



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 19 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN KILONZO KULUNZU.....1ST ACCUSED

AMM.....2ND ACCUSED

GEOFFREY MUTUKU MBUTA ALIAS ALEX.....3RD ACCUSED

JUDGMENT

1. **Stephen Kilonzo Kulunzu, AMM and Geoffrey Mutuku Mbuta alias Alex**, were arraigned on the information of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars were that on the night of 5th and morning of 6th day of October, 2014 within Mashuuru Sub-County in Kajiado County, jointly with others not before court, they murdered PMK. They denied the information and the prosecution called a total sixteen witnesses to prove its case.

2. **PW1-Simon Mutku Mutisya**, an employee of NM (PW5), husband to the 2nd accused and the deceased, testified that he lived with PW5 for several years and knew the 2nd accused as a wife to PW5. She lived at Masii and would quite often visit PW5.

3. On November, 2013, the 2nd accused visited PW5 and she inquired from him on what PW5 did while she was away. She also wanted to know where PW5 spent the night when not in the house. He told her that he thought PW5 travelled to their Masii home. The 2nd accused informed him that her husband had another wife (the deceased) and sought his assistance in tracing where the deceased lived. She promised to pay him Kshs, 50,000 if he found the deceased's residence and requested him to keep it to himself. He revealed this to PW5 who asked him to leave the 2nd accused alone. The 2nd accused persisted but he never undertook the assignment. He decided to move out of PW5's house.

4. In January 2014, the 2nd accused moved to the Nairobi residence permanently. She continued calling him on phone inquiring about the assignment and even asked him whether he had disclosed it to PW5. He denied giving any information to PW5. She warned him that she would ensure he lost the job if he disclosed the information to PW5. She continued calling but he did not respond to some of the calls.

5. In August, 2014, he travelled with the deceased to Kiima and while there, the 2nd accused called and requested to see him. She told him that if he did not get her, he could talk with a lady called Ndinda who had a message for him. He went to see Ndinda but he did not find her. He met her the following day and inquired from her about his message. That was when he learnt that the 2nd accused wanted him to stay with some young men. He declined the request because he did not have room to accommodate them. PW5 had warned him not to cooperate with the 2nd accused. He therefore did not speak to the 2nd accused again. He only saw her after the deceased's death.

6. In cross-examination he stated that he had known both the 2nd accused and PW5 as a family since 2010; that he was related to PW5 although they did not come from the same area and that he never went to their Masii home. He first met the 2nd accused at Masii Market at PW5's work place and later he came to work for them in Nairobi in 2011. The deceased used to visit PW5 and would spend some days in the house. He further stated that the 2nd accused asked him if he knew about the deceased but he lied that he did not. He admitted that he used to disclose all the discussions he had with the 2nd accused to PW5, including the promise he made to pay him Kshs. 50,000 to disclose the affair PW5 had with the deceased, but the 2nd accused never gave him any money. He maintained that he did not know why the 2nd accused wanted to know the deceased's house. He also admitted that he did not know the 1st and 3rd accused.

7. **PW2-Erick Mwangangi**, who was staying at the deceased's home, testified that on 5th October, 2014, the deceased went to church and

returned at 2.p.m. A lady came and asked the deceased whether PW5 would come because she wanted a lift to Nairobi. He went to Kiima Market and left the two and the deceased's sister K (PW11) at home. He returned at 7 p.m. had super and went to sleep in a separate house.

8. At around midnight, he heard dogs bark but when he went out to check, he saw nothing and went back to sleep. The dogs started barking again and some people came and asked the deceased and K to open for them. They knocked the doors politely and called out their respective names. They also went to the house he was sleeping in. He just found them inside the house as he had forgotten to lock the door. They hit him with a panga and ordered him to lie down. They had torches but they had covered their faces. After they left, he went and called a neighbor (PW3). When they returned to the deceased's home they found K (PW11) alone in the house. They asked her where the deceased had gone but she replied that she did not know. They raised an alarm and went searching for the deceased. Neighbours joined them in the search and they found the deceased's body in ditch about 50 metres from the homestead. She was dead. She had a cut on the neck and blood on the head.

9. They covered the body with iron sheets because it was raining. PW5 was informed and reported the matter to the police. Police officers visited the scene and took photographs. He identified deceased's body in the Photographs.

10. **PW3-James Sila Kanyili**, the deceased's neighbour, testified that on the night of 5th and earlier hours of 6th October, 2014, he was sleeping when PW2 woke him up because robbers had attacked at the deceased's home. They rushed to the deceased's home but did not find her. PW11 told them that the deceased went with the attackers. They raised an alarm. Other neighbours responded and assisted in the searched. They found the deceased's body several metres from the home with injuries on the head. They covered the body with iron sheets. PW11 telephoned PW5 who came later in the morning. Police officers went and collected the body.

11. **PW4-Damaris Kavut Mulwa** testified that in 2014 she was working as a supervisor at a restaurant belonging to PW5 and the 2nd accused. Her work was to supervise workers, buy groceries and foodstuffs with money given by PW5 and the 2nd accused. She knew PW5 was husband to the 2nd accused. She did not know any other wife. In September, 2014, she was using mobile No. 0717xxxx. She however later changed the number. She recorded a statement that her mobile phone was taken by police officers in respect to the Mpesa account. A client by the name Lucy had asked her to send about KShs. 19,000 to a number given to her by the 2nd accused. She deposited the money into her Mpesa account and sent it to that number. She however could not remember cell phone numbers for the 2nd accused or PW5.

12. In cross examination, she stated that she was employed by both the 2nd accused and PW5 in the hotel between 2009 and 2014 as the supervisor and she had workers under her. She also handled purchases of foodstuffs and other items required in the hotel. Both PW5 and the 2nd accused would give her money with instructions to handle financial matters in the operations of the hotel. She stated that she received KShs. 19,000 from Masii College through Lucy but she was to wait for instructions where to send it. The money was for payment for a tent.

13. **PW5-NMI**, a senior principal lecturer at [Particulars Withheld] Government, and husband of the 2nd accused and deceased, testified that the deceased died after she was attacked by thugs. He also testified that PW4 was his employee in a hotel at Masii Market. On 16th September, 2014, He was accompanied by the deceased to Mombasa and when they came back on 18th September 2014, he left her at their home at Kiima where she was staying with her sister (PW11). The 2nd accused was staying at his place of work in Nairobi. She would travel home in Masii and Kiima.

14. On 4th October 2014, he left the 2nd accused at Kabete and attended a fundraising at Malili market where the deceased's child was attending school. After the function, the deceased took a bodaboda home while he drove to Masii to check on their business and spent the night there. At 3 pm the deceased called and informed him that a lady called Beatrice Muli from AIC was inquiring whether he would go home so that he could give her a lift, which had disturbed her.

15. On 5th October, 2014 at 8pm, he left for Nairobi together with the 2nd accused arriving at 10.30 p.m. The 2nd accused received many calls but she was switching the phone off. When they arrived in Nairobi, she went out to make calls. At 1.00 a.m., he received a call that the deceased had been attacked by thugs. The 2nd accused was asleep. He woke her up and informed her about the incident. He then telephoned the deceased's sister KK and also called a neighbour, Simon Mutisya in Nairobi. They left for Kiima at 1.30 pm arriving there at 3.30 a.m. He found many people at the scene who explained to him what had happened. He went where the deceased's body was, about 20 metres from the house. It had been covered with iron sheets because it was raining. He went and reported the matter at Salama Police station. Police officers went and collected the body from the scene. The deceased had a cut on the head and had been tied before being killed.

16. He first saw the 1st accused at Kitengela and later at Machakos court but he had no business with him. He did not know the 3rd accused. He saw him at Kajado police station and had no business with him too. He identified the deceased's body in the photographs.

17. In cross-examination, he admitted that he did not know the 1st accused; that he first saw him at Kitengela after he had been arrested and that he had no dealings with him. He also admitted that the 2nd accused was his wife but at the time they were going through divorce. He told the court that they had two matrimonial homes, one at Kabete and the other at Masii; that he had a second marriage in 2007 with the deceased and they had stayed together for 8 years. According to PW5, the 2nd accused knew that he had a second wife and the deceased also knew the 2nd accused, but they had not met.

18. The witness further admitted that the 2nd accused was at their Masii hotel on 5th October, 2014 and that they returned to Nairobi together and arrived at 10.30 p.m. She was in the matrimonial bed when he received the tragic news and he shared the new with her but he did not ask her to accompany him to Kiima. According to the witness, the 2nd accused received many phone calls while at the hotel but he did not know who she was talking to. He also did not hear the discussions. She was literally disconnecting the phone calls all the way from Masii to Nairobi. After they arrived at Nairobi at 10.30 p.m. she would go out to make and answer calls which worried him. He admitted that he did not state in his statement to the police that the 2nd accused was talking on phone which worried him. He also admitted that charging the 2nd

accused had made their relationship more strained. He denied that he was trying to fix the 2nd accused. He also admitted that PW4 was their employee and that she was answerable to both the 2nd accused and he and she would take instructions from either of them.

19. **PW6–Philemon Kechengela Mwamodo**, an officer with the Department of National Registration of Persons, testified that they received requests from Kajiado DCI Central dated 27th March, 2017. In the first request, the DCI asked them to furnish his office with particulars of identity card No. xxxxxx and finger print details and attachment of P20 form. The second request was for particulars of identity card No. xxxxxx. They processed the information and he responded through letter on 26th April, 2017. Identity Card No. xxxxxx was registered in the name of Geoffrey Mutuku Mbata on 8th may, 2002 and was second generation identity card. They also retrieved finger prints for Geoffrey Mbata captured on P20 from the database.

20. Identity card No. xxxxxx was registered in the name of David Kiprimo Malima on 25th July, 1995, and was a first registration. The transition from the first generation to the second generation was done in 1995 and it was a requirement to transit from the first to the second generation of identity cards. The first generation identity cards are no longer valid. He produced the National registration report as exhibit 2.

21. In cross-examination, he stated that they received two memo requests dated 29th December, 2016 in respect of particulars of certain identity card numbers and the offence was obtaining money by false pretenses. The report was dated 14th February, 2017. He stated that he was not given the reason for the fingerprints. They were only requested to reveal the identity of the registered holders of those identity cards.

22. **PW 7–NO92451 PC Ibrahim Ali Hassan**, formally attached to Salama police station, testified that on 6th October, 2014, he was on standby when he received a call from the report office at about 3 pm regarding a murder report that had occurred at Kiima village. He went to the office where he met PW5 who had reported the matter. He called IP Kenga who joined him and they proceeded to the scene where they found many people. The scene was at the border of Kajiado and Makueni Counties. The deceased's body was about 20 metres from her home. She was wearing a T-shirt, a skirt and had a scurf on the head. There was a rechargeable torch besides the body. About 82 metres towards south to the deceased's home, they found an assembled axe with blood stains. The scene was secured and scenes of crime officers took photographs of the scene on 9th October, 2014. The body was taken to Machakos Funeral Home for preservation. PW5 accompanied them to the mortuary for post mortem which was conducted by Dr. Okinyi of Machakos Hospital. According to the post mortem, the deceased had been raped. He was given the swab of the semen samples to take to the government chemist for analysis. He handed over the axe, torch, clothes the deceased was wearing (orange-skirt with blood stains, T-shirt– Black/grey strips also with blood stains which he produced the as exhibits. the axe exhibit -3, skirt exhibit 4, and T-shirt exhibit 5.

23. In cross examination, he confirmed that they were not the first people at the scene; that it had rained on that day and that the body was in a pool of blood and had been covered by iron sheets. It had deep cuts on her head. The axe was found on a footpath and had blood stains. They did not have any suspect in mind at the time.

24. **PW8–No. 232815 CI Stephen Ndeti**, formerly the OCS Kajiado, testified that he received a request to administer a charge and caution to extract blood sample from the 1st accused. He explained to him the reasons for the consent to extract sample and he obliged. They escorted him to Kajiado District Hospital where Dr. Kibunja extracted blood samples from the 1st accused. He produced the consent signed and thumb printed as exhibit 6. Cross examined on behalf of the 1st and 2nd accused, he stated that the 1st accused consented to blood sample extraction but there was no advocate or relative presenting the 1st accused. There was, however, another police officer present.

