 text messages shared in the space of only slightly more than an hour.

- f. Seventh, the alleged conversation between the 1st Accused Person and the alleged abductors of the Deceased on November 8, 2016 which is offered to demonstrate that the Deceased was alive as late as November 8, 2016 is highly improbable for the following reasons:
 - i. Both the 1st Accused Person and her witness, DW3, claimed that when she received the call, a Police Officer told her to put it on speaker phone and that all the Police Officers present, members of the press and a multitude of friends and relatives heard both the abductors on the other end of the line as well as the Deceased urging the 1st Accused Person to cooperate with the abductors. It is highly improbable that all these people who heard that call conspired to keep silent in order to “frame” the 1st Accused Person. Most of these people have absolutely no motive to harm the 1st Accused Person and some, like the members of the press, were strangers



to them. Indeed, if members of the press were present during such a call, it is highly likely that they would have published or broadcasted the scintillating and sensational details of such a call!

- ii. There are material differences between the accounts of the 1st Accused Person and DW3 the only other person who testified about the alleged call:
 1. One, the 1st Accused Person insisted that the call came at around 4:00pm and carefully constructed her timeline for the day to show that it was around that time. Indeed, she claimed a call log in Exhibit 15B showed that it was at 3:57pm. However, DW3 was sure that the call came at around 1:00pm.
 2. Two, DW3 remembered the material part of the conversation was that the alleged abductors told the 1st Accused Person to travel to Nyeri. However, the 1st Accused Person had no such recollection. This would be quite a material part of the conversation given the circumstances: the 1st Accused Person was being asked to travel to Nyeri to negotiate the terms for the release of her husband. This is not a detail that is easily forgotten.
- iii. The phone records of the 1st Accused Person also belie this carefully constructed narrative. The 1st Accused Person claimed that the alleged abductors called her twice on November 8, 2016 – first at 15:57Hrs and then immediately afterwards. However, the phone records for the 1st Accused Person’s phone number (Exhibit 15B) show that the number that the 1st Accused Person claims belonged to the abductors communicated with her phone at least twelve (12) times on November 8, 2016 starting at 14:35Hrs. Six (6) out of the twelve (12) times, it was the 1st Accused Person who made the call. This is a material inconsistency with the story told by the 1st Accused Person and DW3.
- g. Eighth, the phone call records for the Deceased (Exhibit 15A), which I have accepted as credible and reliable, are categorical that the last phone activity on that phone was at 17:57Hrs and it was processed by the cell Tower at Thika Tusksys. This is conclusive evidence that the allegations by the 1st Accused Person that the Deceased’s cell phone was still on as late as the morning of November 9, 2016 are false.
- h. Ninth, a claim by the 1st Accused Person that she made a call to the Deceased on November 6, 2016 at about 6:00pm but that it rang but was not picked up is refuted by the call log data in both her phone and that of the Deceased. There is no such call logged in her phone data – either Exhibit 15B or 15C – and neither is there any such record in the call data for the Deceased. Indeed, as aforesaid, the final cell phone communication to the Deceased’s phone (Exhibit 15A) was at 17:57Hrs.
- i. Tenth, similarly, the claim by the 1st Accused Person’s daughter (PW3) that she called her father the evening of November 6, 2016 is refuted by the phone calls data.
- j. Eleventh, the claim by the 1st Accused Person that her daughter’s phone (PW3) was robbed on November 8, 2016 as she was commuting from the University of Nairobi and that, therefore, she was unable to demonstrate her communication with the Deceased is, also, highly improbable and, in all likelihood, a self-serving falsehood for two reasons:
 - i. One, PW3 was specifically asked during her testimony and cross-examination if she had been threatened or harmed by anyone and she responded in the negative. Not only did she not volunteer information about the alleged robbing of her phone, but she did not disclose that information when specifically asked a question where it would have been natural to give it. This leads to the conclusion that the narrative is an afterthought; and



- ii. Two, as aforesaid, the phone call records do not support this narrative.
 - k. Finally, the testimonies of the children and House Manager of the 1st Accused Person about the goings-on in the house at Icaciri on November 5, 2016 and November 6, 2016 when compared with the narrative of the 1st Accused Person, cast grave doubt about the veracity of the 1st Accused Person’s account about what happened on those days. Two specific ones stand out:
 - i. One, all the three (PW1, PW2, and PW3) told a near identical story about what happened in the house on November 5, 2016 and November 6, 2016. None of the three remembered the 1st Accused Person leaving the house with the Deceased and traveling in the Toyota Sienta to Muigai Inn to collect a parcel. Indeed, all three witnesses were categorical that the Deceased did not leave the house after he got in on November 5, 2016; and
 - ii. Two, PW1 and PW3 (daughters of the 1st Accused Person) testified that when the 1st Accused Person came back to the house on November 6, 2016 at around 6:00pm, she told them that she had “escorted” the Deceased for him to pick up a matatu to Murang’a. The 1st Accused Person did not mention that she had allegedly gone with the Deceased to Uriithi plots to “see” their plots.
111. As for the defence theory by the 2nd Accused Person, aside from some of the vitiating factors listed above – including the phone call records which resolutely refute his version of events, the recovery of shoes belonging to the Deceased in his possession, would, on its own serve as an independent ground to find him guilty of the offence charged. Although commonly used in theft and allied offences, the doctrine of recent possession can be deployed to associate an Accused Person with offences against a person such as murder where the elements of the doctrine are used to identify the Accused Person as the assailant.
112. The doctrine of recent possession has been explained at length by the Canadian Supreme Court in *Republic v Kowkyk* (1988)2 SCR 59 where McIntrye J. gave a history and rationale for the doctrine in the following words:

Before going further, it will be worthwhile to recognize what is involved in the so called doctrine of recent possession. It is difficult, indeed, to call it a doctrine for nothing is taught, nor can it properly be said to refer to a presumption arising from the unexplained possession of stolen property, since no necessary conclusion arises from it. Laskin J. (as he then was) (Hall J. concurring) in a concurring judgment in *R. v Graham*, supra, said at p. 215:

“The use of the term ‘presumption’, which has been associated with the doctrine, is too broad, and the word which properly ought to be substituted is ‘inference’. In brief, where unexplained recent possession and that the goods were stolen are established by the Crown in a prosecution for possessing stolen goods, it is proper to instruct the jury or, if none, it is proper for the trial judge to proceed on the footing that an inference of guilty knowledge, upon which, failing other evidence to the contrary, a conviction can rest, may (but, not must) be drawn against the accused.”

He went on to point out that two questions, that of recency of possession and that of the contemporaneity of any explanation, must be disposed of before the inference may properly be drawn. He made it clear that no adverse inference could be drawn against an accused from the fact of possession alone unless it were recent, and that if a pre-trial explanation of such possession were given by the accused and if it possessed that degree of contemporaneity making evidence of it admissible, no adverse inference could be drawn on the basis of recent



possession alone if the explanation were one which could reasonably be true. Implicit in Laskin J.'s words that recent possession alone will not justify an inference of guilt, where a contemporaneous explanation has been offered, is the proposition that in the absence of such explanation recent possession alone is quite sufficient to raise a factual inference of theft.

113. The Canadian Supreme Court then stated the doctrine in the following words:

Upon proof of the unexplained possession of recently stolen property, the trier of fact may – but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.

114. This statement of the doctrine mirrors that adopted in Kenya. The Court of Appeal restated the doctrine in *Erick Otieno Arum v Republic* Criminal Appeal 85 of 2005 [2006] eKLR where it held:

In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

115. Similarly, in *Isaac Ng'ang'a Kabiga & Another v Republic*, Criminal Appeal No 272 of 2005 the Court of Appeal felicitously stated the elements of the doctrine thus:

It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

116. In the present case, the charged offence is not robbery or theft but murder. However, the doctrine operates to identify the 2nd Accused Person as the assailant once the elements of the doctrine of recent possession have been shown to exist. Here, as analysed above, PW4 testified that the 2nd Accused Person took the shoes belonging to the Deceased after strangling him. The pair of shoes was demonstrated conclusively to have belonged to the Deceased through the evidence of PW14 and PW 17. That same pair of shoes was found in the possession of the 2nd Accused Person less than two weeks after the murder of the Deceased. The 2nd Accused Person has not been able to offer any credible explanation for his possession which is consistent with innocence. His only explanation, refuted by overwhelming evidence, is that the shoes belonged to him. He did not offer any details to show how, when and from where he acquired the pair of shoes. His explanation is, therefore, incredible. Consequently, the Court concludes that under the permissible parameters of the doctrine of recent possession, the 2nd Accused Person was one of the assailants who murdered the Deceased.



117. The final issue that requires brief mention is on the doctrine of common purpose. From the evidence analysed above, it is true that the 1st Accused Person did not physically strangle the Deceased leading to the asphyxiation that ultimately killed the Deceased. However, the evidence has demonstrated that the 1st Accused Person was the author of the plot and likely administered the Xylamine that rendered the Deceased intoxicated hence more vulnerable to the strangulation, and delivered him for the eventual strangulation. It is clear from the evidence adduced at Trial that the 1st Accused Person was the instigator of the plan to murder the Deceased. As the author of the plan, she entered into an agreement with the 2nd Accused Person and PW4 to carry out her intention to murder the Deceased. The 2nd Accused Person killed the Deceased pursuant to that agreement. That makes both the 1st and 2nd Accused Persons principal and joint offenders in the murder of the Deceased.
118. Section 20 of the *Penal Code* is headed, “Principal Offenders”. It reads as follows:
- (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
 - (a) every person who actually does the act or makes the omission which constitutes the offence;
 - (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
 - (c) every person who aids or abets another person in committing the offence;
 - (d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.
 - (2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
 - (3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.
119. Under the explicit definition of Principal Offenders in section 20 of the *Penal Code*, both the 1st and 2nd Accused Persons are principal offenders in the murder of the Deceased.
120. The upshot is that, after due analysis of the evidence presented at trial, the Court makes the following findings:
- a. That the Deceased, Simon Mbuthi Mwangi, was killed on November 6, 2016 at Karakuta Coffee Estate.
 - b. That the killing of the Deceased was principally instigated by the 1st Accused Person who procured the 2nd Accused Person (and PW4) to execute the homicide pursuant to an agreement where the 1st Accused Person promised to pay the two for the killing.
 - c. That the 2nd Accused Person caused the killing of the Deceased pursuant to the agreement with the 1st Accused Person.



- d. That the killing of the Deceased was, therefore, caused by both Accused Persons.
- e. That both Accused Persons had the malice aforethought as defined by law because they intended to cause the actual death of the Deceased.

121. It is, therefore, this Court's finding that all the elements of murder have been established against both the 1st and 2nd Accused Persons. Consequently, I find and hold that both Accused Persons, Jane Muthoni Mucheru and Isaack Ng'ang'a Wambui Alias Gikuyu, are guilty of the murder of Simon Mbuthi Mwangi (Deceased) contrary to section 203 as read together with section 204 of the [Penal Code](#). I hereby convict both of them accordingly.

122. Orders accordingly.

DATED NAKURU THIS 22ND DAY OF APRIL, 2021.

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic

