REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 38 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

DISSAN KIPCHIRCHIR.....ACCUSED

RULING

[1] The accused person herein, **Dissan Kiprchirchir**, was arraigned before the Court on **14 May 2015,** charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63 of the Laws of Kenya.** It was alleged, vide the Information dated **14 May 2015,** that at an unknown time on the night **of 2nd and 3rd May 2015** in Kaplamai Location within Nandi County, he murdered **NCM**. The accused denied those allegations, and had his defence conducted by **Ms. Masai** and **Ms. Nderitu.**

[2] In proof of the charge against the accused, the Prosecution called a total of 12 witnesses; whose evidence was that the body of the deceased herein, **NCM,** was found lying partly submerged in water in a swamp within [Particulars Withheld] Sub-location. There were visible marks on the neck and face, indicative of strangling. The incident was brought to the attention of the Police and the body was removed and taken to Kapsabet Hospital Mortuary to await postmortem. The autopsy was conducted on **6 May 2015** by **Dr. Doreen Momanyi (PW11)**. Her findings led her to the conclusion that the deceased had died of strangulation. By this time, the accused person, who admittedly was the deceased's boyfriend, had surrendered himself to the Police. He was then accordingly arraigned on a murder charge as aforestated.

[3] Thus, the first Prosecution witness, **Godfrey Kipchumba Ngetich (PW1)** testified that he was then earning a living as a *boda boda* operator; and that it was in the course of his work that he got to know the accused person, who was also a *boda boda* operator. He told the Court that he met the accused at Chepterit on the morning of **3 May 2015** at about 6.00 a.m. as he **(PW1)** left for Kapsabet with a client. He added that, he waved at him and the accused waved back. He then proceeded on his way; and that at about 1.00 p.m. that day, he received a report that the accused had murdered the daughter of **J**, a well-known sports personality in the area.

[4] The father of the deceased, **JKM (PW2),** was the second witness for the Prosecution. He confirmed that the deceased, **NCM**, was his firstborn child; that she had befriended the accused while she was still a school-going minor; and that when he got to know of it, he filed a defilement complaint with the Police against the accused. As a result, the accused was arrested and charged at Kapsabet Law Courts with the offence of defilement; which case was still pending as at the time of his testimony. He further told the Court that he was concerned that the accused and the deceased continued with their love affair even thereafter; for which reason the deceased would sneak away from home without permission. He mentioned too that the deceased did not spend the night of **28 April 2015** at home; and added that, while he was waiting for an opportune moment to discuss his concerns with the deceased, he learnt from his wife, on the morning of **3 May 2015**, that their daughter had disappeared again after having been called out of her grandmother's house by the accused the previous night. Later that morning, he was informed that there was a dead body of a girl in the nearby swamp; and when he went to the scene, he identified the body to be that of his daughter, **NC.**

[5] It was further the testimony of **PW2** that he informed the area chief as well as the Police of the incident; and the body of the deceased was subsequently collected and taken to Kapsabet Hospital Mortuary pending investigations. He also mentioned that, on **6 May 2015**, he identified the deceased's body to the doctor who conducted an autopsy thereon to ascertain the cause of death. He pointed out that there were visible injuries on the neck of the deceased suggesting that she had been cut or scratched.

[6] On his part, **Wesley Kipkasi Chumba (PW3),** told the Court that he was at home on **30 May 2015** at about 7.00 p.m. when the accused went there accompanied by the deceased; and that all the deceased sought to know from him was whether her father was at home. They thereafter left after a few minutes. He added that it was not until 12.00 midnight that the accused went back to his house, where he spent the rest of that night. He explained that the deceased was his cousin; and that he was aware of the love affair between her and the accused. **PW3** concluded his evidence by stating that he got to learn of the death of the deceased on **3 May 2015** and could not tell whether the accused and the deceased had any differences or misunderstanding prior to the demise of the deceased.

[7] **Kiprotich Kenei (PW4)** testified that he was at his place of work in Eldoret Town on **3 May 2015** when he got information about the death of the deceased through his wife. He confirmed the incident by calling the deceased's father on the telephone. He had known both the deceased and the accused prior to **3 May 2015;** adding that the accused was once his student.

[8] The next Prosecution witness was **Joseph Kipsang (PW5).** He recalled that the accused had approached him on **2 May 2015** at about 10.00 p.m. with a request to reconcile him with his (**PW5's)** brother **BM**. He explained that the two had disputed over **Benjamin's** stolen laptop, for which **B** suspected the accused. **PW5** testified that before he could intervene as requested, he got to learn from **B** that **N** had been murdered and that the accused was the suspect.

[9] The chief of Kipsebwa Location, **Robinson Kiplagat Tuwei (PW6)** testified herein on **19 November 2018**. His evidence was that, at about 7.00 a.m. on **3 May 2015**, he received a telephone call from the deceased's father, **JM (PW2),** inquiring about the accused's whereabouts. He explained that the accused is his nephew; and this fact was well-known to **PW2,** granted that he stood surety for the accused in the defilement case. He got to learn from **PW2** that his daughter was missing. **PW6** further told the Court that he assured **PW2** that he would make inquiries and revert as soon as possible.

[10] **PW6** then called the accused and ascertained that he was at Mosoriot; and that he was not in the company of the deceased. He informed **PW2** accordingly; but after two hours, **PW2** called back to inform him that his daughter had been found dead. He then relayed the information to the accused and advised him to surrender himself at the nearest police station, as he was said to be the suspect in the deceased's murder. He added that he took it upon himself to escort the accused to **Chemuso Police Station** because he was afraid to do so alone.

[11] **MJ (PW7)** was with the deceased on the night of **2 May 2015.** Her evidence was that the deceased was her niece; and that they would sleep together with her and her younger sister, **GC (PW8)** in the house of the girls' grandmother during the school holidays of **April 2015**. She testified that the deceased disappeared for a few days, only to return on **30 April 2015**; and that on the night in question, she heard a knock on the window as they were playing video games on the computer with the deceased and **G.** She ignored the first knock; but had to check who it was when she heard a second more insistent knock, and saw **Dissan** the accused with the aid of moonlight. Since she was aware of the troubled relationship between the deceased and the accused, she did not alert the deceased; but could tell that she was expecting him. She observed that she became restless; and that she went out of the house for a while and returned to ask her for permission to go and see the accused. It was the evidence of **PW7** that although she declined her request for permission, the deceased went away anyway. She never returned alive. Her dead body was found at around 9.00 a.m. at the swampy area in the village.

[12] **GC (PW8)** told the Court that they were playing video games on the computer on the night of **2 May 2015** with her elder sister, **N**, the deceased and aunt, **M (PW7),** when she heard knocks on the window. She then checked to see who was knocking and recognized the person to be **Dissan**, the accused herein. She explained that the accused person was well-known to her; and that she did not say anything to anybody because the deceased had already mentioned that per person had to be **Dissan**. She thereafter went to bed. The following day, she woke up and went to Sunday School; and that on return, she was told that **N** had been murdered.

[13] **Dr. Otieno Kennedy Hayanga (PW9)** was called to produce the Postmortem Report on behalf of **Dr. Momanyi**. He told the Court that he had worked with **Dr. Momanyi** at Nandi County Referral Hospital for more than 6 years and was therefore familiar with her handwriting and signature. However, an objection was taken by counsel for the defence to his testimony on account of the fact that **Dr. Momanyi** was undertaking her further studies in Nairobi and was therefore in a position to avail herself for this matter. The objection was accordingly upheld and **PW9** discharged.

[14] **Julius Kipkoech Togom (PW10)** was the next witness. His testimony was that they were picking vegetables at about 9.00 a.m. with two others, namely, **Cheruiyot** and **Kibitwott,** when some children drew their attention to the presence of a dead body at the marshy part of the neighbouring farm, about 50 metres away. They immediately proceeded to the scene and found the dead body of a young female which was partially submerged in water. He further stated that, after the body was retrieved from the river, he observed that there were visible injuries on the neck which seemed like cut wounds. As none of them could recognize the victim, they made telephone calls to residents of the area that they knew; and that soon it became known that the deceased was the daughter of **JM (PW2).** The Police were notified and the body was collected from the scene. The following day he was summoned to Kapsabet Police Station to record his statement.

[15] **Dr. Doreen Momanyi** testified on **2 July 2019** and confirmed that she conducted an autopsy on the body of **NCM** at Kapsabet County Referral Hospital mortuary. She noted that, externally, there were scratch marks on the right side of face and on the anterior aspect of the neck. The hands were blue, indicative of lack of oxygen; and the neck was twisted. She also noted that the blood vessels around the neck were raptured, thereby putting a strain on the anterior vessels. She accordingly concluded that the deceased had been strangled manually, and therefore that the cause of death was strangulation. She produced the Postmortem Report and it was marked as **the Prosecution's Exhibit 1** herein.

[16] The last prosecution witness was **P.C. Joel Mugambi (PW12).** He testified that he was on duty on **4 May 2015** at the DCI office, **Nandi**, when the DCIO instructed him to investigate a murder incident that had been reported the previous day. The suspect, **Dissan Kipchirchir,** had already surrendered at **Kabiyet Police Station** on **3 May 2015** and was being held at **Kapsabet Police Station.** He thereafter looked for the witnesses and recorded their statements; and got to learn from **MJ (PW7)** and **GC (PW8)** that the accused sought out the deceased at night on **2 May 2015** from her grandmother's house; and that that was the last time the deceased was seen alive.

[17] On being placed on his defence, the accused told the Court that he spent the night of **2nd and 3rd May 2015** at **Mosoriot** where he was then residing with a cousin. He conceded that the deceased was his girlfriend; and that on the morning of **3 May 2015** at around 9.00 a.m., he was called by the area chief and asked about the whereabouts of his girlfriend, **NC;** and that shortly thereafter, the chief informed him that N had been murdered and that he was believed to be the suspect. He told the Court that he was shocked by the information and wanted to go to the scene where the body had been found but was advised against such a move by the chief.

[18] The accused further stated that later, at about 3.00 p.m. when he called the chief to find out the status of the matter, he was advised to

surrender to the nearest police station because members of the public were looking for him. He accordingly surrendered himself at **Kabiyet Police Station**, from where he was transferred to **Kapsabet Police Station**. He added that this was not the first time **N** went missing; and that whenever she went missing, he would be called by his uncle or neighbours to inquire about her whereabouts. He explained that they were in a relationship with the deceased for 4 to 5 years; and that, although her parents were opposed to the relationship, they deeply loved each and would often spend time in each other's company. While conceding that they spent the night of **29th and 30th April 2015** together with Nancy, he denied that he sought her out from her grandmother's house on the night of **2nd and 3rd May 2015.** The accused also made reference to the defilement complaint filed against him by **PW2.** He conceded that there was such a case pending against him at Kapsabet Law Courts in which the deceased was the complainant, but denied that he threatened her, on the pain of adverse consequences, to withdraw the defilement charge. He accordingly denied the allegations made herein against him.

[19] In her closing submissions, filed herein on **16 March 2021, Ms. Masai** proposed one issue for determination; namely, whether the Prosecution has discharged the burden of proof beyond reasonable doubt. It was her submission that, since no witness placed the accused person at the scene of the murder, the Prosecution case was hinged on mere speculation and suspicion. While she acknowledged that the accused had a romantic relationship with the deceased; and that the deceased had ran away from home for a couple of days, it was her assertion that the accused had no reason to murder the deceased. She pointed out that the two enjoyed a good relationship, with marriage in view, after the deceased completed her schooling; and therefore that the accused would have been the last person to jeopardize that relationship. Accordingly, counsel postulated that the accused was just a scape goat on account of the fact that the deceased's parents disapproved of their relationship.

[20] **Ms. Masai** also urged the Court to give the benefit of the doubt resulting from the contradictions and inconsistencies in the evidence of **PW7** and **PW8** to the accused. She pointed out that although the two were together in the same room with the deceased, it was only **PW7** who allegedly heard the knocks on the window. She further questioned how **PW7** was able to see the accused on a rainy night without any form of light, as the solar light, (referred to by the witnesses as D-light) was off. **Ms. Masai** also took issue with the fact that **PW7** chose to keep quiet about the fact that the deceased left with the accused at night even after he had allegedly threatened to burn the deceased's grandmother's house.

[21] As to whether the evidence of **PW7** was sufficient to justify a conviction on the "last seen" doctrine, **Ms. Masai** referred to the case of **Anjan Kumar Sarma vs. State of Assam**, Criminal Appeal No. 560 of 2014, to support her argument that the mere fact that the accused was the last person to be seen with the deceased was insufficient to found a conviction in the absence of additional cogent evidence inculpating the accused. In her submission, no such evidence was availed by the Prosecution. She also referred to the cases of **Makau & Another vs. Republic** [2010] 2 EA 283; **Sawe vs. Republic** [2003] KLR 364 among others to bolster her argument that mere suspicion is not good enough in cases such as this. She accordingly urged for the acquittal of the accused person.

[22] The Court has carefully considered the evidence adduced herein by the Prosecution as well as the sworn statement of defence given by the accused person. I have likewise taken into account the submissions made herein by **Ms. Masai**, noting that counsel for the state opted to rely on the evidence on record. **Section 203** of the **Penal Code**, pursuant to which the Information herein was laid, provides that:

> **"any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."**

[23] Thus, the key elements of the charge that the Prosecution needed to prove are: the fact of death; that the death was caused by the accused by an unlawful act; and malice aforethought on the part of the accused person. Accordingly, the issues for determination herein are:

[a] Whether the fact of the deceased's death has been proved; and if so, whether the death was caused by the accused;

[b] Whether the deceased's death was attributable to an unlawful to an unlawful act;

[c] Whether malice aforethought has been established.

[24] With regard to the first issue, there is no dispute that the deceased died on the night of **2nd and 3rd May 2015.** Her dead body was found lying in a swamp within Kiptangunyo Sublocation on the morning of **3 May 2015**. Those who saw the body at the scene, such as **PW2, PW10 and PW12,** testified that the body had scratch marks on the neck and face. The same observation was made by **Dr. Momanyi (PW11),** who conducted an autopsy on the deceased's body on **6 May 2015**. She testified that externally, the body had bruises on the face, especially on the right side of face and on the anterior aspect of the neck. She also noted that there was cyanosis of the central and peripheral system; and that the trachea was loose. She observed, too, that the deceased's neck was twisted; and that there was haemorrhage below the skin due to raptured anterior vessels of the neck. **Dr. Momanyi** further testified that the deceased's vulva region was intact save that the hymen was broken but no bruises or secretions were found. The rest of the deceased's body systems were found to be normal.

[25] Thus, **Dr. Momanyi** came to the conclusion that the cause of death of **NCM** was strangulation, evidenced on the anterior aspect of the neck by the scratch marks on the skin, the twisting of the deceased's neck, and the raptured vessels on the anterior part of the deceased's neck. From her observation, **Dr. Momanyi** was of the opinion that the apparent time of death was 72 hours; thereby confirming the evidence of the other Prosecution witnesses that the deceased died on the night of **2nd and 3rd May 2015**. That evidence was entirely uncontroverted; and on the basis thereof, it is my finding, that the Prosecution has proved beyond reasonable doubt that the deceased died of strangulation on the night of **2nd and 3rd May 2015**.

[26] There can be no doubt from the circumstances in which the body was found and the conclusion reached by **Dr. Momanyi** that the death-dealing injuries; notably the scratch marks on the neck of the deceased and the twisting of her neck, were unlawfully inflicted on the deceased by an assailant. Hence, the question to pose is whether the Prosecution proved beyond reasonable doubt that that assailant is the accused.