25. **PW 9–Elizabeth Waithira Onyiego**, an officer from the Government Chemist, Nairobi, testified that on 29th May 2015, they received an exhibit memo from DCI Kajiado Central dated 9th December, 2014 which submitted a number of items, namely; an orange skirt with markings 1 – 7 indicated to be of the deceased; white stripped top – swab stick of the deceased; blood sample indicated to be of the deceased; an axe in a khaki envelope and blood samples from Stephen Kilonzo (1st accused) and Geoffrey Mutuku (3rd accused). They were to determine the origin of the blood samples. The top was heavily stained with human blood but no spermatozoa. The axe was moderately stained with human blood. Item 5 swab stick was not stained with semen or spermatozoa. Her conclusion was that the top and axe matched the DNA of the deceased. She produced the report as exhibit 7. The first exhibit memo dated 9th December, 2014 was produced as Exhibit 8. The second report was that of 29th May, 2015. In cross examination he stated that there was no presence of spermatozoa or semen and that the blood samples did not match that of the 1st or 3rd accused.

26. **PW 10- No. 234576 CI Kamau** attached to Banking Fraud of Kenya, testified that he was asked to extract blood samples from the 3rd accused and as a matter of procedure he sought his consent which was given. He escorted the 3rd accused to hospital for blood sample extraction. He signed the report with regard to the 3rd accused which he produced as exhibit 10.

27. **PW11–FKK**, sister to the deceased testified that on 16th September, 2014 she met the deceased and PW5 on their way to Mombasa and spoke before the two left. When they returned, PW5 left for Nairobi while the deceased stayed at Kiima for a while supervising construction work and she was with the deceased for one week. On 5th October, 2014, the deceased went to church and when she came back, she asked her to prepare super. After super, they retired for the night. At midnight, she heard the deceased asking her to open the gate. As she was opening the door she saw two men flashing torches. They demanded money and ordered her to follow their instructions. She had only Kshs.15. When she later went to the deceased's house she did not find her in the house. She raised an alarm attracting neighbours. They started searching her and found her body some metres away from the house. It had injuries on the head. She telephoned PW5 and informed him what had happened. The body was later picked by police officers. She told the court that she heard one of the men saying "let us leave, we have finished. We did not expect her death." She did not know who they were or recognize them. They recovered an axe that had been used to kill the deceased. In cross examination, she stated that she knew the 2nd accused; that the killers attacked at midnight and demanded money but she did not know who they were.

28. **PW12-No. 444919 Sgt Frank Anunda**, testified that on 11th October, 2014 he was instructed to go to the scene at Kiima accompanied

by other officers from Salama police station. They processed the scene after which they passed through Salama police station and photographed an axe and a small torch. They then proceeded to Machakos Funeral Home Mortuary for post mortem where again several photographs were taken. The first set (1– 6) show the compound of the scene. The 2nd batch (7-18) the view of a particular house. Photo No. 9 is where the deceased spent. The deceased was picked from the door. IP Kenga indicated to him the site where the axe was recovered on the pathway-photo No. 19. The torch and the axe were dropped after the incident. Photo No. 25 show tyre marks of motorcycle. The killer weapon (axe)was new and was under a tree. The photographs taken at the mortuary related to the deceased. Photo No. 59 show injuries she sustained on the left side of the head damaging the skull. The injuries were centred in the head. From the signs, the deceased was sexually assaulted before she was killed. They also took photographs of the cloths the deceased was wearing on the fateful night. The last batch of photos was of the axe. The handle and the axe were new. Photo No. 15 showed where the body was found. He produced the set of photographs as exhibit 1 and the certificate as exhibit 1(6). In cross examination, he told the court that they visited the scene on 11th October, 2014 and that other officers had been to the scene earlier.

29. **PW 13–No. 75781 Sgt. Isaac Pulo**, is the liaison officer attached to safaricom since 2016 dealing with security and call data record. He testified that Safaricom received a request from DCI Kajiado regarding Mpesa records for mobile numbers 0721xxxxxx registered under identity card number xxxxxx in the name of Stephen Kulunzu (1st accused); 0719xxxx registered using identity card No. xxxxxx in the name of AM (2nd accused) and 0700xxxx, identity card No xxxxxx for Geoffrey Mutuku Mbata (3rd accused). They were to ascertain Mpesa transactions in those mobile phones from 24th July 2014.

30. Mobile number 0721xxxx for the 1st accused had one transaction on 24th July 2014 at 13.12 hrs of Ksh.700 received from 2nd accused. On 29th July, 2014 Kshs. 700 was received 2nd accused. On 2nd August, 2014 Kshs 830 was again received from 2nd accused. On 22nd August 2014 Kshs. 5000 was received from 0717xxxx Damaris Kavata (PW4). On 3rd September, 2014 at around 14.28hrs Kshs. 6100 was received from the 2nd accused. On 4th September, 2014 at 10.55hrs Kshs. 4068 was received from 2nd accused. On 16th September 2014 Kshs. 7000 was again received from 2nd accused. On 20th September, 2014, Kshs 11,100 was received from 2nd accused and on 25th September, 2014 at 12.03 hrs Kshs. 6000 was received from 2nd accused. The total amount received was Kshs. 41,540. The 2nd accused sent 36,540 while PW4 sent Kshs.5000. He produced the Mpesa database report for the 1st accused as exhibit 11.

31. Mpesa records for the 3rd accused showed that on 28th September, 2014 at 9.26hrs he received Kshs. 6,100 from 2nd accused; on 29th September, 2014 at 18.26hrs he received Kshs. 2,050 from 2nd accused; on 1st October, 2014 at 900hrs he received Kshs. 20, 000 from PW4; on 5th April, 2014 at 13.37 hrs he again received Kshs. 19,000 from PW4 and on 10th October, 2014 at 17.20 Kshs. 20,000 was received from 2nd accused. PW4 sent Kshs. 39,900 while the 2nd accused sent 25,350. Total amount sent to the 3rd accused was Kshs. 65,250. He produced the Mpesa data for the 3rd accused) as exhibit 13. He also produced the authority and certificate both dated 22nd November 2018 as exhibit 14 (a) and (b). In cross-examination, he stated that the 2nd accused sent money to both the 1st and 3rd accused but he did not know the purpose of the money.

32. **PW14 No. 235039 CI Virginia Ikingo** testified that in November, 2014 she teamed up with Cpl. Munialo and PC Muli to investigate this case. They requested for data for mobile phone No. 0719xxxx belonging to the 2nd accused. Analysis of the phone showed that it had constant communication with 0751xxxx a U line, and Airtel line 0736xxxx. During the investigations, it was established that they were registered for Geoffrey Mbata (3rd accused). They also got this information from the 2nd accused. They went to the 2nd accused's home where they recovered several mobile phones. They wrote an inventory which the 2nd accused signed and it was countersigned by PW5; Mercy and Sharon. From the phones they were able to recover line 07193xxxx paired to a Samsung mobile phone. They arrested the 2nd accused who identified the U line as belonging to the 3rd accused.

33. They were led to Machakos where they arrested the 3rd accused. They conducted a search and recovered two mobile phones, Noka 01/reEno 35xxxxxx 76xxxxx, Nokia 1200 IME No. S/No. 359xxxxxxxxxx. They also recovered Airtel line S/NO 892xxxxxxxxxx, U line S/NO. 89xxx,05xxxxx-04xxxxx. The sim cards were, however, not paired to any mobile phone. They also recovered identity card No. xxxxxx for Geoffrey Mbata. They escorted him to Kajiado police station.

34. Further Mpesa account analysis led them to the 1st accused Stephen Kulunzu of phone No. 0721xxxx. They arrested him and noticed the U mobile number had constant communication with U and Airtel number raising interest. They decided to follow the money transfers for safaricom line 0700xxxx for Geoffrey Mbata(3rd accused). They requested for the data two weeks before and two weeks after the incident. They believed there had been some planning of the incident because of two weeks of constant communication and a few months later stopped. There was also exchange of money between the numbers. The money was from the 2nd accused to the 1st and 3rd accused. It must have been payment for a job done or a job to be done. He produced the inventory dated 20th November, 2014 for the 2nd accused as exhibit 15. He also produced the second inventory dated 23rd November, 2014 for the 3rd accused as exhibit 16. It was signed by the 3rd accused and counter signed by PC Muli.

35. The other phones were recovered save for one phone Samsung for 0719xxxx which was believed to belong to the 2nd accused. He produced it as exhibit 17. He also recovered Nokia X02 and Nokia 1208 exhibit19, (Safaricom sim card S/NO. 892xxxxxxxxxx,) Airtel sim card 592xxxxxxxxxx which were produced as exhibit 21. U Sim card 892xxxxxxxxxx exhibit 22; the identity card as exhibit 23 and the Airtel communication line call data as exhibit 24.

36. In cross-examination, she stated that payments for business can be made through Mpesa. She admitted that it was not unusual to engage in business; that the 2nd accused was a teacher and also managed a hotel with PW5 and she could therefore make payments through Mpesa. The witness stated that she was not aware that the 3rd accused was involved in business. She admitted that they did not establish anything linking the accused to the murder; that she became suspicious of the constant communication because the 2nd accused was a co-wife to the deceased and that money trail was traced to this case. She also stated that there was communication on 6th October, 2014 at 08hrs from the 2nd accused to the 3rd accused and the location was Nairobi. There was however no previous communication between the 2nd accused and

the 3rd accused at all.

37. **PW15–Josephat Too Koech**, Assistant Chief of Talal Sub Location, Kapsesima location, Nandi County, testified that on 1st April, 2017, he met DCI officers from Kajiado over an identity card that belonged to David Kiprimo who was from his jurisdiction but had passed on sometime in 1998. They proceeded to Kiprimo's home where the family produced the original old generation identity card. The family confirmed that David Kiprimo died in 1988.

38. **PW16 No 59105, Sgt. Titus Munyalo** is the officer who took over investigations from Salama Police Station officers since the crime scene was within Kajiado County. He, together with other officers, visited the scene which was about 20 metres from the deceased's house. The body had been moved to the Machakos Funeral Home for preservation and post mortem. It had a deep cut wound on the head. They obtained a court order to investigate the 2nd accused's bank account No. xxxxxx at Barclays Bank which was suspected to have been the source of the money used to design and execute the murder.

39. He testified that investigations into the account showed that the 2nd accused had been withdrawing money and sending it to 1st and 3rd through Mpesa. On 3rd September, 2014, she withdrew Kshs. 8,000 and sent Kshs. 6,100 to the 1st accused through Mpesa. On 4th September, 2014 she withdrew Kshs. 10,000 and sent Kshs. 4,000 to the 1st accused. Kshs. 8,500 was again withdrawn and Kshs. 7,000 sent to the 1st accused; on 20th September, 2014, Kshs. 11,000 was also sent to 1st accused and on 25th September, 2014 Kshs. 7,000 was withdrawn and Kshs. 6,000 sent to 1st accused.

40. Further investigations revealed that the 2nd accused also withdrew money and sent it to the 3rd accused through Mpesa. She withdrew Kshs. 7,000 and sent Kshs. 6,100 to the 3rd accused; on 1st October, 2014, Kshs. 20,000 was withdrawn and sent to the 3rd accused by PW4; on 5th October, 2014 Kshs. 19,000 was again sent to the 3rd accused by PW4 and on 6th October, 2014, Kshs. 10,000 was withdrawn from the account at Sarit Centre, Westlands.

41. The 1st accused's mobile No. was 0721xxxx; the 2nd accused's Number was 0719xxxx; the 3rd accused's Number was 0700xxxx, while that of Damaris(PW4) was 0717xxxx. The 3rd accused's mobile phone had been registered using identity No. xxxxxx belonging to David Kiprimo Maima who died in 1988 at Kapsabet. He produced the order to investigate the account as exhibit 27; Barclays Bank statements as exhibit 28 and the sketch plan and map as exhibit 29. The copy of the identity card of David Kiprimo from National Registration Bureau was produced as exhibit 37(a) (b) and the registration details for the three accused persons as exhibit 31. The Postmortem report by Dr. Okinyi was admitted by consent as Pex32. It showed that the cause of death was severe head injury due to blunt trauma. The accused were arrested after going through call data of the 2nd accused.

