



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO 42 OF 2017**

**REPUBLIC.....PROSECUTORVERSUS**

**TWG.....SUBJECT**

**JUDGMENT**

**Introduction**

[particulars withheld] School, Nairobi, is an all girls’ boarding school situated in [particulars withheld] Estate, Nairobi. It is located at [particulars withheld] . Its neighbours include Kibera Law Courts. It is a big school occupying xx acres of land. In 2017, the school had a population of xxxx students according to the evidence of the then School Principal, JKM (PW3).

This court was told that MG Nairobi is an Extra County School and with a population of xxxx students it is obvious to this court that the Management of MG Nairobi must have had a gargantuan task in running the affairs of the school and making sure that all the students are well taken care of. For instance, this court learned that in 2017, Form One (1) had six (6) streams! This court did not get the benefit of information as to how many streams there were in the other classes as at that time. There was evidence from some of the girls that in Form One the classes were crowded.

In regard to the dormitories, it was not possible to establish the number of students accommodated in each dormitory but this court was informed that at the time of the events of this case, KD had 354 students. This number may have been bigger or smaller as this figure was not ascertained using school records. It is also clear to me from the evidence that the dormitories, especially K that housed Form One students, were crowded. This was also the evidence of the fire expert.

A perimeter fence with razor wire surround most of the school. The frontage on [particulars withheld] Road has a K-apple fence. The school has two gates, Gate X that opens to the Administration Block and Gate X that opens to the Chapel and the Classrooms area. Both gates are made of metal and are manned by security guards. At the time of the incident giving rise to this case, [particulars withheld] Security Guards were manning the school with two police officers from [particulars withheld] Police Station who had joined the security team following special request from the school administration.

This court was informed that at the time of the events that gave rise to this case, there were eight security officers and two dogs and that during the day, Gate X was manned by two security officers while Gate X had one security officer. At night Gate X had three security officers and Gate X had one security officer. There was one security officer with a dog at the school swimming pool.

There is a second fence surrounding the school field and the classes all the way to the school farm. This is a K-apple fence with chain link and barbed wire inside. There is a gate at the swimming pool. Near the farm another security officer with a dog is stationed.

The third fence encloses the dormitories. It is a very high K-apple fence at the back with barbed wire. There was a section near ED that was fenced with iron sheets. There is a gate to the dormitories near the dining hall. The dormitories had two gates, both manned by security officers.

At the time this court visited the school on 22<sup>nd</sup> February 2019, the School had three (3) Dormitories. These are K to the far right side facing the dormitories from the Administration Block followed by K and E to the end near [particulars withheld] Road. KD located between K and K D was not standing at that time. There was an empty yard where K was supposed to be standing. This court was informed that it had been demolished after the fire because it was causing trauma to the students. Indeed court records of 3<sup>rd</sup> October 2017 show that this court (Lesiit, J) released the structure to the prosecution following an application by the prosecution to that effect. At the time of that application, the court was told that the structure was causing trauma to the students and given that a video of the structure and photographs showing all entry and exit points had been taken and further that debris had been collected for analysis the building would not be necessary for purposes of evidence.

It seems that the building was demolished after it was released by the court to the State through the office of the DPP. Having taken over the conduct of this case and having visited the school, I now know that this act of demolishing the building was ill-advised. Crucial evidence was

lost there. I was of the view that a court official ought to have visited the building to view and record the evidence before demolition was done. There is something real in observing a scene first hand instead of relying on video evidence or photographs.

MG opened for the third term on 28<sup>th</sup> August 2017. The evidence produced in court did not mention anything unusual on this day and I want to believe that it was a normal opening day for the school. There is evidence to show that during opening days, all students and the parents or guardians bringing them back to school were allowed to enter the school through Gate X. After the bags for the students were inspected to ensure that students did not bring to the school prohibited items, they were allowed into the school. This is what happened on 28<sup>th</sup> August 2017.

The story of MG Nairobi was to change barely four days later after the opening. A disaster of unimaginable proportions struck the school. In the wee hours of 1<sup>st</sup> September 2017, a Friday and early hours of 2<sup>nd</sup> September 2017, the Saturday, KD was gutted by an inferno that left (10) of the students, who had just reported back to school on the Monday of that week ready and eager to learn, dead and their families grieving the loss of their daughters.

It is that fire that is the reason that we are here. Immediately after the fire, it was rumoured that the Subject before this court, at that time a minor aged 14 years in Form [particulars withheld] and housed in KD, had started the fire that killed ten (10) of her school mates. Police conducted their investigations and at the conclusion of those investigations, she was charged with ten (10) counts of murder.

### **The Charges**

All the ten (10) charges bear similar statements of offence and particulars. The only difference in the charges are the names of the victims. All the charges are drawn against TWG and relate to the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. For record purposes and for clarity, I will replicate the particulars of each of the ten charges.

#### **Count 1**

Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1<sup>st</sup>/2<sup>nd</sup> September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered **AAM**.

#### **Count 2**

Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1<sup>st</sup>/2<sup>nd</sup> September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered **ANN**.

#### **Count 3**

Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1<sup>st</sup>/2<sup>nd</sup> September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered **OEN**.

#### **Count 4**

Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1<sup>st</sup>/2<sup>nd</sup> September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered **MEO**.

#### **Count 5**

Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1<sup>st</sup>/2<sup>nd</sup> September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered **NW**.

#### **Count 6**

Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1<sup>st</sup>/2<sup>nd</sup> September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered **AHO**.

#### **Count 7**

Count 8 Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1<sup>st</sup>/2<sup>nd</sup> September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered **WK**.

### **Count 8**

Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1<sup>st</sup>/2<sup>nd</sup> September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered **HJT**.

### **Count 9**

Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the offence were that TWG on the night of 1<sup>st</sup>/2<sup>nd</sup> September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered **MMMC**.

### **Count 10**

Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the offence were that TWG on the night of 1<sup>st</sup>/2<sup>nd</sup> September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered **LWN**.

At first the Subject faced 9 counts. She was presented to court for the first time on 12<sup>th</sup> September 2017. She pleaded not guilty to the 9 counts of murder. On 3<sup>rd</sup> October 2017, the Prosecution substituted the charges from 9 to 10 after an additional student died. On that day, the Subject took the plea again, this time for 10 counts of murder. She pleaded not guilty.

### **Prosecution Case**

To support its case, the prosecution called a total of 42 witnesses. These include students of MG School some of whom were the Subject's classmates, dormitory mates, her friends and school mates. There were members of the School Administration including the School Principal, teachers and the Matron. There were security officers deployed to the school including one of the police officers from KP Station deployed at the school that night of the fire, parents of the students who passed on as a result of the fire, police officers including investigators and expert witnesses including officers from the Government Chemist, Fire experts and pathologists.

It is prosecution's case that TWG, a student at MG Nairobi, in Form One (1) in 2017 and accommodated at KD, sent a WhatsApp text message on 27<sup>th</sup> August 2017 to KJM (PW13) that she would burn the school. This was one day before the school opened on 28<sup>th</sup> August 2017 for the Third Term. It is the prosecution case that Tiffany hated the school and wanted to get out of that school by whatever means, be it running away from the school, being assisted by her friends to suffocate herself, drinking hand sanitizer or setting the school on fire. The evidence in respect of these events was tendered by LNN (PW6), KJM (PW13), MMM (PW31) and IP HKK (PW40).

It is the prosecution case that when the school opened on 28<sup>th</sup> August 2017 and the days following that date, T was seen by her class mates and friends with a matchbox. There is evidence by PM (PW8) that she saw T with a matchbox in the dormitory. There is evidence from LNN, CO (PW41) and MMM (PW31) who is mother to VW (victim in Count 10) relating what her late daughter had narrated to her that T had a matchbox and one day she demonstrated to her classmates how she could cast spells using the matchbox. Lorna and Claire told the court that Tiffany lit the fire and they had to blow it out for fear that a teacher would find out.

It is the case for the prosecution that T intended to burn KD on 31<sup>st</sup> August 2017 but did not do so because, according to L, there were too many people around. L testified that T has shown her a hand sanitizer on which she has circled the word "highly flammable" and told L that she would burn the school. C testified that T showed her a Dettol sanitizer on which T has circled the word "highly flammable" on the bottle.

It is the case for the prosecution that on the night of 1<sup>st</sup> and 2<sup>nd</sup> September 2017, T and her friends, including VW (victim in count 10) prayed before going to bed with T asking God for forgiveness for what she was about to do that night. Later that night, T woke up TM (PW4) and told her that there was a fire on her bed. T woke up and saw what she described as a small fire looking like a ring at the lower (leg) section of T's bed. T said T's bed was neatly made as though no one has slept in it. On being woken up, Tracy screamed attracting a few of the other girls who woke up.

It is the case for the prosecution that this fire spread to the entire KD causing the death of 8 girls at the scene and injuries to many including VW (Count 10) and MN (Count 9). These two girls sustained serious burns and died later in hospital while undergoing treatment.

### **Defence Case**

The Subject testified under oath on 10<sup>th</sup> May 2021. At the time, she was aged 18 years and an adult under the law. She denied all the evidence by her classmates, friends and schoolmates. She denied belonging to a cult as alleged by her friends. She denied demonstrating a spell by using a matchbox to light a fire in the classroom during prep. She denied that she had a matchbox or that she showed it to her friends. She denied telling her classmates and friends that she would burn the school. She admitted having a hand sanitizer and explained that students were allowed to come to school with hand sanitizers for use because the school sanitation was very poor. She admitted remaining in class one evening, not with intentions of escaping from the school as was alleged in evidence but to stay away from senior girls who had made sexual advances towards her.

She admitted belonging to a WhatsApp group but denied sending messages on the group about burning the school. She admitted writing sticky notes to her friends and stated that girls used to write sticky notes to each other all the time. She testified that she is the one who wrote Ex. 1, a sticky note, and that she was expressing fear and anger in that note. She said that at the time of writing Ex. 1 her stomach felt like it

was burning and that she said she would drink hand sanitizer because she was scared and did not know what to do. She admitted being taken out of the school by her mother for counselling after she had been found in classroom after evening preps. She admitted writing the song “I see fire” by ES. She explained that she wrote this song in order to learn the lyrics and that this was before she joined MG. She stated that by writing on her calendar, “World End” she was referring to 23<sup>rd</sup> September 2017, when her menses started because it was a painful experience. She testified that her mother told her to mark that day in order to remember it. She told the court that she could not write on the calendar “periods” or “menses” because she did not want her classmates to see it given that her calendar was displayed on top of her desk.

She denied asking her friends to suffocate her or planning to drink hand sanitizer. She denied being a member of a cult or belonging to Illuminati.

In respect to the fire said to have started on her bed, she denied starting it. She testified that on 28<sup>th</sup> August 2017, she reported back to school and her bag was searched and that nothing was found in it. She testified that on the night of 1<sup>st</sup> and 2<sup>nd</sup> September 2017, there was a lot of noise from the girls in the evening and that as punishment, the prefect switched off the lights early. She stated that she went to bed early. She said she woke up at 2.00am with stomach pains due to ulcers. She said she suffered from ulcers and had been nursing them. She testified that after waking up she went to the wash rooms feeling nauseated and having diarrhoea. It was in the dark and on the way she met a girl whose face she could not see. She said the girl was wearing a dark pink pajamas and that she did not know the girl.

She testified that she took 10 minutes in the washroom and when she returned to her Section, P Section, at the entrance, she saw fire on her bed. She decided to wake up TM whose bed was near hers. She told T to wake up other girls in their Section as she went to alert others. She said she went to the B Section to wake up L a friend of hers who slept near the entrance. She testified that she heard someone scream and this caused a panic. She said that girls woke up and started running out causing confusion. She said she, too, started running out of the dormitory.

She said she did not know who had started or caused the fire. She said she knew that strangers from [particulars withheld] slums used to come to the school to watch school activities and that someone may have come from outside to the school because the wall (fence) was not high.

LWG, T’s mother, testified as the second defence witness. She testified to her daughter’s discomfort in school due to workload, school hygiene and lesbianism. She testified about the day following the fire and their taking their daughter home. She talked about the investigations thereafter and how her daughter was accused of burning the school and her eventual arrest and charge. She told the court that Tiffany told her that someone was targeting her since her bed was lit.

### **Delay in this case**

It behoves this court to explain the delay in concluding this case at this stage before proceeding with this judgment. I am aware that the delay in finalizing this matter must have caused concern to all the parties and especially to the victims’ families who desire to have this matter finalised for ends of justice to be met and for closure. There are several intervening factors that made it impossible to finalize this matter as faster as expected. The record of the court file is clear on the circumstances that led to the delay in concluding this matter.

This matter commenced with the plea on 12<sup>th</sup> September 2017. A hearing date could not be taken because at this preliminary stage, the case was not ready to be set down for hearing due to the volumes of evidence being collected and reports from the experts on exhibits submitted for examination and analysis. The case did not commence hearing until 3<sup>rd</sup> December 2019. From this time to 11<sup>th</sup> May when the defence wound up their case there are several factors that hampered expeditious disposal of this matter.

There are a total of 42 prosecution witnesses and 2 defence witnesses. These include students and their teachers, school security, police officers, investigating officers, parents of the students who perished in the fire, experts including fire experts, forensic experts and pathologists. The students who testified were not from one school. They were scattered in different schools, private and public schools, where they transferred after the fire at MG. In respect of the students this court was only able to receive their evidence either during school holidays or during half-term breaks. This took the court a while to gather all the evidence from the students.

Secondly, there were many samples of exhibits to be examined and analysed. This consumed a lot of time. It was not possible to take evidence from witnesses without the exhibits to avoid recalling them to identify the exhibits thereby taking more time. To secure attendance of expert witnesses also posed a challenge.

Thirdly, this is an emotional case and often times this court had to adjourn the hearing to give the witnesses, especially the parents of the deceased students, time to compose themselves following breakdown during testimony. This also affected one Prosecution Counsel who could not control herself and who broke down during the trial during an emotional testimony by one witness.

Bearing in mind the challenges of getting the students to testify during school term, this court tried its best to cover some ground with the evidence when these students became available. The court file record will show that most of the hearings were being done during school holidays and half-term breaks.

In 2020, nothing much took place in regard to the hearing of this matter. Covid 19 Pandemic struck in early 2020. In March 2020 there was closure of courts and we were not able to hear matters in open court. From 26<sup>th</sup> November 2019 to 21<sup>st</sup> September 2020, this matter could not proceed. At the time, 30 witnesses had testified leaving a balance of 12 witnesses yet to testify.

When the court partially opened for hearing in September 2020, I was transferred to the Family Division. I was on the Cause List in the Family Division and had to seek time off to attend to this case. I managed to hear the remaining witnesses and the defence. The matter concluded on 11<sup>th</sup> May 2021 pending filing of submissions by parties. Thereafter I was transferred to Kajiado High Court before I had time to write this judgment. Kajiado is a one-person station. I had to find time outside court hours to write this judgment in addition to Kajiado

judgements and rulings.

The delay in concluding this matter was not intended. All efforts have been put in place to ensure that the delay does not extend unnecessarily longer than can be managed. I take this chance to express this court's empathy to all the families that lost their daughters in the fire giving rise to this case and apologise to all the parties in this case for the delay that was not intended and whose reasons have been explained in this judgment.

### **Submissions**

Both the prosecution and the defence filed submissions. These form part of the court record and I need not replicate them in this judgment. I will however highlight the issues raised in each set of submissions.

The prosecution highlighted the chronology of events triggered by the conduct of T immediately before the school opened, on arrival at the school and the events of the night of the fire as narrated by witnesses and concluded that there was sufficient evidence, circumstantial, that T started the fire that led to the death of 10 of her school mates. It was submitted that the conduct of T after the fire and that her defence is a mere denial and lies. The prosecution cited **Republic v. Richard Itweka Wahiti [2020] eKLR; Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR** on reliance of circumstantial evidence and **DKC v Repbli (2014) eKLR** to emphasize the point that a minor who is found guilty should not be released to society without being brought to terms with the consequences of his actions or omissions by a custodial sentence.

The defence also submitted on circumstantial evidence. The totality of submissions by the defence is that the evidence by the prosecution is full of irregularities, inconsistencies and contradictions leading to doubts that must be resolved in favour of the accused. They submitted that the entire prosecution case has been anchored on circumstantial evidence. They cited **Sawe v. Republic [2003] KLR 364** and **Abanga alias Onyango v. Republic Cr. Appeal No 32 of 1990 (UR)** on the issue of circumstantial evidence arguing that the circumstances relied on by the prosecution are not cogent enough to satisfy the law as laid down in the **Abanga case** and that suspicion, however great can never form the basis of inferring guilt.

### **Offence of murder**

Under Section 203 of the Penal Code, Cap 63 Laws of Kenya, murder is defined as follows:

***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

In that definition lies the ingredients of murder that must be proved before a person under trial for murder can be convicted of that offence. The law places the burden of proof in criminal cases on the State, represented at the trial by the Office of the Director of Public Prosecutions. The standard of proof in criminal matters is **proof beyond reasonable doubt**. That is a very high standard to meet. The State must prove the following in a murder trial like this one:

- (i) That there is a victim of that murder – that is someone has died.
- (ii) That there is an unlawful act or omission causing that death or what we often refer to as *actus reus*.
- (iii) The identity of the person causing that unlawful act or omission.
- (iv) That there was malice aforethought, intention to cause that death, what we refer to as *mens rea*.

All the 42 prosecution witnesses who testified in this case were aiming at establishing either one or more of the ingredients of murder stated above. To get the answer as to whether the Prosecution has discharged the burden of proof and whether the standard of proof was reached, this court must examine all the evidence tendered herein.

### **Victim(s) of murder**

This court has received evidence from the school that at the scene of the fire, eight bodies were recovered. Two of the girls, victim in Count 9 MMN and victim in Count 10 VWN, died in hospital making a total of 10 victims of this fire. There is evidence from the parents of these children, all very painful stories they had to tell. Majority of them told this court that they could not properly identify their daughters due to the degree of burns on the girls' bodies. To get positive identification of the bodies, DNA samples had to be extracted from the relatives and matched with samples extracted from the bodies. Nine out of the 10 victims of this fire were finally positively identified using DNA method. Evidence shows that victim in Count 9, though she died while undergoing treatment, was identified using DNA because two families were claiming the same girl. The victim in Count 10 died after she had stayed in hospital for some time and there was hope that she was going to recover.

John Kimani Mungai, (PW28) specialist in forensics and working at the Government Chemist Laboratory received on the 6<sup>th</sup> September 2017 various samples extracted from the bodies of the victims. These samples included blood swabs, cartilages, liquid blood, liver, kidney, stomach and muscles for purposes of DNA identification. He testified that on the same day, buccal and mouth swabs were collected from the following people for the same purpose:

- (i) BM, mother to EMO missing person.

- (ii) HJ and JJ parents of HH missing person.
- (iii) LT and JL parents of HT, missing person.
- (iv) GW mother to NWT, missing person.
- (v) AKN and SN parents of WKK missing person.
- (vi) FVA mother to MN missing person.
- (vii) JM and CN parents of EN missing person.
- (viii) CA mother to NN missing person.
- (ix) AM and AM brother and sister to A M a missing person.

After the exercise, this witness produced the Report as Exhibit 34 confirming the identities of all the nine victims listed above whose body samples he had compared with samples taken from their relatives. This brought the issue of identification of the bodies to a close. It was confirmed through this evidence that all the 9 girls who died as a result of the fire at MG Nairobi in the early hours of 2<sup>nd</sup> September 2017 were positively identified.

In addition to this evidence, there is the evidence of Grace Atieno Midigo (PW38), a pathologist by profession. She produced the post mortem reports on behalf of Dr. Oduor Johansen. The first Report was that of **AM**, victim in Count One (1). This witness told the court that the post mortem was done at Chiromo mortuary on 5/9/2017; that the victim wore black top with pink lining on the neck and shoulders; that the clothes were partially burnt; that she was a female of African race child/adult with good nutrition and medium physique 173 cm and that the body was refrigerated.

Externally, she had 2<sup>nd</sup> and 3<sup>rd</sup> degree burns on the face, anterior trunk, anterior aspect of lower limb, anterior and medial aspect of upper limbs and first degree burns on partial trunk mainly on limbs and thoracic and posterior aspect of limbs. There were burns on legs. Internally the respiratory system had swollen lungs and oozing blood on one section. Soot was found on the trachea and bronchus. There was swelling on the tissues of the trachea. The heart was normal but had bleeds. In the digestive system the liver and spleen were normal, same with stomach and intestines. There were spot like bleedings in the urinary system. The kidney had reddening of tissues. There were no fractures on the head. The nervous system had moderately swollen brain.

As a result of the examination, the doctor formed opinion that cause of death was 102% burns. Liver, blood, kidney and stomach contents were taken for toxicology. On 27/3/2018, the toxicology report was out. It showed carbon monoxide poisoning. DNA was used to identify the body. Report was produced and marked Exhibit 50.

The doctor explained that 1<sup>st</sup> and 2<sup>nd</sup> degree burns are superficial burns including skin. As the degree progresses to 3<sup>rd</sup> and 4<sup>th</sup> degree burns become severe. She explained that the 100% are burns of whole body then 2% is the inhaled making it 102% burns.

The 2<sup>nd</sup> Report she produced was that of **NN**. The pathologist testified that this post mortem was done on 5/9/2017. These were charred body parts involving top part of skull, teeth and jaw. There were both upper limbs and both lower limbs loosely attached fragments of tibia and fibula. There was splitting of skin and muscle, minimal burnt skins around the buttocks and the internal organs were exposed. There were bonny fragments in the second bag. Lungs on the upper part were burnt. There was soot and frothy material in the trachea. Digestive system had charred stomach and perforated intestines extensively burnt and liver partly burnt. The skull was fractured with blood oozing out. Eyeballs were charred.

