



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI.

CRIMINAL CASE NO 35 OF 2013.

REPUBLIC..... PROSECUTOR

VERSUS

AMOS GITAU MACHARIA1ST ACCUSED

DAVID MWANGI KIBUE2ND ACCUSED

EMMANUEL MWANGI LUBISA3RD ACCUSED

JUDGEMENT.

1. The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars of which were that on the 12 day of march 2013 (sic) at Ruai Trading center , Ruai location in Njiri District within Nairobi county murdered **DIANA KATONI KINGOO**.

2. They first appeared before Muchemi J on 7/3/2013, when their plea taking was deferred to enable them undergo mental assessment. On 25/3/2013, their cases were consolidated and a plea of not guilty was recorded for all of them. Their trial was then set for 29th and 30th of the said month.

3. On 9th may 2013, they appeared before Korir J for the hearing of an application for bond, whose ruling was delivered on 14/8/2013. After several false start at hearing before Korir J, on 13 /8/2016, their trial commence before me and to prove its case the prosecution called and examined a total of eleven witnesses. At the close of the prosecution case, by a ruling dated 19/6/2019, I found and held that the prosecution had failed to establish a prima facie case against the 2nd Accused and proceeded to acquit and discharge the same for reasons stated therein. The 1st and 3rd accused persons were placed on their defense at which they both gave sworn statements in defense without calling any witness.

PROSECUTION CASE.

4. **PW2 KELVIN MUTISYA KINGOO** a brother of the deceased testified that on the material day 11/1/2013, he spent the day at home with the deceased together with their parents up to 7 pm when his girlfriend PW6 joined them and informed him that she had met with the deceased on her way to Ruai Shopping center to buy VISA BRANDY. He testified further that after thirty minutes, the deceased joined them with a 250ml bottle of the said drink. They were later on joined by their houseboy called Joshua.

5. In the process of sharing the drink, the said Joshua grabbed a glass from the deceased spilling the drink, with Joshua saying that he is the one who had loaned the deceased the money for the drink and therefore entitled to a share of the same. It was his evidence that Joshua thereafter left for their parents' house within the same compound and shortly the deceased received a cellphone call which she answered outside the house and left for their parents' house before returning in changed clothes. She then informed him that she was going to meet with a friend of hers who was in the area and requested him to ask the house boy, who was now not in good terms with her to open for her the gate, which he did and the deceased left the compound.

6. He stated further that the deceased did not return back up to 11 pm when he called her to inquire of her whereabouts and found her line off. He then received a call from a number not in his phonebook and when he answered the caller did not speak and immediately disconnected. After few minutes he received another call from the same number and thinking that the deceased was scared of speaking to him, handed over the phone to PW6 who then spoke with her, who said that she was at the mosque next to their home, some one hundred meters away.

7. The deceased took longer than expected to get home, forcing him to call her again from the same number and she said that she had reached the gate, from the background he could hear noise, he then asked her whether she was in trouble and she said she was ok. He then advised her to knock at the gate upon reaching for him to go and open for her, which she did not, forcing him to call the number again but found it off

that time around. It was at midnight when he went to sleep. At 7.00 am he received the sad news of the recovery of her body. He was later on called to the police station where he was able to identify the deceased cellphone upon the recovery of the same.

8. In cross examination, he confirmed having seen the 1st accused in the area with a broken leg and stated that he did not know whether he was a friend of the deceased. He further confirmed having seen the 2nd accused at a Motor cycle repair shop at the trading center and stated that he had no relationship with the deceased.

9. **PW6 RUTH WATERE NGANGA** corroborated PW2's evidence and stated that she met the deceased at 7.00 pm on the way, who informed her that she had some money with which she was going to buy visa brandy at Ruai trading center and would return back home shortly, which she did at 8.00pm . She came to PW2's house with the drink and two glasses one for herself and for her brother. It was her evidence that Joshua the house boy then come to the house and asked for a half share of the drink on account of having funded the purchase, leading to an altercation between him and the deceased. She stated further that the deceased left the compound at 9.00pm and at 10.00 p.m. called her before her phone went off.