42. In cross examination, the witness stated that he was not among the first team that visited the scene but did much of the investigations. The deceased's body had already been taken to the mortuary. He maintained that the 2nd accused contracted the 1st and 3rd accused to kill the deceased and she paid them through Mpesa. He also stated that they relied on the Mpesa transactions and the fact that the 1st and 3rd accused had communicated as revealed by the call data from the mobile providers which connected them to the murder plot. The amount withdrawn from the bank was 109,790.00. The 1st accused received Kshs. 68,250 while the 3rd accused received Kshs. 41,440. He maintained that there was a relationship between withdrawal of the money, the Mpesa transactions and the murder.

43. He admitted, however, that there was no eye-witness to the murder; that the axe used was recovered and dusted for analysis but the result did not connect the 1st and 3rd accused with the murder. He also admitted that analysis of the spermatozoa was not carried out. He again admitted that the samples extracted from the 1st and 3rd accused did not connect them to the murder.

44. When put on their defence, all the accused elected to give unsworn testimonies and called no witness.

45. The 1st accused, **Stephen Kilonzo Kulonzu, (DW1)** testified that he is a driver and was staying at Huruma Estate in Nairobi. On 5th October, 2014 when the offence was committed, he was at his rural home at Kilimambogo in Machakos County. On 5th April, 2015, he was at Huruma Nairobi when a lady called and requested to meet him. When he informed her that he was at Huruma, she asked for the direction to where he was which he gave her. She went to Huruma and met him. She introduced herself as a police officer and asked him to accompany her to the police station where he would be informed why he was wanted.

46. They proceeded to Kitengela police station where he was placed in the cell. The following morning, 6th April, 2015, four police officers went and took him from the cell to an office where they interrogated him whether he had any relationship with the 2nd accused. He told them that he met the 2nd accused at Wakulima market in May 2013 when he was requested by the women who had sold vegetables to the 2nd accused to ferry the vegetables for her in his pick-up. He delivered the vegetables to the 2nd accused's house at Kabete. From that time the 2nd accused became his customer. He would transport vegetables and other foodstuffs for her whenever she went to the market. She would pay him in cash and through Mpesa. The 2nd accused later asked him to supply her chicken and maize which he did and she continued to pay in cash and through Mpesa.

47. When police officers asked him for proof of the business he was doing with the 2nd accused, he gave them a notebook in which he recorded the payments the 2nd accused made to him. They took the notebook together with his phone. He was transferred to Kajiado police station where he stayed from 6th April, 2015 until 18th April, 2015 when he was produced in court and the police were given more time to conduct investigations.

48. On 21st April 2015 he was taken to Kajiado County Hospital for blood sample extraction. On 22nd April 2015 he was taken to Machakos High Court and charged with murder. His case was later consolidated with that of the 2nd and 3rd accused. He stated that he did not know the

3rd accused and had not met him before. He also denied committing the offence. He maintained that he did not know why he had been charged.

49. The 2nd accused **AMM (DW2)**, a teacher by profession and also a business lady, also gave unsworn testimony. She told the court that she lived at Masii in Machakos County and had also stayed at Kabete, in Nairobi. On 5th October, 2014 she was at Masii for the weekend with PW5. They left for Nairobi in the evening and arrived at around 10 p.m. At about 1 a.m. PW5 received a call and talked to the caller in Kikamba. She did not know the caller. After the call, PW5 told her that he had an emergency to attend to and left. When she called him the following morning, that was when he informed her that the deceased had been killed and he was busy dealing with the matter. He returned home the next day and told her that some thugs had attacked the deceased at her house, stole some things and killed her. He left again and came back the following Saturday. They left together for Masii and she returned on Sunday living with PW5 at Masii. The deceased was buried on 17th October, 2014.

50. On 20th November, 2014 at around 6 a.m two gentlemen and two ladies went to her house and introduced themselves as police officers from Kajiado. They picked her up and took her to Kitengela police station and put her in the cells. On the way they asked her about names of many people some of whom she did not know. She was later transferred to Kajiado police station where she was interrogated on whether she knew the deceased. She told the officers that she only knew her by name but they had not met. They also asked about her relationship with some other people who had been arrested, including her son, a supervisor of their hotel, two teachers she did not know among others. They then asked her if she knew the 3rd accused. She told them that she had known him since 2013 when she visited Masaku Tent makers at Machakos and bought a tent from him. She had also introduced a friend who also wanted to buy a tent to the 3rd accused. She told the police that she used to send money to the 3rd accused through Mpesa and she would at times pay in cash. She was later taken to Machakos High Court together with the 3rd accused and charged. She met the 1st accused in court on 4th June 2015 and their cases were consolidated. She denied committing the offence.

51. **Geoffrey Mutuku Mbutha (DW3)** the 3rd accused similarly gave unsworn testimony. He told the court that he had a shop at Machakos Town and was also selling tents. On 5th October, 2014 he was at his business in Machakos. On the morning of 6th October, 2014, he left Machakos at 6 am for Nairobi to collect stock for his shop and returned the same day arriving in the evening. On 23rd November, 2014 while at his place of business, the 2nd accused called him and asked him to go and meet her. He found her with two gentlemen who introduced themselves as police officers. They asked him if he knew the 2nd accused. He informed them that he had known her since 2013 and that she was his customer. She used to hire tents from him for use during functions.

52. In 2014, she bought a tent from him and he also sold a tent to another lady introduced to him by the 2nd accused. He also told the police that the 2nd accused had not told him anything about murder after they asked him if she had told him anything about it. He further told them that the 2nd accused used to pay for the tents both in cash and through Mpesa. They took him to Kajiado police station where he was held for some time. He was later taken to court together with the 2nd accused where they were charged with an offence he knew nothing about. Their case was later consolidated with that of the 1st accused who he also did not know. He denied committing the murder.

53. In their submissions, Ms. Achar, learned counsel for the 1st and 2nd accused, submitted that the prosecution did not prove its case beyond reasonable doubt. According to counsel, the prosecution did not prove *actus reus* and *mens rea*, the key ingredients of the offence. It was counsel's submission that the prosecution did not prove beyond reasonable doubt that the 1st and 2nd accused committed the offence.

54. Counsel argued that the prosecution case was wholly pegged on circumstantial evidence, but even then, the circumstantial evidence cannot be the basis of a conviction. Counsel cited ***R v Kipkerring Arap Koske & 2 others*** (1949) EACA 135 for the argument that to justify conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that he is guilty.