The doctor found 100% dry heat burns. Toxicology report was received on 27/3/2018 showing no toxic substances detected. The cause of death was found to be 100% dry hot burns. DNA was used to identify body. The Report was produced as Exhibit 51.

The 3<sup>rd</sup> Report relates to **EN**. The main findings were burns. The skull was fractured with brain exposed; fractures of facial bones and amputation of upper limbs. The doctor explained that thermal amputation is caused by heat. Internally all ribs had fractures. There was cherry red coloration of tissues of trachea, charred heart, liver and intestines and stomach. The kidneys were not found during post mortem. There was charred brain tissue. There were 100% burns with suspected carbon monoxide. DNA was used to identify body.

It was explained that a team of doctors did post mortem and this body was examined by Dr Njeru but Dr Oduor signed the Report. Cause of death was 100% burns with carbon monoxide. The report was produced as exhibit 52. The doctor explained that the missing kidney may have burnt to ashes or may not have been found.

The Report of **MEO** shows the main findings to have been 95% burns marked with loss of upper skull, orbit and maxilla, multiple fractures on the upper and lower limbs. There was total loss of back and neck with more loss on the right. The backbone was exposed. The lower limbs had right amputation of lower limbs – fibular and congested chest. Teeth were charred with exposed enamel.

Internally, the lung was charred. There was soot in the trachea and charred liver. The stomach was congested and empty. The left kidney burnt. The bladder had no urine. The brain was charred. The maxilla and the orbit were charred. The cause of death was burns and asphyxia. Samples of DNA was extracted including blood swabs, cartilage and left femur shaft and liver and left kidney. On 27/3/2018 toxicology report was out. No toxicology was detected. Report is signed by Dr Odour. Report was produced as exhibit 53. She was identified through

DNA analysis. The doctor explained that cherry red coloration is caused by burns.

The Report of **NW** shows main findings were heat fractures of skull with underlying tissues severely burnt. The mandible was destroyed. Facial bones were burnt and brittle. Right upper limb was missing. Left upper limb had a fracture. Tissues of chest and abdomen were completely burnt exposing internal organs. Lower limbs were completely burnt. The skin of the buttocks was not burnt. There was soot present in trachea. The heart was burnt, the liver was partially burnt. The spleen was normal and the stomach was empty. Urine was present. The top of the skull was partially burnt. Spinal column was burnt. Cause of death was 110% burns with suspected carbon monoxide poisoning. DNA and toxicology samples were collected – urine, blood swabs, kidney, liver, and stomach contents. On 27/3/2018 toxicology and DNA results came back. There was carbon monoxide found in the blood, cause of death was burns and carbon monoxide poisoning. She was identified through DNA. The Report was produced as Exhibit 54.

The Report of **HA**'s main findings are bilateral fractures and amputation of limbs with severe muscle contraction of right side. There were fractures on lower limbs. There were burnt muscles of lower limbs. There was no burning on right side. The chest was partially burnt. The breast tissue was visible. The right lung completely burnt but the left lung was spared. The heart was normal in size. There was loss of tissue on the stomach. The stomach contents were brown liquid. The liver was partially burnt. The head had fractured skull and loss of structural facial bones. The cause of death was found to be extensive burns with suspected carbon monoxide poisoning. Samples of cartilage and tissue, blood from heart, liver, kidney and muscle for toxicology were taken for analysis. On 27/3/2018 results came back. She was identified by DNA. The Report was produced as Exhibit 55. The cause of death was burns with carbon monoxide not detected. The doctor explained that this means she burnt before inhaling the carbon monoxide.

In respect of the Report of **WKK** the main findings were completely charred human remains. The remains were in body bags. The top of the head was burnt with burnt out brain tissue. The face was completely burnt. The teeth and maxilla were completely burnt. One tooth on left side was intact. The chest was burnt out with loss of skin and muscle. The chest tissue denoting female was visible. There was heat fractures of severe contraction. The lower limbs had heat fractures. At the back there was skin. She may have been lying on her back. Internally there was soot and inflammation of airways and swelling of lungs. The heart was normal and the stomach empty. The small intestines were partially burnt. The mandible was absent. There was a fracture on lower jaw. They used the tooth to assess her age. The cause of death was 110% burns with suspected carbon monoxide poisoning. Samples for DNA and toxicology were taken for analysis. Results came out on 27/3/2018 results were that carbon monoxide was absent in blood. Cause of death was burns only. The body was identified by DNA. The Report was produced as Exhibit 56.

In respect of the Report of **HJ**, the main findings were charred remains with over 90% burns exposing bone and internal organs; with fire fractures on both lower and upper limbs; fractures of the head; the brain was visible. There was loss of bilateral outer ears. There was partial amputation of upper and lower limbs. The toes were missing. The trunk on the left was missing exposing charred lungs, bowels and liver. It was difficult to examine the teeth. The teeth were biting the tongue. There was cherry red coloration. The lung was charred. The trachea had soot and froth. The digestive system was charred on the left side. The spleen appeared normal. The kidneys and uterus were normal. The bone facing spinal column was exposed.

The doctor formed the opinion that cause of death was due to burns and asphyxia. Blood samples and cartilage were taken for DNA testing. They also took shaft of femur. They took liver and left kidney for toxicology. Results came out on 27/3/2018. No toxic substances were found. The cause of death was burns. The body was identified by DNA. The Report was produced as Exhibit 57.

In respect of the Report of **MN**, the main findings were singed hair around anterior hairline. There were signs of medical intervention. The left upper chest had central venous catheter. There were incisions to improve circulation of blood. There was a tag showing her name and admission number. There were ECG tags on her skin. There were 2<sup>nd</sup> degree burns on face and neck, lower anterior abdomen, chest, lower limb anterior left and both upper limbs. Her burns were approximated as 3%. The heart was normal. Stomach had 200 mls undigested material. Lining of stomach was severely eroded. The brain was congested with raised intracranial pressure. Cause of death was complication following dry heat and inhalation of burns. Toxicology samples – kidney stomach, blood and liver were taken. DNA samples blood swabs, cartilage were taken. Carbon monoxide was found in blood. Cause of death was burns and carbon monoxide burning. Identification was through DNA. Dr Mutiru signed the Report (Exhibit 58). She was under treatment and she suffered 50% second degree burns.

The last report is for **VWN**. The main findings were deceased was moderately pale. She had healed burns on left side face. She had burns on upper and lower limbs, on neck and lower back and buttocks. There was skin graft on thighs and shin. Lungs were swollen. Heart was normal but there was blood accumulation. There was liver congestion, kidney was swollen. Skull was swollen. Cause of death was complications of burns. There were Dr Gachie and Dr Oduor performing post mortem. The body was identified from the word go. This was done in Lee Funeral Home. Date of post mortem was 2/10/2017. She died in Nairobi hospital. She died on 28/9/2017. The Report was produced as Exhibit 59.

All this evidence proves beyond reasonable doubt that the 10 girls, victims of the fire at KD, died. The evidence by the prosecution witnesses is proof that the deaths of the 10 girls occurred. This evidence has convinced this court, beyond reasonable doubt, that indeed the 10 girls died as a result of the fire that occurred on the night of 1<sup>st</sup> and 2<sup>nd</sup> September 2017 at KD of MG, Nairobi. I have no doubt in my mind in so finding.