10. At 11 .00 pm she received a call from unknown caller and after ten minutes the deceased came on line and spoke with her briefly before her brother took the phone and spoke with her. In the morning she received a call from a neighbor asking her to confirm the information she had received on her death. She further stated that when she spoke with the deceased, she sounded joyful and she could hear male voices on the background.

11. In cross examination by Mr. Ombeta for the 3rd Accused, she confirmed the scuffle between the deceased and their houseboy, Joshua who was upset with her to the extent of knocking down her drink, but he later on open for her the gate to get out of the compound.

12. **PW9 MARTIN WAITHAKA KIMANI** confirmed that on the 11/1/2013 while at his Wine and spirit shop at Ruai, the deceased and PW2 went to his shop at 10.00pm and bought VISA BRANDY for Ksh. 200. He then closed his shop at 8.00pm and did not see the deceased thereafter.

13. **PW7 JAMES WAKAFA NJIRU** testified that in the month of January 2013 one **MIKE SONKO** then the senator for Nairobi visited the area during electioneering period and gave youths some campaign money, who scrambled over the same. He later on met a group of youths including the 1st accused, who said that he had picked Ksh. 50 and a mobile phone which he was selling at Kshs.4000 while he wanted to pay Kshs. 3000 for it. They therefore differed on the price and he let it at that.

14. It was his further evidence that he later on heard that the 1st accused was involved in motor cycle accident and visited him to wish him quick recovery and still found him with the said phone. He later on heard that he had been arrested over the said phone. He confirmed in cross examination that the 1st accused was his friend and did not know him to be of a criminal nature. He further stated that the 2nd accused had been known to him for five years, having worked with him at the same garage.

15. **PW3 CORP. MUTHONI ERASTUS** testified that on 12/1/2013 , she was at the station as the duty officer ,when she received a report from the Father of the deceased, a retired Deputy Commissioner of Police on the recovery of her body at a place known as corner mbaya area of Ruai . She proceeded to the scene where the body was, next to a quarry. The deceased had a jungle green belt on her neck giving an impression that she had been strangled using the same. She was laying on her back facing upwards. She carried a search in her pocket and recovered nothing. She confirmed that the deceased had no visible injuries and that there was no sign of struggle at the scene.

16. **PW4 PC PAUL WABULWA WASIKE** stated that he visited the scene with PW3 and after the scene of crime had processed the same, the body was taken to Umash Funeral home. **PW1 PETER N KANYI** a scene of crime Officer processed the scene and took photographs .He stated that the body had a belt on the neck, the left leg had no shoe, which was lying next to it. In cross examination by Mr. Ombeta for the 3rd accused, he stated that the body could have been brought to the scene.

17. **PW5 DR. JOHANSEN ODUOR** carried out post mortem on the body, which had cyanosis, multiple bruises on the front of the neck with no bruises corresponding to the belt. As a result of his examination, he formed an opinion that the cause of death was asphyxia due to manual strangulation. He opined that the belt was placed on the neck after her death. He collected specimens from the body for further analysis by the Government Chemist.

18. **PW10 INSP. CHARLES MURIITHI** testified that on 28th Feb.2013, he received information that the cellphone of the deceased was being used by the 1st accused, who was a known bodaboda operator in the area. He gave this information to his then OCS, who called the accused to the station and he came with the deceased cellphone. It was his evidence that upon interrogation, the accused said that the phone had been brought to him by the 2nd accused whom they later on arrested. In the month of March he arrested the 3rd Accused whose cellphone had been used by the deceased to call her brother the night she died and thereafter he stopped using voice communication and was only using data, making it difficult for him to be tracked down. He stated further that upon ,arrest he noticed that the 3rd accused was a common face in the area and that he had at some stage shared a table with him at a local pub.

19. On interrogation the 3rd accused admitted having been with the deceased at a pub and later went with her to his house where he had a another girl called Peris Wahu Kamau, who was also arrest and confirmed that she met with the deceased and an argument arose between them, resulting in her slapping her before they escorted her away to take a bodaboda home. In cross examination by Mr. Wamwayi for the 2nd accused, he stated that the majority of the bodaboda operators in the area were known to the OCS who had the cellphone number of the 1st accused who immediately responded when called. The 1st accused then led them to the 2nd accused whom they arrested,

20. In cross examination by Mr. Gatumuta for the 2nd Accused, stated that he was only an arresting officer and not a co-investigating officer. He further stated that the 1st accused told him that the 2nd accused only brought to him the person who sold him the phone. He stated further

that Peris in her statement said that she slapped the deceased while in the house of the 3rd accused because she had gone to see her boyfriend. He stated that he did not know why she was released but that it was on the advice of ODPP.

21. In cross examination by Mr. Ombeta for the 3rd Accused, he stated that the 3rd Accused and his girlfriend Peres escorted the deceased outside the house where she took a bodaboda and that his phone was used to call PW2 at 11.00pm. He stated that the distance between the 3rd accused houses to the scene where the body was found, was between 1 -4 kilometers.

22. **PW11 CORP. WELDON KOECH** stated that he was assigned to investigate the case. He testified that the 1st Accused was arrested because he was found in possession of the deceased mobile phone, while the 2nd Accused had brought to him the person who allegedly sold it to him. He confirmed that the 3rd accused was with the deceased before she died. In cross examination by Mr. Wamwayi for the 1st accused, he stated that he investigated the case with then PC Muriithi who arrested the first accused. On cross examination by the 2nd accused he stated that he was not there when the same was arrested and further that Peres Wahu told them that she slapped the deceased because she had gone with the 3rd accused to his house without knowing that she was in the house.

23. It was his further evidence that the 3rd accused gave the deceased money to enable her go away and that they had enough evidence to charge Peres Wahu but were advised by the DPP not to charge her. In cross-examination by the 3rd Accused, he stated that the distance between his house and the deceased home was about 3 km. It was his evidence that there was no struggle at the place where the body was found and it was likely that the same was killed in the 3rd accused house before being taken to the scene. He confirmed that the 3rd Accused met with the deceased and the pub where they were drinking spirits and that her phone was used to call her brother when her phone went off.

DEFENCE CASE

24. At the close of the Prosecution case, the court found that the prosecution had not established a prima facie case against the 2nd accused person who was subsequently acquitted and discharged. When put on their defense, the 1st and 3rd accused offered sworn statement of defense without calling any witness.

25. **DW1 AMOS GITAU MACHARIA** stated in defense that he could not remember where he was on the material day but must have been in Ruai Area. It was his evidence that he did not know the deceased and the 3rd Accused, until he was called to Ruai police station to report there with the mobile phone he was using at a time when he had two handsets, one techno which he bought from someone who was introduced to him by the 2nd accused and the sum sung which turned out to belong to the deceased.

26. It was his evidence that he had picked up the said Samsung on 18/1/2013 during a campaign meeting organized by the then Senator for Nairobi MIKE SONKO, in the company among others PW7 who wanted to buy it but they differed on the price. He thereafter had a motor cycle accident while riding from Ruiru and at all material times had the said phone in his possession. It was at the police station where he was informed that the said phone belonged to the deceased and was thereafter charged with her murder which he denied.

27. In cross examination, he denied being involved in the murder of the deceased and stated that he did not know that the phone he had picked at a campaign meeting belonged to the deceased. He denied stealing it from the deceased and that is why he readily took it to the police station when he was called to do so. He further denied having known the 3rd accused, whom he met for the first time on 21/3/2013 at the Police Station. He stated that he could not remember all the people he had carried on his motor bike the night the deceased was killed but was sure of having not met or carried the 3rd accused.

28. **DW2 EMMANUEL MWANGI LUBISA** the 3rd Accused testified that on 10/1/2013 he had come from Eldoret and moved into a new house in the company of his girlfriend one Peres Wahu and a friend called Ken. He then proceeded to Ruai Trading center where the deceased joined him for a drink at the wine shop before she left them, at about 7.30pm she joined him again at a pub for further drink up to 9.00pm when his girlfriend called him to go home . The deceased then requested him to let her use his phone to call, which he did. She further requested him for bus fare.

29. It was his evidence that since he did not have enough money for both of them, he decided to take the deceased with him on a motor cycle to his house where he had some money which he intended to give her. Upon getting to the house, his girlfriend whom he had left in the house became unhappy, leading into an altercation between her and the deceased, before he separated them. He then took the deceased to the bodaboda rider who was waiting outside the house, who left with the deceased while he returned into the house and did not leave having switched off his cellphone. The following day, when he put on his phone, he received an mpesa notification for Kenya shillings ten, and when he called the sender, received no response.

30. It was his evidence that he proceeded to Quick mat supermarket in the area, where a friend of his asked him whether he had heard that the lady he was with the previous night had been killed. He then went to the owner of the pub where they had been that night, who confirmed the death. He then went to his friends for consultation and was advised to either report to the police station or to run away and escape but he decided to stay put in the area. He was subsequently arrested in the month of March and his mobile phone taken by the police. His girlfriend was also arrested. He denied having any relationship with the deceased.

31. In cross examination by Mr. Okeyo for the prosecution, he confirmed being with the deceased on 11/1/2013 at 5.00 p.m and again between 7.30 p.m up to 10.00 p.m and that she had used his cellphone that night to call. He further confirmed having gone with her to his house to get for her fare on a motor cycle which they got at the center but stated that he did not know the rider. He denied being the last person seen with the deceased and confirmed the quarrel between the deceased and his girlfriend stating that the unknown boda boda rider was the last person seen with the deceased.

SUBMISSIONS

32. On behalf of the 1st Accused it was submitted by Mr. Wamwayi that the only evidence against him was that he was found with the mobile phone belonging to the deceased on 28/2/2013 while the deceased had died on 12/1/2013. It was submitted that he gave an account on how he got the said phone to PW7, whom he offered to sell it to, long before he **was arrested and before he knew of the death of the deceased . PW7 later visited him and** still found him in possession of the phone which he later gave to PW10 and Chief Inspector Kitembe who was not called as a witness. It was submitted that the fact that he had two mobile phones on arrest was confirmed by PW11 Insp.Koeh.

33. It was submitted that being found with the deceased mobile phone did not place him at the scene of murder, the same having given a plausible explanation on how he came into possession of the phone having no reason to suspect that it was involved in a crime. It was submitted further that there was no evidence that he knew the deceased and no malice aforethought was established on his part and therefore no case was established by the prosecution against him and he should therefore be found not guilty and acquitted.

34. On behalf of the 3rd Accused, Ms. Kali, submitted that whereas he was with the deceased on the material night, there was no evidence tendered to confirm that he was in a relationship with the deceased or that he would have caused harm to her. It was contended further that he escorted her to the bodaboda rider only to be informed the following day of her death. It was submitted that no malice aforethought was established by the prosecution and therefore he should be found not guilty and acquitted.

35. On behalf of the prosecution Mr.Okeyo submitted that the death of the deceased was not through natural cause and that the 1st accused knew that the phone he had picked belonged to somebody else and did not hand it over to the police, which amounted to unlawful enrichment for which he should be held responsible. By proceeding to sell the phone, it was submitted constituted malice since it was picked from the scene.

36. On the 3rd Accused it was submitted that ,having confirmed being with the deceased the material night and his phone having been used to call her brother without identifying himself and thereafter putting off the phone, without giving an explanation for that ,he was under a duty to offer an explanation for his action which he failed to so do. It was submitted that his action of taking the deceased to his house, implied that he had some other motive rather than giving her the Ksh.50 fare and that he had planned the murder of the deceased but did not want to do it in a social place.

37. It was contended that the 3rd accused was placed at the scene of crime being the last person seen with the deceased. It was stated that his behavior towards the brother of the deceased, taking her to his house and the fight between her and his wife pointed to malice. It was submitted that the case against him was proved beyond reasonable doubt.

38. In a rejoinder Mr. Wamwayi stated that the doctrine of recent possession was not established against the 1st accused and that failure to take the phone to the police did not constitute malice aforethought, it was stated that the same could only be charged with the offense of being in possession of suspected stolen property and not murder. Ms Kali contended that the prosecution failed to prove any relationship between the 3rd accused and the deceased and that he offered an explanation on why he took to his house which was in the opposite direction. It was submitted that summons were issued to his wife Peres Wahu who failed to attend court.