55. Counsel also relied on ***Omar Mzungu Chimera v Republic*** (Criminal Appeal No. 56 of 1998) to argue that the circumstances from which an inference is to be drawn must be cogently and firmly established. The circumstances must be of a definite tendency pointing towards guilt of the accused, and the circumstances 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 no one else.

56. According to counsel, PW2, and PW11 testified that the attackers were wearing masks and, for that reason, they could not be identified or recognized. Police officers who testified also stated that they were not the first responders and that other people were already at the scene and the body had been moved.

57. Regarding the calls data, counsel argued that there was no link between the 1st accused and the 3rd accused and the two never communicated. There was no call tower triangulation and no witness was called to explain that concept to the court. Counsel argued that according to the call data, the 1st accused was nowhere near Kiima area where the murder took place while the 2nd accused was at home in Nairobi on the material night with PW5 her husband. Neither accused was near at Kiima or even at close to the scene of crime.

58. On the money transfer, counsel argued that the 2nd accused was in business and dealt with several suppliers. She had a business relationship with the 1st accused who supplied and also transported goods for her. It was therefore not unusual to make or receive money through Mpesa.

59. It was also counsel's submission that blood stains found on the killer weapon, (the axe), did not match blood samples extracted from the 1st and 3rd accused. Similarly, the sperm swab traces from the deceased's private parts, who was said to have been sexually assaulted, did not yield a positive result to connect the 1st and 3rd accused to the commission of the offence.

60. Counsel relied on PON v Republic [2019] eKLR, where the Court of Appeal held that to base a conviction entirely or substantially on circumstantial evidence, it is necessary that the guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. Counsel maintained that the prosecution did not prove its case to the required standard that that the 1st and 2nd accused committed the offence they were charged with. She urged that for an acquittal.
61. Mr. Itaya, learned counsel for the 3rd accused, also submitted that the prosecution did not discharge its burden to prove the case against the 3rd accused beyond reasonable doubt. According to counsel, the prosecution did not prove *actus reus* and *mens rea* against the 3rd accused. He submitted that apart from the fact that the 3rd accused received money through Mpesa, the prosecution did not prove that he killed the deceased. He urged the court to acquit the 3rd accused.
62. Mr. Meroka, learned principal prosecution counsel, submitted that it is indeed the prosecution's duty to discharge the burden of proof and establish malice aforethought to sustain the information of murder against the accused persons. He submitted that the prosecution witnesses' evidence proved its case against the accused to the required standard. He relied on section 21 of the Penal Code on common intention.
63. The section provides that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed, of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. He therefore submitted that the action of the accused connected each of them to the murder of the deceased.
64. Learned prosecution counsel dismissed the accused persons' explanation that they were in business. He maintained that the evidence of PW4 was clear that she was the only one who did purchases for the hotel business and not the 2nd accused, and that neither the 1st nor 3rd accused made any supplies to the hotel. He also dismissed the claim that the 3rd accused supplied the 2nd accused with tents since the tents were not supplied to the hotel.
65. Mr. Meroka argued that the accused opted to give unsworn testimonies to "*avoid testing the veracity of their evidence*" which was a "*calculated move to bar further truths from being unraveled.*" According to Mr. Meroka, the accused persons' election to give unsworn testimony, though a right allowed in law, the unsworn testimony is of no probative value. He cited Mercy Kajuju & 4 others v Republic [2009] eKLR. He also relied on Amber May v Republic [1979] eKLR that unsworn statement is not strictly speaking evidence. It has no probative value but should be considered in relation to the whole evidence and for it to have value, it must be supported by evidence recorded in the case.
66. The Constitution confers on an accused the right to remain silent. And even where an accused opts to remain silent, that does not lessen the prosecution's duty to prove its case against him beyond reasonable doubt.
67. Learned prosecution counsel also cited Solomon Mungai v Republic [1965] EA 363 and Njoroge v Republic [1983] KLR on the applicability of section 21 of the Penal Code on common intention that if several persons combine for an unlawful purpose, and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not, provided that the death was caused by the act of some or one of the party in the course of his endeavours to effect the common object of the assembly.
68. He urged the court to find that the prosecution proved its case beyond reasonable doubt and convict the accused as charged.
69. I have considered the evidence from the prosecution and the defence, submissions and the decisions relied on. The accused were charged with murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 provides that any person, who of malice aforethought causes the death of another person by an unlawful act or omission, is guilty of the offence of murder. The ingredients of the offence of murder are: death of a person; the death should have been caused by an unlawful act or omission, with malice aforethought.
70. Section 206 of the Act provides that malice aforethought will be deemed to have been established where evidence is adduced proving: an intention to cause the death or to do grievous harm to any person, whether that person is the person actually killed or not; Knowledge that the act or omission causing death will probably cause the death 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; an intent to commit a felony; or an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
71. In the present case, there is no doubt that a person died. PW2 testified that there was an attack at the deceased's home on the night of 5th and early morning of 6th October 2014. The attackers left with the deceased. He called PW3 and with help from other neighbours, they went in search of the deceased. They found her body some metres away from her house. PW2, PW3, PW5, PW7, among others witnesses, saw the injury the deceased sustained, which they described as a cut wound on the head. The body was taken to Machakos Funeral Home for preservation and postmortem. Their evidence established that indeed there was death of a human being.
72. The postmortem report was produced by PW16 with consent of the defence as exhibit 32. The pathologist established that the deceased had died from severe cut wounds to the head with an open skull fracture and brain laceration. He concluded that the deceased died due to blunt head trauma. That evidence is clear that the deceased's death was caused by an unlawful act, namely; a cut wound on the head which caused severe injuries to the head and brain. The prosecution, therefore, proved the first two ingredients of the offence beyond reasonable doubt.
73. The most critical ingredient is whether accused caused the deceased's death. That is; were the accused responsible for the death and did they have malice aforethought to kill or cause grievous harm to the deceased?
74. In a criminal trial, the prosecution has a legal burden to prove its case against an accused person beyond reasonable doubt. The court

should only convict where it is satisfied that the evidence on record has established the guilt of the accused beyond reasonable doubt. That is, at the end of the trial, there should be no doubt in the mind of the court that the accused committed the offence he is charged with. It should not admit of plausible possibilities. (See Stephen Nguli Mulili v Republic [2014] eKLR; Pius Arap Maina v Republic [2013] EKLK; Festus Mukati Murwa v Republic [2013] eKLR.)