[27] As was correctly submitted by the defence counsel, there is no direct evidence connecting the accused with the murder of the deceased. This is in the sense that nobody saw him strangle the deceased to death. In the same vein, nobody saw him dispose of the deceased's body at the swamp where it was found. Accordingly, the accused complained that he was treated as the prime suspect simply because he was the deceased's boyfriend. Moreover, the accused raised an *alibi* and asserted that he spent the night of **2 May 2015** at **Mosoriot**; about 7 km away from the home of **PW2.**

[28] Needless to say that the onus is on the Prosecution to displace that alibi defence; a point well-made by the Court of Appeal in **Kiarie vs. Republic** [1984] eKLR, thus:

> **"An *alibi* raises a specific defence and an accused person who puts forward an *alibi* as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an *alibi* introduces into the mind of the court a doubt that is not unreasonable…"**

[29] Similarly, in **Athuman Salim Athuman vs. Republic** [2016] eKLR, the Court of Appeal held that:

> **"It is trite that by setting up an *alibi* defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case...The burden to disprove the *alibi* and prove the appellant's guilt lay throughout on the prosecution...the purpose of the defence of *alibi* is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act..."**

[30] With the foregoing in mind, I have evaluated the Prosecution evidence. I note that heavy reliance was placed on the evidence of **PW7**, the deceased's aunt who was one of the last persons to see her alive. Her evidence was that while in the house of her mother-in-law where she would spend the nights with the deceased and the deceased's younger sister **G,** the accused went there on the night in question and knocked on the window. She ignored the first knock, but when she heard a second louder knock, she personally opened the curtain partially to check who it was. She told the Court that she then saw the deceased standing outside the window. She added that she was able to see him with the aid of moonlight; and that the accused was known to her before the night in issue.

[31] The evidence of **PW7** was complemented by the evidence of **PW8**. She too heard the knocks on the window, checked and saw the accused standing outside the window. She added that the deceased seemed to be in expectation of the accused and when the knock was sounded, she remarked that it had to be **Dissan. PW8** also mentioned that she had known the accused before the fateful night. Thus, the evidence of both **PW7** and **PW8** was that the deceased went out of the house and returned after a short while; asked **PW7** for permission and although **PW7** declined, she dressed up and left shortly before midnight and never returned; only to be found dead in the morning.

[32] It is plain then, that the evidence presented herein is purely circumstantial in nature; premised on the doctrine of **"last seen".** It is now trite that for circumstantial evidence to form the basis of a conviction, it must point irresistibly to the guilt of the accused person and rule out all other reasonable hypothesis. This was well-explicated in **R. vs. Kipkering Arap Koske & Another** [1949] 16 EACA 135 by the Court of Appeal for East Africa thus:

> **"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."**

[33] Likewise, in **Joan Chebichii Sawe vs. Republic** [2002] eKLR, it was held that:

> **"… the evidence in this case was entirely circumstantial. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused**."(see also **Makau & Another vs. Republic [2010] 2 EA 283)**

[34] Thus, in **Musili Tulo vs. Republic** [2014] eKLR, the Court of Appeal explained that in order to sustain a conviction, such evidence must satisfy the following requirements:

> **(a) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
>
> **(b) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
>
> **(c) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.**

[35] It is not lost on the Court that the incident occurred at night and therefore that there is need for testing with greatest care the evidence adduced by **PW7 and PW8** regarding their identification of the accused person**.** Hence, in **Paul Etole & Another vs. Republic** [2001] eKLR, the Court of Appeal sounded the caution that:

> **"…Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of**

the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger…"

[36] How then is the "testing with greatest care" to be undertaken? The suggestion in **R. vs. Turnbull & Others** [1973] 3 AllER 549, is that:

"...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

[37] In the instant matter, **PW7** explained that all three of them were seated on a bed that was next to the window; and that although the D-light had been switched off, there was moonlight that enabled her to see and recognize the accused person. She explained that she had seen the accused person two or three previous occasions when he visited to talk to the deceased at place where they would wash clothes. She also mentioned that after the knocks on the window, the deceased became restless; she then opened the door and went outside. She returned after some time to ask her for permission to go away with the accused.