ANALYSIS AND DETERMINATION

39. To sustain conviction on a charge of murder , the prosecution is under a legal and evidential duty to prove the following elements of the offense:-

- a) The fact and cause of death
- b) That the death was caused by unlawful act of omission or commission on the part of the accused person
- c) That it was caused with malice aforethought as defined under section 206 of the Penal Code as follows:-
 - 1) Intention to cause the death of or to do grievous harm
 - 2) Knowledge that the act or omission causing death will probably cause death of or grievous harm to some person, whether that person is he 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
 - 3) An intent to commit a felony
 - 4) 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.

40. The fact and cause of death was not disputed at the trial. PW2 Kevin Mutisya Kingoo a brother of the deceased, PW3 Corp. Muthoni Erastus, the first police officer at the scene in the company of PW4 Paul Wasike, PW6 Ruth Watere and the 3rd accused in his defense all confirmed the death. The cause thereof was proved through the evidence of PW5 Dr. Johansen Oduor, to be asphyxia due to manual strangulation. As I have said before, at the time of this judgment there was no news “fake” or “real” of the resurrection through either of the two miracle workers that I know of: the mighty prophet of god or our Lord and Savior Jesus Christ. It therefore follows that these two elements of the offense were proved beyond reasonable doubt.

41. The only issue for determination is whether the said death was caused by unlawful act on the part of the accused persons either jointly or severally. At the close of the prosecution case, there was no direct evidence tendered of any eye witness to the death of the deceased and

therefore the prosecution case is solely based on circumstantial evidence.

42. The law on circumstantial evidence in Kenya is now well settled. This court had an opportunity to put its imprint thereon in the case of **R Vs. ELIZABETH ANYANGO OJWANG [2018] eKLR** as follows ;

“21. For the prosecution to sustain a conviction on circumstantial evidence the Court of Appeal in the case of SAWE v REPUBLIC [2003] eKLR had this to say:-

“In order to justify on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. 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 remain with the prosecution. It is a burden which never shift to the party accused.”

22. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances get snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions, see NAVANEETHA KRISHNAN v THE STATE BY INSPECTOR OF POLICE – SUPREME COURT OF INDIA, CRIMINAL APPEAL NO. 434 OF 2013.”

43. The prosecution evidence against the 1st accused was that he was a bodaboda rider who was found with the cellphone belonging to the deceased .This was confirmed through the evidence of PW10 who stated that he was well known at Ruai Police station so when he received information from an informer that he had the phone belonging to the deceased , he passed this information to the OCS , who called him and he readily went to the station with the said phone which he had openly been using in the area. There was however conflicting evidence between PW10 and the accused on how he got the said phone. The Accused account was however corroborated by the evidence of PW7 and PW11 who stated that he had two mobile phones, one which he pick at the campaign meeting and one which he purchase from someone who had been introduced to him by the 2nd accused. It was PW7’s evidence that he was present where 1st accused picked up the phone and later when he visited the same he found him in possession of the phone, before he later learned that he was arrested over the same phone.

44. It was the prosecution contention was that the 1st accused was through the evidence tendered brought within the scope of the doctrine of recent possession. The Court of Appeal in the case of **ERIC OTIENO ARUM v R KSM CR. APPEAL NO 85 of 2005 [2016] eKLR** stated as follows:-

“Our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analyzing it and after it accepts that which it considers is the correct and honest version. That duty as has been said is wholly on the trial court and on the first appellate court. This court has no such duty on hearing a second appeal such as before us but if it be satisfied that that duty has not been fully discharged by the first appellate court then it will take the line that had it been done either or both courts would have arrived at a different conclusion.”