75. The above decisions lay emphasis on the fact that the prosecution must not only prove its case beyond reasonable doubt, the court must ensure that *mens rea* and *actus reus* are proved to the required standard.

76. The main prosecution witnesses in this trial were PW1, PW2, PW3 and PW11 who were the key witnesses. PW1 worked for and lived with the 2nd accused and her husband (PW5). He testified that the 2nd accused was wife to the PW5 and that PW5 was also married to the deceased. The deceased would regularly visit and spend time with PW5. The 2nd accused requested PW1 to assist her find out where the deceased lived and even promised to pay him Kshs. 50,000, but he did not undertake that assignment. She also inquired from him whether PW5 had an affair with the deceased but he told her he was not aware of any relationship between the two. PW1 disclosed all this to PW5 who asked him to leave the 2nd accused alone. It was not clear from this witness why the 2nd accused wanted to know where the deceased lived.

77. PW2 who was staying with the deceased, told the court that on the material night people went to the deceased's home, beat him up and went away with the deceased. He did not identify them. He called PW3, a neighbor, and together, they went in search of the deceased with the help of other villagers who responded to the alarm. They found the deceased's body in a ditch several metres from the homestead. She was already dead. The body had a cut wound on the head. He did not know the attackers. PW3's evidence was similar to that of PW2.

78. PW11 testified that some men went and knocked at the gate. The deceased asked her to open the gate. As she opened the door, she found two men who demanded money from her but she only had Kshs. 15. They went to the deceased's house and left with her. The men had covered their faces and, therefore, she was not able to identify them. She later heard one of the attackers say; "let us go, we have finished. We did not expect her to die." She raised an alarm attracting neighbours. They went in search of the deceased and found her body several metres from the homestead. She called PW5 and informed him about the incident. PW5 reported the matter to the police who went and took the body to Machakos Funeral Home for preservation and post mortem.

79. From these witnesses' account, there is no direct evidence on who killed the deceased. The prosecution's case, therefore, turns on circumstantial evidence.

80. PW13, a liaison officer attached to Safaricom, on request from the investigating officer, conducted analysis on the call data in respect of the mobile numbers of the 1st 2nd and 3rd accused. The details of the call data and Mpesa account analysis revealed that the 1st accused and 3rd accused received money from both the 2nd accused and PW4 on several dates between July 2014 and October 2014 through Mpesa. The 1st accused received Kshs. 36,540 from the 2nd accused while PW4 sent him Kshs. 5000, making a total of Kshs. 41,540. The 3rd accused received Kshs. 25, 350 from the 2nd accused while PW4 sent him Kshs. 39, 900, making a total Kshs. 65,250.

81. PW14 CI Virginia Ikingo, requested for mobile phone data for the accused from the mobile service provider Safaricom. Analysis of the 2nd accused's phone data showed constant communication with other lines, including that of the 1st accused. They went to the 2nd accused's home, conducted a search and found several mobile phones. They also recover her line 0719xxxx. The 2nd accused identified a U line belonging to the 3rd accused. They went to the 3rd accused's place at Machakos, conducted a search and recovered two Nokia mobile phones, sim cards and his identity card. The sim cards were however not paired to any mobile phone. Analysis of his Mpesa account led them to the 1st accused's line. They arrested him and noticed that the U mobile number had consistent communication with U and Airtel numbers raising some interest. They decided to follow the mobile money transfers data. They believed there had been some planning of the incident, because of two weeks of constant communication and a few months later stopped. There was also exchange of money between the numbers from the 2nd accused to the 1st and 3rd accused. They believed the money was payment for a job done or to be done. This witness admitted, however, that they did not get anything linking the accused to the murder and that there was no communication at all between the 2nd accused and the 3rd accused.

82. PW16, the investigating officer, applied for an order to investigate the 2nd accused's bank account which was suspected to have been the source of money used to design and execute the murder. The 2nd accused had been withdrawing money and sending it to the 1st and 3rd accused through Mpesa. On 3rd September, 2014, she withdrew Kshs. 8,000 and sent Kshs. 6,100 to the 1st accused. On 4th September, 2014 she withdrew Kshs. 10,000 and sent Kshs. 4,000 to the 1st accused; Kshs. 8,500 was again withdrawn and Kshs. 7,000 sent to the 1st accused. On 25th September, 2014, Kshs. 7,000 was withdrawn and Kshs. 6,000 sent to the 1st accused. Further on 1st October, 2014, Kshs. 20,000 was withdrawn and sent to the 3rd accused by PW4; on 5th October, 2014, Kshs. 19,000 was sent to the 3rd accused by PW4. Similarly, on 6th October, 2014, Kshs. 10,000 was withdrawn from Barclays Bank, Sarit Centre Westlands. It was this witness' belief that the 2nd accused contracted the 1st and 3rd accused to kill the deceased and paid them through Mpesa for that purpose.

83. The witness admitted that they wholly relied on the Mpesa transactions and communication (call data) from mobile providers in charging the accused. In his view, there was a relationship between withdrawal of the money and the Mpesa transactions. He however admitted during cross examination, that although the murder weapon (axe) was recovered and dusted, nothing much came out of the analysis to connect the accused. He again admitted that blood samples extracted from the 1st and 3rd accused did not connect them to the murder.

84. The accused denied committing the offence. The 1st accused testified that he used to transport goods for the 2nd accused and had also been supplying her with foodstuff since 2013. She paid him both in cash and through Mpesa. The 2nd accused also denied plotting to kill the deceased. She maintained that the 1st accused used to transport goods for her from the market and that she had purchased a tent from the 3rd accused and hired some tents from him. She paid both of them in cash and through Mpesa. The 3rd accused maintained that he had sold a tent

to the 2nd accused and she also hired some tents from him. She paid for the tents both in cash and through Mpesa.