From the evidence of the pathologist it is shown that all the girls were victims of the fire. The cause of death was either burns, complications arising from burns and carbon monoxide inhalation and poisoning in some cases. This leads to the conclusion that all the ten deaths were as a result of the fire that gutted KD.

The investigations that were carried out included the possible causes of that fire. This evidence was adduced by OC (PW18). He testified that he was one of the people in the investigations team that arrived at the school on 2<sup>nd</sup> September 2017. He prepared a report after conducting his investigations. He investigated possible causes of the fire and narrowed this down to electrical fault, cigarette butt, chemical reaction and arson. He eliminated the first three possible causes of the fire and narrowed his investigations to one possible cause of the fire, arson.

On electrical fault he eliminated this as the possible cause of the fire by concluding that there was electricity (power) during the fire incident and that this was switched off; that the electrical termination found on the building conduit system was tight and firm though burnt and that the distribution board serving the building and the protection gears were found functional.

He eliminated cigarette butt as the possible cause of the fire. He testified that there was no indication that the fire was caused by the cigarette butt because the school is a “no smoking zone” and therefore no one was allowed to smoke. He also eliminated chemical reaction although the report does not show the reasons for this elimination.

His conclusion was that arson was the cause of the fire. He however eliminated external arson for reasons that the security at the school was good thereby ruling out external arson. His opinion is that the fire was caused internally by someone within the dormitory. I have no reason to doubt this evidence and therefore it is my finding that the fire at KD of MG School Nairobi resulted from arson. Arson is a criminal act. Simply defined, arson is the criminal act of deliberately setting fire to property. It is an unlawful act as defined under Section 203 of the Penal Code.

In considering evidence of opinion of the fire expert, and other experts who testified in different aspects of this case, I remind myself of the Court of Appeal views on expert evidence in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139**, where the Court held that:

***“Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”***

I am alive to the weight a court of law should place on expert opinion as I am reminded in **Stephen Kinini Wang'ondou v The Ark Limited [2016] eKLR** where the court expressed itself as follows:

***“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.”***

The court in the above case considered that four aspects must be addressed by the court while considering expert opinions, namely that such evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance; that such evidence must be considered alongside the rest of the evidence; that where there is conflicting expert opinion, the court should test it against the background of all the other evidence in the in order to decide which expert evidence is to be preferred and that a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones. In arriving at the conclusions of this case, I have taken this into account and considered all the evidence tendered alongside that of the experts. I have no reason to doubt the fire expert opinion in this case given that there is no other opinion to the contrary presented before this court.

The next issue for determination is the identity of the person that started the fire. The prosecution has pointed a finger at the Subject but the defence argues that the evidence by the prosecution is not reliable due to inconsistencies and contradictions and that the prosecution has failed to prove the case against the Subject beyond reasonable doubt. What is not in dispute, however, is that the prosecution is relying on circumstantial evidence in relation to who started the fire. This brings me to this question: What is circumstantial evidence? The Supreme Court in **Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR** discussed at length circumstantial evidence as follows:

***The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is “indirect [or] oblique evidence ... that is not given by eyewitness testimony.” It is “[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact.” It is also said to be “[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence....”***

***On its application, circumstantial evidence is like any other evidence. Though, it finds its probative value in reasonable, and not speculative, inferences to be drawn from the facts of a case, and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding disputed questions of fact, circumstantial evidence should never be given a derogatory tag.***

***However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court “should proceed with circumspection when drawing firm inferences from circumstantial evidence.” The court should also consider circumstantial evidence in its totality and not in piece-meal. As the Privy Council stated in Teper v. R [1952] AC at p. 489 “Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.”***

Following the decision in **Kipkering Arap Koskei & Another v. R (1949) 16 EACA 135**, for guilt to be inferred from circumstantial evidence “... *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, ...*”

Also in **Musili Tulo v. Republic [2014] eKLR** the court stated that “*to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt.*” *The chain must never be broken at any stage. In other words, there “must be no other co-existing circumstances weakening the chain of circumstances*

**relied on” and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused.**

It is to the circumstances of this case that this court must turn in order to determine whether the subject is guilty of the crimes she is accused of or not.

I have read all the evidence presented to this court. That the Subject was a troubled girl is no secret. She was unhappy with her parents for not listening to her and for not allowing her to participate in a writing competition. This was testified to by her friends and class mates. She was unhappy about the school. She actually hated the school. She claimed the sanitation was poor and that the students in Form (1) One were made to clean the toilets among other complaints. She wanted a transfer but her parents were not listening to her on this respect. The information on her feelings about the school and her parents was shared to her friends and classmates through her discussions with them.

From the evidence on record, the Subject’s admission to MG was not through the normal school intake. It was through a request made through intervention by some officials in Jogoo House. This was given in testimony by the school principal. The Subject joined the school later than the other girls who were admitted normally. From her first day in school, it was clear that she did not like the school. The evidence of Brenda Mbatha (PW7) captures the Subject’s first day in school. Part of B’s evidence reads as follows:

***“I know TW. I remember the time I met her. It was late in first term of 2017. I was going to class after supper at 6.30 pm. I met a girl crying. I was with my friend who has left. I approached the girl crying and asked her why. She told me she was new in the school and her parents had left her in school and matron did not take her bags and she did not know anyone in the school. I decided to help her. I was a ranger similar to scouts and I decided to help her. I asked the matron then I took her to the hostel and got her a place to sleep. I took her to the dining but she declined to eat. I took her to KD. I was directed to do so by the matron. The dormitory has a ground and upper floor. It is divided with sections. I took her to the last section with available place. The sections were G, B and P sections. I took her to the last section. I cannot remember the colour. It has 2 entrances front and back. I took her to the last section from the front door. There was a cubicle but this was not a section. Purple section was last to back door.***

***I had other interactions with T after this day. When she got to school she was supposed to have what we call a big sister to help her know the school but she did not have one. I decided to help her. I took her to class but she had no chair. I got her a stool. I showed her my class and took her back to her class. We became friends. As the term (first) continued we were supposed to join a sports club. I was in English coral and a ranger. She came for auditions and joined the club coral. On other days we would exchange notes wishing each other well. In second term her friends L and others came to my class. I know L. They told me they could not find T. It was games time. I told them she must be in school. I went on to do games and sports. They came back during preps and told me they could not find T. I got worried and I went to her classroom to look for her. I asked the desk mate the last time she had seen T. She could not remember. She gave me a note she said T had written and left in her locker. I cannot remember name of her desk mate. The note had mentioned a couple of names as though telling them goodbye as they had been good to her. She said she would take acid and die. We went round the school looking for her. I cannot name the names in the note. The desk mate said the note was from T and that she had found it in her desk. The lockers of the girl and T’s were next to each other. We had the note with us. I found T with EK a form 3 girl next to the chemistry lab. I held T by the hand. She was crying. I asked her about the note which I had in hand. She snatched it from me saying it was nothing. We assumed it was nothing. She looked fine although crying. We took her to class. We did not report this incident to anyone. We did not think there was anything to worry about since she looked okay.”***

This is just one of the accounts adduced by her friends, classmates and school mates about how unhappy the Subject was at the school. It was said that she had attempted to escape from the school and one evening she remained in the classroom after evening prep with the intention of escaping. Ms C M (PW35), the Boarding Mistress at MG testified that one evening, V, victim in Count 10, told her that one girl has not reported at the dormitory from evening preps. That girl was the Subject. She was found hiding under a table in the classroom in the dark. She complained that she wanted a transfer from the school. Evidence shows that her mother was called to the school to pick her up and take her home after that incident. She was taken for counselling after this. It was stated that she used to prick herself using biro pen as testified by RFN (PW1) who at one time was desk mate of the Subject.