[38] The evidence of **PW7** as to what transpired on the night of **2nd and 3rd March 2015** assumes greater significance granted the unrefuted fact that the deceased had earlier left home for several days and only resurfaced on **30 April 2015**; and when **PW7** questioned her about it, she revealed that she had gone to visit the accused. This fact was expressly conceded to by the accused person. Thus, **PW7** was confident that the deceased had gone out with a person they could trust and would be back in no time.

[39] On her part, **PW8** mentioned that she too heard the knocks on the window and on checking, she saw the accused, a person hitherto well-known to her. She explained that she did not discuss the issue because the deceased told them the person knocking had to be **Dissan**. She too confirmed that the bed on which they were playing computer games was next to the window; and that the deceased also confirmed that it was **Dissan** knocking at their window and made a loud comment to that effect. As to the source of light, she made reference to the D-light being the source of light outside the house.

[40] In addition to the evidence of **PW7** and **PW8, PW3** testified that the accused went to his house in Kaptangunyo Sublocation on the night **of 30 April 2015** at about 7.00 p.m. in the company of the deceased. That the deceased merely wanted to know whether her father was at home. Further to the foregoing, **PW5** also testified that the accused visited his home on the night of **2 May 2015** at about 10.00 p.m. to seek his intervention in a dispute he had with his **(PW5's)** brother **B**. That evidence confirms that the accused was in [Particulars Withheld] on the night of 2nd and 3rd May 2015. In the premises, the evidence of **PW3** and **PW5** goes to confirm that the deceased spent considerable time with the deceased prior to her death; and therefore augments the testimonies of **PW7** and **PW8** that the deceased was the last person to be seen with the deceased.

[41] Regarding the doctrine of "last seen", it is trite that where it is applicable, it has the effect of shifting the burden of proof onto the accused person to give an explanation as to how the deceased met his/her death; failing which he would be presumed to be the culprit. Thus, in **Republic vs. E K K** [2018] eKLR, **Hon. Lesiit, J**. quoted the following excerpt from the Nigerian case of **Moses Jua vs. The State** (*2007) LPELR-CA/IL/42/2006:*

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

[42] No such explanation was forthcoming from the accused. It is also significant that on the night of her death the deceased revealed to **PW7** that the accused was piling pressure on her to withdraw the defilement case. Thus, she is reported to have told **PW7** that the accused had threatened to burn their grandmother's house or do something bad unless she went out to meet him about the possible withdrawal of the defilement case; something the deceased had discussed with her on the **30 April 2015** when she returned home after spending a few days with the deceased.

[43] The law recognizes, in **Section 33(a)** of the **Evidence Act, Chapter 80 of the Laws of Kenya,** that:

"Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(a) Relating to cause of death **when the statement is made by a person as to the cause of his death, or as to any of the**

circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

[44] Hence, in a discussion of the above provision, the Court of Appeal expressed its view, in **Philip Nzaka Watu vs. Republic** [2016] eKLR, thus:

> **"Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements … While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe."**

[45] Besides, the unquestionable fact that the accused was at the time facing a defilement charge which he wanted withdrawn is significant in so far as it demonstrates motive for the deceased's murder. And, although motive is not necessarily an ingredient of a murder charge, it is relevant in a case such as this, that is entirely dependent on circumstantial evidence. This was well explained by the Court of Appeal in **Dishon Litwaka Limbambula vs Republic** [2003] eKLR

> **It was proved that the appellant had issued actual threats to harm the complainant before a certain matter between them in another court was heard. We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person.**
>
> **See section 8 of the Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.**
>
> **In the case before us, the two courts below were entitled to hold that interference could be raised that the appellant had a motive to attack the complainant.**
>
> **We are satisfied that the appellant was properly convicted and we uphold the conviction…"**

[46] It is within the foregoing backdrop that I consider pertinent the evidence of **PW7** as to the reason for the deceased's insistence on going out on the fateful night to be with the accused person. Placed alongside the evidence of **PW3** and **PW5**, the evidence is strong enough to irresistibly point to the accused person as the assailant who strangled the deceased to death.