85. As already adverted to earlier, the prosecution's case against the accused is purely circumstantial, since there is no direct evidence that the accused caused the deceased's death. The prosecution has relied on the evidence of PW1; PW13, PW14 and PW16 to argue that it proved its case against the accused beyond reasonable doubt. It is its case that the 2nd accused conceived the plot to kill the deceased and assigned the 2nd and 3rd accused to execute that plot. That was why, it argued, she withdrew money and sent it to the 1st and 3rd accused through Mpesa. The defence on its part argued that the prosecution did not prove either directly or through circumstantial evidence beyond reasonable doubt that the accused committed the offence.

86. Circumstantial evidence is as good as any evidence if it is properly evaluated, and it can prove a case with the accuracy of mathematics. (*Musili Tulo v Republic*, (Criminal Appeal No. 30 of 2013); [2014] eKLR. It has also been held that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination, is capable of proving a proposition with the accuracy of mathematics. Circumstantial evidence should, however, be very closely examined before basing a conviction on it. (*Ndurya v Republic* [2008] eKLR).

87. In *John Mutuma Gatabu v Republic* [2015] eKLR, where the prosecution case was entirely based on circumstantial evidence, the Court of Appeal stated:

It has been stated in numerous cases that in order to justify a finding of guilt, the circumstantial evidence, taken as a whole, ought to be such that the inculpatory facts lead to the irresistible conclusion of guilt and that there should be an absence of any co-existent facts that are exculpatory or explicable on any other reasonable hypothesis save the guilt of the person accused.

88. Similarly, in the words of Lord Norman in *Teper v R* [1952] AC, 480 at page 489:

Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another...It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the influence.

89. I have considered the evidence of both the prosecution and the defence. The prosecution relied on calls data, Mpesa statements and bank records to conclude that since the 2nd accused withdrew money from her account and sent it to the 1st and 3rd accused, the money was payment for purposes of executing the murder. PW14 did admit in cross examination that there was nothing wrong or unusual for one to engage in business and receive or send money through Mpesa. He also admitted that they did not establish anything linking the accused to the murder. He again admitted that there was no communication at all between the 2nd accused and the 3rd accused. PW16 also admitted that although the killer weapon, (axe) was recovered and dusted; nothing much came out of the analysis to connect the 1st and 3rd accused with the murder. The blood samples extracted from the 1st and 3rd accused did not yield anything to connect them with the murder either.

90. The Mpesa data that the prosecution relied on showed that money was sent to the 1st and 3rd accused by not only the 2nd accused but also PW4, an employee of PW5 and the 2nd accused. The money was sent over a period of time 2014, July 2014 through October 2014, while the offence was committed on the night of 5th and morning of 6th October 2014.

91. The 1st accused stated that he had been transporting goods for the 2nd accused since 2013 and she used to pay him in cash and through Mpesa. He even told the court that he gave the police the note book containing the records on those payments. The 3rd accused also maintained that he had sold a tent to the 2nd accused and she had also hired tents from him for which she would pay through Mpesa and in cash.

92. In *Joseph Kimani Njau v Republic* [2014] eKLR, where the appellant had been convicted for murder, the Court of Appeal held that:

[12] In all criminal trials, both the actus reus and the mens rea are required for the offence charged, they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard.

93. On the evidence on record, there is really nothing to connect the accused with the murder of the deceased. Neither the 1st nor 3rd accused was at the scene of the murder. They were not seen by any of the prosecution witnesses commit the offence. The circumstantial evidence did not place them at the scene either. The mobile data and Mpesa transactions alone cannot be conclusive evidence that they were involved or committed the murder. The evidence does not raise even remote connection between the murder and the money sent to them by the 2nd accused. This is a case of the prosecution chasing a wild goose. It is too remote to assume that because the 2nd accused sent money to the 1st and 3rd accused, they must have committed the murder. That cannot be the proof beyond reasonable doubt required by law.

94. The prosecution could argue that the evidence of PW1 was vital in trying to connect the 2nd accused with the murder because she was interested to know where the deceased lived and whether she had an affair with PW5. That would be but suspicion. That was the kind of situation Lord Norman warned about in *Teper v R* (supra), when he said that circumstantial evidence should be narrowly examined "because evidence of this kind may be fabricated to cast suspicion on another person."

95. Similarly, addressing the issue of circumstantial evidence in *Sawe v Republic* [2003] eKLR, the Court of Appeal stated that in order to justify inference of guilt based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused, and 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. The burden of proof always remains with the prosecution and never shifts to the accused.

96. The prosecution did not show that only the accused could have committed the murder and no one else. PW5 testified that on the afternoon of 4th October 2014, the deceased called and informed him that a lady called Beatrice Muli of AIC, had gone to inquire from her whether he would go so that he could give her a lift to Nairobi, which had disturbed her. Who was this Beatrice Muli, and why would that have worried or disturbed the deceased, given that the murder was committed that night?

97. PW11 also testified that the deceased asked her to open the gate at night. Was she expecting someone and, if so, who was this, given that it is unusual to open a gate for someone late at night unless there was a prior appointment?

98. It was such situations that the court had in mind when it stated in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR, that:

Before circumstantial evidence can form the basis of a conviction...it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence.

99. In the circumstances of this case, there is no proof beyond reasonable doubt that the accused were involved in the design and commission of the deceased's murder. It cannot, therefore, be said that the circumstantial evidence was so watertight as to exclude the possibility of other people committing the murder.

100. The prosecution seems to have proceeded on the suspicion that the accused could have killed the deceased or known how she died. That would remain suspicion because suspicion, however strong, is not enough to sustain a conviction. The prosecution could not proceed on suspicion that since the 2nd accused withdrew money and part of it sent to the 1st and 3rd accused, it was for payment of the plot to murder the deceased and, therefore, the three committed the murder.

101. In *Sawe v Republic* (supra), the Court of Appeal addressed the issue of suspicion thus:

The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

102. The prosecution evidence left no clue on what exactly happened, and who killed the deceased. The prosecution not only failed to prove *actus reus* but also *mens rea* on the part of the accused beyond reasonable doubt, the key ingredients to achieve a conviction for the offence of murder.

103. In the circumstance, this court is left with no option but to find that the prosecution has not proved the guilt of the accused to the required degree. Consequently, I find the accused not guilty and hereby acquit them of the information of murder.

DATED SIGNED AND DELIVERED AT KAJIADO THIS 26TH DAY OF OCTOBER 2021.

E C MWITA

JUDGE