There is evidence showing that the Subject chatted on WhatsApp with KJM (PW13) where, according to K, the Subject told K that she would burn the school. The evidence of their WhatsApp chats was retrieved from the Subject’s phone by JK (PW36) and among other contents, these chats showed that the Subject was interested in Illuminati and had discussed the possibility of burning the school.

There is evidence from CA (PW40) a classmate of the Subject that the Subject had told her that at the end of that week of 28<sup>th</sup> August 2017 she would not be in school. C thought the Subject meant that she will be transferred from the school. There is evidence from PM (PW8), LN (PW6) and CA (PW40) that the Subject had a matchbox and that these witnesses had seen the Subject with that matchbox with C and L testifying that they had witnessed the Subject demonstrating how she could cast spells using the fire. This was during evening preps on 30<sup>th</sup> August 2017 when the Subject lit a matchbox but the girls put it off for fear of being found out and the retribution.

There is evidence from TM (PW4) that on 1<sup>st</sup> September 2017, she left evening preps at 9.30pm and on arriving at the P Section which she shared with the Subject and other girls, she found the Subject already in bed under covers. According to PW4, this was unusual for the Subject. PW4 testified further that she went to take a shower and went to chat with friends and on returning to her bed, the lights had been switched off. She said she went to bed and that she was woken up later that night by the Subject who told her that there was fire on her (the Subject’s) bed. PW4 told the court that she saw the fire on the lower section of the Subject’s bed which was neatly made as if someone had not slept in it. On seeing the fire, which she described as a small round fire, PW4 screamed as a result of which other girls woke up and ran outside the dormitory.

There is evidence by PM (PW8) who also shared P Section with the Subject and PW4 that on the night of the fire, someone woke her up and told her that there was fire below her. PW8 slept on the upper decker above the Subject. It is worth noting that the Subject did not wake the

other section mates up other than PW4. Evidence shows that when PW8 woke up, her blankets were on fire. She saw fire on the lower decker, which was the Subject's bed. PW8 testified that at the time she woke up and saw the fire, the Subject was not present. She ran out to escape the fire.

There is further evidence from PW40, K and PW6 L that the Subject had shown them a Dettol Hand sanitizer with words "highly flammable" circled on the bottle. The whereabouts of this bottle are unknown. None was recovered from the Subject or from the scene of the fire. The police nonetheless made available a similar bottle with contents. This is what was taken to the Government Chemist for analysis. Eunice Wamuyu (PW31) from the Government Chemist testified that a Dettol hand sanitizer was received at the Government Chemist Laboratory on 29<sup>th</sup> November 2017 for analysis. It was found to contain 70% ethanol which is highly flammable. Obviously this evidence is not helpful to the prosecution for the reasons that this is not the same bottle described by the witnesses given that this is not the hand sanitizer that was recovered.

There is evidence from the Subject's friends and classmates that the Subject had suicidal tendencies and that she had asked L and LK (PW5), among others, to help her suffocate herself but they did not take her serious which annoyed her. The evidence of B (PW7) is also relevant on this issue.

All these girls were vigorously cross-examined by the defence team. They did not change their evidence. I also observed them as they testified. They impressed me with their demeanour. They seemed firm in their evidence in chief and in cross-examination in respect of all the evidence they adduced touching on this case and the behaviour and conduct of the Subject. It is my considered view that they did not fabricate their evidence.

The evidence from the experts in respect of the scene of the fire show that the P Section of KD was most affected by the fire. This evidence is contained in the video (Ex. 22) prepared by DC (PW16) and recorded by SO (PW19). Several witnesses including PW16, fire expert O C (PW18) and Ms CM (PW35) are seen in the video explaining various scenes in the dormitory. From their evidence, the fire is believed to have started in the P Section where the Subject was housed together with PW4 and PW8. This is because according to their evidence, the walls of this Section and the roof had cracks and dark due to smoke exposure indicating the intensity of the fire in this section. The beds in this section were burnt and coiled due to the intense heat. PW16 further testified that wind played a crucial role in fuelling the flames and that P Section was highly congested with personal items and belongings. The Subject's bed is marked as "S1" which was the lower decker. From their observations as explained in the video played in court, fire started in the ground floor and was fuelled by the wind to spread to the 1<sup>st</sup> floor where all the deaths occurred. It was explained in evidence that the girls on the ground floor were able to wake up and escape the fire through either the rear door near the washrooms or the front door towards the gate leading to the Administration Block. Hence they were not seriously affected by the fire.

On the 1<sup>st</sup> floor, things were different. The girls had nowhere to escape through. The only way out was through the ground floor that was already in flames by the time they managed to wake up. The windows had grills and could not be used for escape although some girls managed to escape and jump from the roof. It can be deduced that the girls on the first floor were trapped. With the intensity of the fire due to strong winds that night as testified, these girls, some of who are victims in the charges herein, were trapped inside and suffered serious burns. From the description of the remains of the departed girls, some of them did not even have chances of escaping due to the intensity of the flames. It is also not far fetched to think that some girls may have burnt to death while still sleeping.

Ashes were collected from various points on the ground floor at the P Section and other points in KD. The evidence shows that samples were delivered and received at the Government Chemist on four different dates. On 2<sup>nd</sup> September 2017, 38 batches of exhibits, mainly ashes from the scene were taken for examination. Out of these samples, petrol was detected from ashes collected from the extreme right corner of the first cubicle. It was not specifically explained that this cubicle was the one called Purple Section and neither was there explanation as to whether by referring to this section as the first cubicle, the witness was counting from the washrooms side or from the front door.

On 7<sup>th</sup> September 2017 a piece of cotton wool containing ashes was received at the Government Chemist. No flammable substance was detected from this sample. On 3<sup>rd</sup> October 2017 more ashes were received but on examination, no flammable substance was detected. Lastly, on 29<sup>th</sup> November 2017 the Dettol hand sanitizer was received. It was found to contain 70% of ethanol which is highly flammable. I have explained in this judgment that this sample was made available by the investigators and was not one of the samples recovered from the scene.

All the evidence in this case shows that there are certain issues that are not contested. It is not contested that a fire gutted KD on the night of 1<sup>st</sup> and 2<sup>nd</sup> September 2017. It is not contested that 10 girls died as a result of injuries sustained from that fire. It is not contested that there was fire on the bed where the Subject slept. It is not contested that all the girls who died were from first floor of KD. It is however contested as to who started the fire. It is for this court to piece together the circumstances of this case to determine whether the prosecution has, through circumstantial evidence and other available evidence, met the threshold of proving this case beyond reasonable doubt.

Both the prosecution and the defence agree that the case for the prosecution is based on circumstantial evidence as regards the identity of the person who started the fire. All the evidence agree that no witness knows who started the fire. This is an issue that has to be resolved by circumstantial evidence. I have noted however, that the respective approaches by the Prosecution and the defence in regard to that circumstantial evidence is different. The prosecution is basing their case on the behaviour and conduct of the Subject before and after opening the school as well as before and after the fire. Simply put the prosecution case is that the Subject chatted with her friends about burning the school because she hated it; that she used Dettol hand sanitizer to start the fire that consumed the KD and led to the death of 10 of her school mates. They claim that the Subject has a matchbox which she may have used to set the dormitory on fire and that she had told her friends her intention to use the matchbox for that purpose and that she belonged to a cult.

The defence on the other hand deny that the Subject set the dormitory on fire. The defence highlighted the following as the circumstances that this court ought to consider and determine that they do not form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Subject and none else:

- (a) Mental status of the Subject.
- (b) Element of hand sanitizer.
- (c) Possession of match sticks.
- (d) Selective WhatsApp chats and screenshots.
- (e) A poem depicting "I see fire".
- (f) A hit word "World end" in the Subject's calendar.
- (g) A sticky note (Ex. 1) depicting frustrations of the Subject and expression of her feelings.
- (h) Perceived Subject's Illuminati practices and demonic worship.
- (i) Allegations of Subject lighting fire in class, piercing her hand with pen and drinking sanitizer.

It is true that some of the circumstances are as shown above. But it is my view that the defence has selected these circumstances to suit their arguments and their case. Some of the circumstances highlighted by the defence and enumerated above may have been explained by evidence. The Subject's mental status was normal as testified by the experts (Dr. Joseph Maundu, deceased, and Dr. Gatere) who assessed her and found her mentally stable. Possession of Dettol hand sanitizer is admitted. However, no Dettol Hand sanitizer was recovered from her. The sanitizer taken for testing is not the one seen with the Subject. The one taken to be examined had been brought by the police for that purpose. From that evidence this court learned that it was highly flammable due to presence of 70% ethanol. However this court cannot rely on this evidence in respect of the guilt of the Subject because this exhibit has no relation to this case.

The song "**I see fire**" is by ES. It came out in evidence that the Subject wrote this song before she joined MG School in order to learn the lyrics. In my view the Prosecution failed to show the connection between this song and the burning of the dormitory. Likewise, the words "**World End**" have been explained and I have no reason to doubt that explanation in absence of evidence. I have no reason to believe that by writing those words, the Subject was relating the words with what she was planning to do. The rest of the highlighted circumstances are relevant to this case as will shown.

Evidence has been produced showing WhatsApp chats. They may be selected by the prosecution but they show chats between the Subject and one of the witnesses. It is true these chats say a lot of things expressing frustrations between the two girls including mention of burning the school and escaping from the school. These may have been just jests and may be nothing serious should be taken out of them. However, there is evidence from several witnesses that the Subject had a matchbox and even demonstrated how to light a fire during prep time. This court cannot ignore evidence of three witnesses who have been vigorously examined and cross-examined without changing the evidence. There is evidence of sticky notes including Ex. 1 that show the frustrations and anger expressed by the Subject towards her parents and the school generally. She has admitted writing Ex. 1. There may have been no proof that the Subject practices demonic worship or that she has joined Illuminati. This court was not given evidence to show what Illuminati is and why it is bad to belong to it or whether it is associated with devil worship. This is a court of law and is governed by the law and procedure. Parties must prove what they allege and without such proof, this court has no option but to disbelieve evidence that is not backed by facts.

There is evidence to show that the Subject was unhappy, both with her parents and with the school. This has been proved by evidence and partly admitted by the Subject. I have explained the expert evidence on the arson as the cause of the fire. I have explained eyewitness accounts of witnesses who saw the fire on the Subject's bed including the admission by the Subject that there was fire on her bed on the night in issue. Evidence shows that the fire was started internally. The reason given is that the security at the school was tight and therefore no external influence could have caused the fire. It is not lost to me that the defenced alluded to external influence in starting the fire. I have not found such evidence even during scene visit at the school.

I have considered this evidence. I have no doubts in my mind that the fire started on the Subject's bed and spread to the rest of the Sections of the ground floor. It was fuelled by strong winds to spread to the first floor trapping the girls on that floor and leading to deaths of some of the girls on that floor. The Subjects defence that she found the fire on her bed after visiting the washrooms cannot be true although this court is alive to the fact that she has no duty to prove her innocence. She testified that the dormitory was dark but she claimed to have passed a girl whose face she could not identify but who was wearing dark purple pyjamas while she was on her way to the washrooms. If it was dark as not to be able to identify the girls face, how could she have identified a dark colour like dark purple pyjamas in the dark? I am not sure what the Subject intended to achieve by this evidence, perhaps to indicate that the girl she met if the one who started the fire on her bed? Actually evidence shows that the Subject was wearing purple pyjamas that night.

I have considered that the school occupies a large area. It has a fence made of stone wall, K-apple fence and iron sheets with barbed wire and chain link wire in some section. It is true, as observed from the scene visit, that on some sections of the stone wall fence, razor wire placed on top had fallen off. But inside the school compound were guards from [particulars withheld] Security with two dogs and two armed police officers from [particulars withheld] Police Station. There is no evidence of an outsider finding his/her way into the school compound all the way into the KD and starting the fire on the Subjects bed. If such an intruder existed, which I doubt, he/she could have been detected by the dogs even if he/she would have escaped detection by the guards and the police.

I have considered the evidence by the Subject on the issue of the fire and her conduct that night. I find it strange for a girl of her age at the time (14 years) to come back from the washroom and find fire on her bed and casually wakes up PW4, her Section mate, fails to wake the rest of the Section mates and casually walks away to wake up her friend in other sections of the dormitory. She did not scream or shout in reaction to finding fire on her bed. It is not usual to find fire on someone's bed at 2.00am. It is strange and it is scary and the normal reaction

of any human being irrespective of age would be to get shocked, shout or scream in shock and call out loudly for everyone to wake up and escape. This is not what happened. The Subject was not shocked, at least from the accounts from her testimony and the other witnesses. She casually and calmly reacted to that disaster despite the fact that fire was on her bed. How strange can that be! Unlike her, PW4 screamed when she saw the fire after the Subject woke her up!

It is my considered view, having taken into account all the evidence tendered in this case including that of the defence, that the Subject made good her word to burn the school or dormitory. She may have been joking with her friends and classmates at the beginning before opening the school but this turned into reality when circumstances of life, as shown by her frustrations as expressed to her friends and her conduct, became overwhelming to her. She could not handle what was happening in her life and she got her outlet by setting her bed on fire. I am alive to the evidence that no one saw the person who set the dormitory on fire but there is uncontroverted evidence that fire started on the Subject's bed. What was used to start that fire is not known. It could be hand sanitizer and matchsticks or anything else. There is evidence that traces of petrol or petroleum product was detected after examination of the ashes from the sections near the washrooms. I am not able to attribute the presence of petrol in the dormitory to the Subject without any evidence to that effect, but a fire did start on her bed. From the description, it was a small fire and could have been managed and put out. But it was late into the night. Everyone was asleep and unaware of what was happening. On waking up these girls just panicked and started running helter skelter in an attempt to escape. Help was not coming. Most of the evidence shows that the Matron and the Principal had to be woken up. Most of the teachers who arrived at the scene found the dormitory in flames. In other words, by the time help arrived, the fire has dangerously spread in most of the building trapping the girls on first floor on that floor with no escape route. The windows had grills and the dormitory was congested. All these factors made escape for most of the girls impossible. It also seemed that none of the girls had been trained on fire drills.

I have no evidence to connect the Subject with the petrol detected but this court does not rule out possibility of a petroleum product in the mix of things. What is proved beyond doubt is that fire started on the Subject's bed. Through circumstantial evidence, the accused started the fire. It is my finding, therefore, that there are reasonable inferences to be drawn from the facts and circumstances presented before this court to enable me find probative value in the circumstantial evidence presented before me. I find the chain of events in the circumstances of this case so complete that the culpability of the Subject, and no one else, is established without any reasonable doubt. I find that the chain of circumstances has not been broken at any stage. In other words, there are no other co-existing circumstances weakening the chain of circumstances relied on in this case. I also find that the circumstances from which the guilt inference is drawn are of definite tendency and unerringly point towards the guilt of the Subject.

The Subject did not like the school. She hated it. Her parents seemed unconcerned about her circumstances. She had made an attempt to remain in class one evening with the aim of escaping from the school leading to counselling. She wanted a transfer from the school, something that her parents did not seem to give a listening ear to. She also seemed to be crying for attention. I am not a psychologist but the behaviour of the Subject portrays a child crying for attention. She seemed unprepared for a public school like the one she landed in. She expressed her frustrations to her friends and classmates and showed some unconventional tendencies as testified by some of the witnesses. She was seen with matchbox and demonstrated how to light it. She used WhatsApp chats and sticky notes to express her feelings and frustrations to her friends and class mates and even threatened to burn the school. Whether she meant it at the time of making those expressions seems to have turned into serious threats which she carried out.

There is also the issue of the evidence of MMM (PW31), the mother of VW, victim in Count 10. She testified at length about her conversation with her daughter while admitted at Nairobi Hospital undergoing treatment. She told the court that her daughter told her it was the Subject who had started the fire. PW31 told the court that her daughter was at the Intensive Care Unit at the time she told her this. She stated that after discharge from the ICU her daughter was accommodated in the general ward with signs that she was getting better. She testified that her daughter was eager to discuss the fire. She testified as follows in reference to her daughter while admitted in the general ward:

***“This is the time she wanted to discuss the fire and how it was started and planned. She talked of a WhatsApp group started by T and others. She was kept off the group because she could not keep secrets. She told me that T had told her she would use hand sanitizer to burn the school. She said T circled the label on the table with “flammable” and demonstrated in class how this was possible. She told me they thought it was a joke because T would say she would do something but fail to do. They reported to the teacher, I cannot remember the name but nothing happened.”***

Can this evidence be treated as a dying declaration?

***Section 33 (a) of the Evidence Act reads as follows:***

***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, 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***

In ***Moses Wanjala Ngaira v Republic [2019] eKLR***, the Court of Appeal while making reference to ***Philip Nzaka Watu vs Republic [2016] eKLR***, stated the following on admission and reliance on a dying declaration:

***“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.”*

Further in **David Agwata Achira v Republic [2003] eKLR** the Court of Appeal stated in respect to dying declarations:

*“The law on dying declarations in Kenya was laid down in the case of Pius Jasunga s/o Akumu v R (1954) 21 EACA 331 which was cited with approval in the case of Okale v Republic [1965] EA 556 relied on by the appellant’s counsel. The case Okale v R (supra) was in turn followed in Aluta v Republic [1985] KLR 543 where it was held at page 547 paragraphs 5-10 thus:*

*‘In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial Judge to put forward a theory not canvassed in evidence or in counsels’ speeches. A trial judge should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination, unless there is satisfactory corroboration”.*

The defence criticised the statement of PW31 to the effect that it was not recorded in the conventional way but through an email. Indeed this witness told the court that she recorded her statement through email. However, I have noted that this is the statement relied on by this witness. She was cross examined on it and did not change the evidence contained in that statement. I would have been uncomfortable with this method of recording statement but the contents of this statement have been validated through examination in chief and cross examination. Besides, what is contained in that statement in regard to the Subject’s interactions with her classmates and friends has been stated in the evidence of other witnesses, which evidence is contained on court record.

After careful analysis of this evidence and after exercising caution in taking this evidence into account, I am satisfied that the evidence by PW31 about what VW told her is not fabricated. I am satisfied it satisfied the requirements of Section 33 (a) of the Evidence Act and therefore it is a dying declaration.

The totality of the evidence, both circumstantial and direct evidence (seeing fire on Subject’s bed) as well as expert evidence and the dying declaration and the Subject’s behaviour and conduct as testified by her friends and classmates, all point to the Subject as the culprit. I am satisfied with this evidence having taken care to ensure that the rights of the Subject as an accused person herein are not trampled upon. This settles the issue of who set the fire that led to the death of the 10 victims in this case. I find this issue proved beyond reasonable doubt.

The last issue for determination is the *mens rea*. The question that requires an answer is whether the Subject had malice aforethought in her actions. Malice aforethought is defined under Section 206 of the Penal Code as follows:

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.*

For our purposes I will narrow this definition to cover Section 26 (a) and (b) of the Penal Code. The question of malice aforethought has attracted numerous authorities in our legal system. One such authority is the case of **Isaak Kimanathi Kanuachobi – vs- Republic -(Nyeri) Criminal Appeal No. 96 of 2007 (UR)**, where the Court of Appeal expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal Code as follows:

*“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape, or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought (See Republic –v –Stephen Kiprotich Leting & 3 Others (2009) e KLR HCCC No. 34 of 2008). In the circumstances of this case, where there was a fight involving the appellant and others in a place of worship leading to another fight where the appellant stabbed the deceased with fatal consequences, we do not think there was malice aforethought at all. The appellant should not have been convicted of murder but should have been convicted of manslaughter. (See Juma Onyango Ibrahim – vs- R, Criminal Appeal No. 312 of 2009 Court of Appeal (Kisumu).”*

I have considered this issue. It is my finding that the prosecution has not proved malice aforethought in respect of the Subject. Given the circumstances of this case as explained in this judgment, it is my considered view that the Subject was not starting the fire with the intention of killing her school mates. To me it seems like an action born of a desperate attempt to make her be transferred from this school by any

means. Her aim may have been just to cause a fire and burn the building without hurting anyone but it was ill-intentioned given that the building had two floors, ground and first. There were going to be casualties as a result of this fire. The Subject, in her naivety, may have overlooked the consequences of her actions. Her attempt to wake some of her friends up was aimed at rescuing them from the fire.

It is my considered view that the prosecution has not proved malice, whether express malice, implied malice or constructive malice as defined in *Isaak Kimanthi Kagnuachobi – vs- Republic* case above. Where malice aforethought is not proved, but there is proof that the person under trial is the one who killed the victims, then the offence committed is not murder but manslaughter. It is therefore the finding of this court that, the prosecution having failed to prove the element of malice aforethought in respect of this case, this court is not able to find the Subject guilty of the offence of murder. Consequently, I find the Subject, T. W. G not guilty of the offence of murder in all the 10 counts she is facing. She is hereby acquitted of the ten counts of murder she is facing. Instead, I find the offence proved beyond reasonable doubt to be manslaughter in all the 10 counts. Consequently, I find the Subject, T. W. G, guilty of unlawful act or omission of causing the deaths of the ten victims enumerated in Counts 1 to 10, all inclusive, contrary to section 202 (1) as read with section 205 of the Penal Code. I enter conviction against her for each of the ten counts of manslaughter accordingly. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DECEMBER 2021.**

**S. N. MUTUKU**

**JUDGE**