45. Once the above facts have been established, the accused then bears the evidential burden to give a reasonable explanation on how he came into possession of the said goods as per the provisions of Section 111 of the Evidence Act as was stated in the case of **PAUL MWITA ROBI v. R. KSM CRIMINAL APPEAL NO200 of 2008.**

Justice C.Meoli in the case of **MICHAEL MUGO GITHONGE &4 others v. R [2017] eKLR** had this to say on the said doctrine: recently, this Court in **Moses Maiku Wepukhulu & PAUL NAMBUYE NABWERA -Versus- Republic CRA NO. 278 OF 2005 (Koome, Mwera & Otieno-Odek, J.J.A.)** quoted with the approval what constitutes the doctrine of recent possession in the case of **Malingi -Versus- Republic, [1989] KLR 225:**

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. That the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was (from the nature of the item and the circumstances of the case) recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items.” [Emphasis added]

The doctrine is a rebuttable presumption of fact. Accordingly, the accused is called upon to offer an explanation in rebuttal, which if he fails to do, and an inference is drawn, that he either stole or was a guilty receiver.

As was aptly stated in the case of **Hassan -Versus- Republic, (2005) 2 KLR 151:**

“Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver.”

46. In this case whereas it was proved that the phone belonged to the deceased and that it was found in the possession of the 1st accused, the same gave a plausible explanation on how he came into possession of the phone, which explanation was corroborated by the prosecution own witnesses. Whereas PW10 stated that the accused had told him that the said phone was sold to him by a person introduced to him by the 2nd accused, from the evidence on record, it is clear that the same had two mobile phones including a Techno, which is the one that he bought from the contact of the 2nd accused.

47. I have taken into account the conduct of the 1st accused, as submitted by his Advocate, that he was openly using the said phone at Ruai area, where the deceased and her parents lived, and which he wanted to sell to PW7 and the fact that he readily took the same to the OCS, thereby portraying an innocent conduct. He would not have openly used the phone and taken himself to the police station if he had killed the deceased. By their very nature mobile phones are items which readily changes hands. I am therefore satisfied that the 1st accused successfully discharged the evidential burden placed upon him and that the prosecution failed to connect him with the murder as required in case based on circumstantial evidence.

48. This being a criminal trial where the burden is beyond reasonable, it is my finding that as regards the 1st accused, the prosecution case left a lot of doubt. There was no evidence that he knew the deceased or that he is the bodaboda rider who allegedly carried the 3rd accused and the deceased. Finally there was no proof of motive on his part to cause the death of the deceased. Mere possession of her phone without further connecting evidence cannot be a basis for finding the same guilty. Finally as I stated in the case of **Elizabeth Ojwang (supra)** motive becomes a very important factor in a case based on circumstantial evidence.

49. I therefore find and hold that the prosecution failed to establish its case as against the 1st accused beyond reasonable doubt and consequently find the same not guilty and acquit him of the charges. The 1st accused is hereby set free forthwith unless otherwise lawful held.

50. As regards the 3rd accused, the same was placed together with the deceased through the evidence of PW2 and PW6, his mobile phone was used by the deceased to call them, the night she died. In his defense he admitted having been with the deceased twice on the material day and that he later on went with her to his house where an altercation arose between her and his girlfriend. He further confirmed that the following day he was informed of the death of the deceased, which he later on confirmed from the owner of the pub where they had been that night.

51. According to the prosecution case, the 3rd accused was the person last seen with the deceased alive. Justice Lesiit in the case of **REPUBLIC v. EKK [2018] eKLR** has explained the principles applicable under this doctrine as follows:-

“Having been placed at the scene of the incident as the oldest person who was last seen with the deceased before she died, the accused has a duty to give an explanation of how the deceased met her death, or alternatively how they parted company.

43. Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of Moses Jua V. The State (2007) LPELR-CA/IL/42/2006. That court, while considering the ‘last seen alive with’ doctrine held:

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

44. In yet another Nigerian case the court considering the same doctrine, in the case of Stephen Haruna V. The Attorney-General of the Federation (2010) 11 LAW/CA/A/86/C/2009 opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

45. Quoting from another jurisdiction, to be specific India, the courts there have developed that doctrine further. In the case of Ramreddy Rajeshkhanna Reddy & Anr. v. State of Andhra Pradesh, JT 2006 (4) SC 16 the court held:

“that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

52. The 3rd accused in his defense stated that he went with the deceased to his house for the sole purpose of giving her fare to take a bodaboda home, which is what he allegedly did. It was his evidence that he did not know the rider who took them to his house but stated that the same waited for her as he went with her to the house. At the close of the defense case and on cross examination, he did not offer an explanation of the logics of going with the deceased to the house if his intention was only to get the money. I have weight his account against

the prosecution evidence and in particular that of the investigating officer on the account of the event as given by his girlfriend and find that his account was not truthful and an afterthought.