[47] It is not lost on the Court that counsel discredited the evidence of **PW7,** citing inconsistencies between the evidence of **PW7** and **PW8** who were in the same house with the deceased on that night. One of the contradictions appears to be that **PW7** testified about the night of **1 May 2015** as opposed to **2 May 2015.** Counsel also questioned why **PW7** kept quiet about the fact that the deceased had left the house at night with the accused; and why it was that **PW8** did not see the deceased leave the house that night.

[48] A careful consideration of the evidence of the two witnesses however gives a different impression. In her evidence in chief, **PW7** explained that she tried to call **PW2** but the call did not go through. She added that she brought the matter the attention of the deceased's mother as soon as she woke up; and indeed, **PW2** confirmed that his wife brought the matter to his attention. This was before the news of the death of the deceased was broken to him. **PW7** further explained that she was not particularly worried that the deceased had left the house. She explained that she had left the house that night and returned; and so she was confident that she would be back soon. She also pointed out that the deceased had gone out to meet a person she knew to be her boyfriend. It is to be recalled too that **PW7** mentioned that when the deceased went out and returned, she did ask her for permission to go away with the accused; although she declined her request. Clearly therefore, not much turns on the fact that **PW7** did not report the incident to **PW2** that very night. She sufficiently explained the circumstances of that apparent inaction; which I find logical.

[49] Moreover, **PW7** was categorical that the deceased went away on the very night that preceding the discovery of the body of the deceased; and therefore the discrepancy as to the date of the offence does not necessarily detract from the prosecution version of the events surrounding the death of the deceased. It is within the context of the foregoing that I would not consider significant the variance as to whether the source of light was moonlight or solar powered D-light. Indeed, in **John Nyaga Njuki & 4 Others vs. Republic**, Cr. App. No. 160 of 2000, the Court of Appeal explained that:

> **"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."**

[50] *Likewise*, ***in Philip Nzaka Watu vs. R*** (supra) the Court of Appeal acknowledged that human recollection is not infallible. Here is what it had to say in this regard:

"...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

[51] *Thus, it is in the light of the foregoing that I am satisfied that the circumstantial evidence presented herein by the Prosecution unerringly points to the accused as the assailant who unlawfully strangled the deceased to death. There were no co-existing circumstances or any suggestion that the deceased could have left her grandmother's house in the middle of the night for some other purpose than to be with the accused person. Taken in its entirety, the Prosecution evidence has completely displaced the accused's alibi and squarely placed him at the scene of the murder of the deceased,* ***NCM.***

[52] *On whether the Accused had malice aforethought when he committed the unlawful act complained of herein,* it is the law that what needs to be proved by the Prosecution is any of the circumstances set out in **Section 206** of the **Penal Code.** That provision states thus:

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

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

[53] Accordingly, in the case **Nzuki vs. Republic [1993] eKLR** the Court of Appeal held that:

"...murder is the unlawful killing of a human being with malice aforethought. 'malice aforethought' is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result...Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused:

(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;

(iii)Where accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed."

[54] In this case, not only were scratch marks found on the neck and face of the deceased; but it was also ascertained by **Dr. Momanyi** that the deceased's neck was twisted and the blood vessels around the neck were raptured. The evidence therefore clearly demonstrates both the intention to cause death and the knowledge that the deliberate act of strangulation would result in death. Additionally, that the deceased's body was dumped in a marshy part of a river is a clear indication of an attempt by a conscious wrongdoer to get rid of the body. Hence, there is clear proof of malice aforethought herein.

[55] In the premises, it is my finding that all the ingredients of the charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** have been proved beyond reasonable doubt against the accused person. I thus find him guilty and hereby convict him of the offence of murder as charged pursuant to **Section 322(1)** of the **Criminal Procedure Code**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 19TH DAY OF MAY, 2021

OLGA SEWE

JUDGE