53. After his phone had been used to call the deceased brother, the same went off and as per the evidence of PW10, he switched to using only mobile data and therefore could not be traced. Even after he was allegedly advised to report to the police by his friends, he decided not to do so, thereby portraying a guilty mind. This is looked at against his account that he did not know the deceased but admitted having met with her twice that night. His evidence that he had recently come from Eldoret confirms that he is the one the deceased was going to meet having told her brother that he was meeting a friend who had returned back in the area.

54. There is no evidence tendered by the 3rd accused to show that the deceased left his house alive, having confirmed that there was a fight between the same and his girlfriend who was not happy at his bringing in another woman into the house knowing very well that he had left her thereat. The prosecution evidence as to the cause of death as per the evidence of PW4 Dr. Oduor to be asphyxia due to manual strangulation and the fact that as per the evidence of PW11, the deceased was killed somewhere before the body taken to the scene provides a chain of circumstantial evidence linking the 3rd accused to the death of the deceased. I therefore find and hold that the 3rd accused failed to discharge the burden placed upon him, the prosecution having established beyond reasonable doubt that he is the last person seen with the deceased alive.

55. The accused account that he did not know the boda boda rider who took him and the deceased to his house and later on to her home cannot be believed taking into account his evidence that the same waited for her at his house and it is clear that the same did not want to disclose his identity knowing the role he must have played in the disposal of the body.

56. The final issue for determination is whether malice aforethought was established. In the case of **R v. EKK** as to whether motive for the offence was essential and whether it has been established in this case. It is trite law that motive need not be proved. This is evident under **Section 9(3)** of the **Penal Code** which stipulates thus:

“(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.”

57. That provision was the subject of interpretation in the case of **Chogo vs. Republic (1985) KLR1**, where the Court of Appeal held as follows:-

“Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.....”

58. From the prosecution evidence, it is clear that the only other person who might have had a direct motive to cause the death of the deceased, would have been the 3rd accused girlfriend/wife Peres Wahu, who was arrested but not charged nor called as a witness by either the prosecution or the defense. The 3rd accused is however brought within the ambits of Sections 20 and 21 of the Criminal Procedure Act both which provides as follows as against the 3rd accused;

“20(c) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence,

And in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.”

59. Further Section 21 of the penal code provides as follows:-

“21. Joint offenders in prosecution of common purpose 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.”

60. The circumstantial evidence presented before me and as corroborated by the 3rd accused shows he was the last person seen with the deceased at a drinking pub, he then went with her to his house where a fight arose between her and his girlfriend. The deceased died out of manual strangulation. There is no evidence showing that the deceased ever left the 3rd accused house alive. His evidence that he put her on a motor cycle raises doubt in that if he had been with the bodaboda rider from the pub to his house and that he waited for the deceased at his compound while he was with her from which fight arose, it is not probable that he could not remember the rider and or registration number of the motor bike. Further his conduct of switching off his mobile phone soon after the deceased had called her brother and not putting the same on until he was arrested and not reporting to the police even when he was advised so, to my mind point to a guilty mind and conduct.

61. The third accused was therefore an active participant in the death of the deceased or aided and or abetted in the same for which he is criminally held liable. I am therefore satisfied that the circumstantial evidence tendered herein irresistibly points to the guilty of the 3rd accused and consequently find the same guilty of murder contrary to Section 203 of the Penal Code and convict the same thereon.

In the final analysis I find the 1st accused not guilty and acquit him of the charges but find the 3rd accused guilty as charged and it is ordered.

Signed and Dated at Nairobi this 28th day of May, 2020

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J. WAKIAGA

JUDGE

Signed and Delivered at Nairobi this 29th day of May, 2020 through Microsoft Google Teams.

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D.O. OGEMBO

JUDGE