



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO.65 OF 2011**

**REPUBLIC.....STATE**

**-VERSUS-**

**PRISCILLAH CHERONO CHEBET.....1ST ACCUSED**

**EMMY JEPKOSGEY CHUMO.....2ND ACCUSED**

**JOSEPHINE CHELEL.....3RD ACCUSED**

**JUDGMENT**

**The Charge**

1. On the night of 23<sup>rd</sup> July, 2011, the body of Metrine Litsusa Khavai(deceased)was found lying on the floor of a bedroom in her house at Kenya Medical Association (KMA) estate in South C, Nairobi. The head was wrapped with a blood stained mosquito net. Other evidence of the gruesome death were blood-stained clothes and a rungu which were tucked away in the ceiling of the bedroom.
2. After due investigations which spanned one month, Priscilla Cheronno Chebet, Emmy Chepkosgei Chumo, and Josephine Chelel being the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Accused respectively, were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that on the 23<sup>rd</sup> day of July 2011 at the Kenya Medical Association Estate House No. 30 at Muhoho Avenue, South C murdered Metrine Litsutsa Khavai.

**The Prosecution Case**

3. The Prosecution called 17 witnesses and produced 19 exhibits. At the centre of the prosecution case was an alleged sour relationship between the three accused and the deceased. The deceased was married to one Paul Kiprotich Ruto (PW14) who was the elder brother and guardian to all three accused. According to the prosecution, there was no love lost between the Accused and the deceased and their sour relationship provided the motive for the alleged murder.
4. PW14 (hereinafter Ruto) alleged that his sisters whom he supported were disrespectful to his wife Metrine and were supportive of his former wife one Joan Chelagat whom he had divorced and married Metrine. Ruto stated that he initially lived with his sisters but when their relationship with his wife Metrine deteriorated, he rented separate accommodation for the 1<sup>st</sup> and 2<sup>nd</sup> Accused at Langton Flats on state house road and restrained them from visiting his house in his absence. He continued living with the youngest sister Josephine (3<sup>rd</sup> Accused) and demanded that the sisters cut links with his first wife Joan.
5. The Prosecution also relied on a confession alleged to have been made by the 1<sup>st</sup> and 2<sup>nd</sup> Accused admitting their role in the death of the deceased. The confession was however strenuously repudiated at the trial. I shall return to the issue of the confession statements later on in this judgement.

**The defence case**

6. The court found a *prima facie* case against all three accused. Each accused gave a sworn statement in their defence and also called their mother Jane Chebet Chumo who testified as DW4. Each accused denied the charge and denied the existence of a bad relationship with the deceased. Further, and as already stated, the 1<sup>st</sup> and 2<sup>nd</sup> accused denied that they confessed to killing the deceased.

## The Law

7. This being a murder case, the prosecution is required by law to prove death of the deceased and the cause of such death. It must also prove that the accused caused the death and that in so doing, acted with malice aforethought. It must also be proved that the three Accused had a common intention to cause the death of the Accused. The standard of proof is one beyond reasonable doubt and the onus of proof remains with the prosecution. See **Woolmington v. DPP [1935] EA 462**. See also **Sawe V Republic, Criminal Appeal No.2 of 2002**.

### Death of the deceased and cause of death

8. The death of the deceased was not disputed at all. There was no doubt that she died on 23<sup>rd</sup> July, 2011. Stephen Kimetto (PW1), Everline Aringo(PW2), Julius Jumatatu Ombele(PW5) and Josephine Chelel (3<sup>rd</sup> Accused) all saw her body lying in her house on the fateful night. Photographic evidence of her dead body (Exhibit 7 (1-V111)) were produced by No. 78498 PC Kabucho Kipsamo(PW7) the scenes of crime officer. The body was identified at the mortuary by her husband Paul Ruto(PW14) and her father Jonah Isutsa. Inspector Mulatya (PW16) was in attendance. I accepted the evidence of these witnesses and found the fact of death proved.

9. Dr. Peter Muriuki Ndegwa(PW16) of police surgery performed the post mortem examination on 26<sup>th</sup> July 2011 at the Lee Funeral Home. He observed that the deceased was dressed in a blood stained red top and black trousers. He noted the following external injuries: laceration on frontal scalp, incisive wound on frontal scalp measuring 13 by 5 cm, penetrating stab wounds on the left eye socket, side of the neck, upper arm and the right elbow area, and below the chin. There were bruises below the chin, multiple pin pointed bruises on the left chest wall, on the left upper arm; one complete horizontal ligature impression on the neck measuring 8cm long and one incomplete ligature impression.

10. Upon internal examination of the body, Dr. Ndegwa observed hemorrhage on the outer surface of the lungs. There were injuries on the head, bruises on the frontal side of the scalp, depressed fracture of the skull bone, and intercranial haemorrhage and pressure. There were also subcutaneous bruises over the right breast and right upper arm. Dr. Ndegwa concluded that the injuries presented evidence of torture. He opined that the cause of death was head injury due to sharp and blunt force trauma, and; ligature or manual strangulation.

11. I accepted the pathologist's expert opinion on the cause of death and admitted the post mortem report (Prosecution Exhibit No. 19) into evidence. I found no reason to doubt the findings. The cause of death was therefore proved beyond reasonable doubt.

### Whether the accused caused the death of the deceased

#### **The Confession**

12. The prosecution relied on a confession allegedly made by the 1<sup>st</sup> and 2<sup>nd</sup> accused. **Section 25** of the Evidence Act defines a confession thus:-

**“25. A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”**

**In Sango Mohamed Sango & Anor V. Republic, (2015) eKLR**, the court of appeal clarified section 25 of the Evidence Act as follows: -

**“Broad as section 25 appears to be, a confession must still be sufficiently clear that the accused person admits all the elements of the offence charged. As the former Court of Appeal for Eastern Africa stated in REX V. KITUYAN S/O SWANDETTI (1941) 8 EACA 56, a confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence.”**

13. William Sakali Nangulu (PW6) testified that he had taken confession statements from the 1<sup>st</sup> and 2<sup>nd</sup> accused on 1<sup>st</sup> July 2014. The defense team of learned counsel Mr. Wamwayi, Mr. Nyaberi and Mr. Katwa for 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Accused respectively promptly objected to any reference to or production of the two statements on the basis that they were not taken in accordance with the law.

14. The court held a trial within trial on 8<sup>th</sup> October 2015. Three prosecution witnesses No. 56274 PC Jarius Mbondo (PW1), No. 235074 Inspector Lawrence Mulatya (PW2) and No. 218745 SSP William Nangulu (PW3) testified in the trial within trial. The 1<sup>st</sup> and 2<sup>nd</sup> accused also testified in the trial within trial as DW1 and DW2 respectively. In the trial within trial, the 1<sup>st</sup> and 2<sup>nd</sup> Accused alleged that they were beaten and tortured and threatened by police officers including PW1 Jarius Mbondo and PW2 Lawrence Mulatya at the Makadara police station. They stated in their respective testimonies that they were threatened that they would be shot and dumped in Karura Forest if they did not make a confession.

15. In their respective submissions, Defence Counsel argued strongly that the confession statements were not taken in conformity with the law and specifically section 25A of the Evidence Act and the Evidence (out of court confessions) Rules, 2009. Counsel argued that the recording officer being one of the investigators was not qualified to record the statements, that the 1<sup>st</sup> and 2<sup>nd</sup> Accused were not cautioned; and, that the statements lacked the mandatory certificate by the recording officer.

16. Once the confession was repudiated, it was upon the prosecution and particularly the recording officer to prove that the confession was made voluntarily without coercion and without promise. In **Sango Mohamed Sango (supra)** the court of appeal stated that **“the trial court must be convinced first about the voluntary nature of the confession and secondly that the confession has the ring of truth.”**

17. In the present case, the court critically examined every aspect of the objection in the light of the stringent provisions of section 25A of the Evidence Act and the Evidence (out of court confession Rules, 2009.) The court also examined the repudiated testimonies of the 1<sup>st</sup> and 2<sup>nd</sup> Accused. In a lengthy reasoned ruling delivered on 28<sup>th</sup> June, 2017, the court made the finding that the confession statements had been made voluntarily and that the recording officer was qualified to record the confessions. The court came to the conclusion that the 1<sup>st</sup> and 2<sup>nd</sup> Accused had repudiated the confessions as an afterthought.

18. A trial court is however required to judiciously consider all evidence before judgement. This is particularly so when dealing with a confession. In **Sango** (*supra*) the court went on to further state that:-

**“As this Court stated in KANINI MULI V. REPUBLIC, CR. APP. NO. 238 of 2007, even after the trial court has ruled a confession admissible, the accused person is still entitled to call evidence to show that the confession cannot be acted upon”.**

19. In this respect, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Accused asked the court to reconsider the confession evidence in its final determination and disallow it in evidence on the basis of the grounds earlier articulated in the trial within trial.

20. I have in the course of this judgement re analyzed the evidence in the trial within trial and have come to the same conclusion that the confession statements were made in accordance with the law and are therefore admissible in evidence. Both confession statements were duly signed by the Accused respectively and bears requisite certificate of the recording officer. The recording officer was qualified to record the confessions as he was not directly the investigating officer but was the head of the DCI office in Makadara. I have also found that contrary to the allegations of torture by the investigators made by the Accused, the healed wounds on their hands observed by Dr. Maundu (PW17) and recorded in their medical reports Exhibit No. 21 and 22 respectively, were injuries sustained in the course of their fight with the deceased. This conclusion is further fortified by the fact that neither the 1<sup>st</sup> and 2<sup>nd</sup> Accused nor their counsel raised the issue of having been tortured or forced to make their statements to the recording officer when they were first presented in court or throughout the trial until PW5 testified.

21. Following the above, it is my firm conclusion that the confession statements were made voluntarily and that the 1<sup>st</sup> and 2<sup>nd</sup> accused only repudiated them as an afterthought. In admitting the confession statements, I take a similar observation as the court of Appeal in the case of **Paul Nakwale Ekai v Republic [1981] eKLR** that .....*‘Again, a substantially truthful confession may contain many mistakes... In an appropriate case, a trial judge may rely on such a confession, notwithstanding the mistakes it contains.....’*

I shall now delve into the details of what the 1<sup>st</sup> and 2<sup>nd</sup> accused stated in their respective statements and analyse the same along with other evidence in the case.

#### **The 1<sup>st</sup> accused’s statement**

22. In her statement dated 25<sup>th</sup> August, 2011 (Exhibit No. 13) Priscilla Cheronu narrated that she used to live with her brother Ruto(PW14) and his wife Metrine in Ruto’s house in Lang’ata Onyonka estate together with Emmy Chepkosgei (2<sup>nd</sup> accused) and Josphine Chelel (3<sup>rd</sup> accused). That their relationship with Metrine got strained because Metrine used to report them to their brother and in turn their brother would beat them. She said that at some point she was expelled from the house and went to live temporarily with a cousin in Embakasi in 2009 and in 2011, Ruto rented a house for herself and Emmy (2<sup>nd</sup> Accused) in Milimani.

23. On the events of the material date, Priscilla stated in her statement that on 18<sup>th</sup> July, 2011 their younger sister Josphine who was living with Ruto and Metrine wrote a message to Emmy (2<sup>nd</sup> Accused) and herself informing them that she had been beaten by Ruto because Metrine reported that she had come home late and that she (Josephine) had stolen a laptop from the house. Priscilla stated that the information really annoyed them. She was further annoyed when she learnt from Ruto that Metrine had alleged that she (Priscilla) was mistreating his daughter. When she briefed her sister Emily, she also got annoyed and they decided to confront Metrine with those allegations.

24. Priscilla further narrated that on 23<sup>rd</sup> July, 2011, they woke up at around 9.00am and at around midday, left Milimani for Metrine’s house in South C. They left Josphine who had visited them at around 10.00am in their house. Josephine was not feeling well. On arrival at Metrine’s house around 3.00pm, they let themselves in and waited for her. She arrived at about 4.00pm. They asked her why she had been making negative reports about them to their brother Ruto. She responded that “it was not them who brought her to this house” and it was then that the quarrel degenerated into a fight.

25. Priscilla further said that she rushed to the kitchen and picked a knife with a black handle and Metrine ran upstairs while abusing them. They caught up with her upstairs and the fight continued. Metrine bit Priscilla’s second right hand finger. Priscilla fell and Metrine stepped on her stomach. Emmy pulled Metrine back and Priscilla then stabbed Metrine severally. They overpowered her and hit her with a maasai rungu several times on the head. They stuffed some clothes in her mouth so that people could not hear her screaming.

26. Priscilla went on to state that Metrine became unconscious and fell on the floor. That they became worried and collected the bloodstained clothes and rungu and hid them in the ceiling. That she took the kitchen knife and washed it in the kitchen and they locked the door and threw the keys through the sitting room window. They then left for their house in Milimani taking with them Metrine’s phone which they threw into a dustbin near KICC.

27. Back at their house, they found Josephine who informed them that Judy Chebet(PW12) had been there. They escorted Josphine to Afya Centre stage and she went back to south C. Priscilla further narrated that at about 11.00pm, Steve (PW1) called to inform them that Metrine was dead. They went to Metrine’s house the following morning and joined other mourners. They travelled home for the burial and later returned to Nairobi.

28. Priscilla concluded her statement by stating that they were arrested on 23<sup>rd</sup> August, 2011 at around 5.00am and taken to CID offices Industrial area and she made her confession to the DCIO on 24<sup>th</sup> August, 2011 after which she led the police to Metrine's house where they recovered the kitchen knife and from where the bloodstained rungu and clothes were recovered from the ceiling.

#### **The 2<sup>nd</sup> accused's confession statement.**

29. The 2<sup>nd</sup> Accused Emmy Jepkosgei stated in her statement that she lived with her brother Ruto and worked in his SEDCO company as an assistant valuer. She recalled that she was living in Ruto's house when Metrine moved in in 2009. Initially, she had a good relationship with Metrine which deteriorated when Metrine started making false accusations against her. She cited an incident when Metrine falsely told Ruto that she (Emmy) had gone to Eldoret when she was not supposed to, and also that she was pregnant. This report led to her being beaten by Ruto who also discontinued supporting her University studies at the University of Nairobi where she was studying a degree course in Land Economics and had to drop out.

30. Emmy stated that on 8<sup>th</sup> July, 2011, Josephine informed Priscilla and herself that she had been beaten by Ruto because of Metrine and they got annoyed and decided to go and confront her. They left Josephine in their house. Josephine told them where she had left the key and they let themselves into Metrine's house upon arriving there at about 2.00pm. According to Emmy, Metrine arrived home at about 4.00pm and inquired what they were doing there and a confrontation ensued. Emmy stated that she asked Metrine why she made false reports about them to their brother. They started fighting and when Metrine ran upstairs, they followed her.

31. As the fight continued, Metrine ran into the bathroom but Emmy dragged her out and pushed her into the bedroom while Priscilla rushed for a knife and stabbed her several times. Emmy said that she reached for a rungu and hit Metrine on the head and she fell down unconscious. They stuffed the bloodstained clothes and the rungu in a paper bag and hid them in the ceiling. Emmy said that she took Metrine's phone and put it in her bag. They locked the bedroom and left. On their way to Kilimani they threw Metrine's phone into a dustbin near K.I.C.C. The following day they went to Metrine's house in South C to join the other mourners and later left for the burial at their rural home.

32. The two confessions extensively reproduced above, are similar in all material aspects. In short they detail the buildup of anger against their sister in law and explain how the 1<sup>st</sup> and 2<sup>nd</sup> Accused planned to confront her on the false reports she allegedly made to their brother Ruto who in turn quarreled or beat them. They state how they went to the deceased's house and waited for her to get home and how they confronted her immediately she arrived. They detail how the confrontation degenerated into a fight that led to her gruesome and unlawful death.

33. The confessions constitute material admission of the facts constituting the offence and guilt on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Accused. They admitted to fighting, stabbing the deceased with a kitchen knife and clobbering her head with a masai rungu. They also stated how they locked her in and left carrying with them her mobile phone which they threw into a dust bin near KICC. Further, it is clear from the two confessions that the 1<sup>st</sup> and 2<sup>nd</sup> accused acted with common intention, first in planning to go and confront the deceased, and secondly, in jointly participating in fatally assaulting her. By their own admission, Priscilla stabbed her severally, while Emmy hit her with the Masai rungu. In the upshot, I find that the confessions contain material admission of guilt on the part of the 1<sup>st</sup> and 2<sup>nd</sup> accused.

34. It would however be unsafe to make a finding of guilt on the basis of the confessions alone particularly because they were strongly repudiated. There must be other corroborative evidence. In **Patrick Mwangi Weru Vs. Republic HCCRA No. 103 of 2004, (2013)eKLR**, the court of appeal stated that a court must exercise great caution before proceeding to convict on a retracted confession. Stating that a trial court must look for independent corroborative evidence, the court went on to cite the case of ***Tuwamoi – v- Uganda (1967) EA 84,91***, where it was stated:-

**“A trial court should accept any confessions which has been retracted or repudiated or both retracted and repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all material points and surrounding circumstances that the confession cannot be but true.”**

35. There was no independent eye witness to the killing of Metrine. Other than the confession above, the rest of the evidence was circumstantial. In the case of **Erick Odhiambo Okumu v Republic Criminal Appeal No. 84 of 2014 [2015] eKLR** the Court of Appeal stated with respect to acceptability of circumstantial evidence that:-

**“It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in *MUSILI TULO V. REPUBLIC* (supra): “Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics”.**

36. The principles upon which circumstantial evidence must be considered were clearly laid out by the predecessor court of appeal in the case of ***R. v. Kipkering Arap Koske & Another*, 16 EACA 135** as follows:-

**‘(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**

**(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**

**(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.'**

37. The same principles were restated in **Sawe v Republic Criminal Appeal No. Case No. 2 of 2002**, where the Court of Appeal stated thus:-

**“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”**

38. The circumstances relied on by the prosecution revolves around two issues: the sour relations between the accused and their sister in law which provided a possible motive for the killing and the conduct of the accused prior, during and after the killing of the deceased. Evidence in respect of the relations that existed between the accused and Ruto and his deceased wife came from Ruto(PW14), his cousin Kimetto(PW1) and the three accused in their defence, as well as their mother(DW4). I will therefore sequentially set out the evidence of the prosecution and the defence testimonies of the accused in order to analyse them together on the question of the alleged sour relationships.

39. PW14 (Ruto) told the court that he married his first wife Joan Chelagat in 2001 and separated in 2006. He narrated various incidences that led to their separation. Ruto said that he started a relationship with Metrine in 2006 and started living together in 2009 in his house in Langata. His wife Joan however brought trouble and it was then that he rented a house at KMA South C and moved Metrine there. Joan remained in the Langata house with his sisters whom he later moved to KMA and rented out the Langata house.

40. Ruto testified that in June 2011, while he was out of the country, he learnt that there was a problem between his wife Metrine and his sisters. Metrine was no longer comfortable living with them as they disrespected her. He said that he then rented a house for Priscilla (1<sup>st</sup> Accused) and Cosy (2<sup>nd</sup> Accused) while Josphine (3<sup>rd</sup> accused) remained with Metrine. Around the same time, he discovered that Priscilla had given his laptop to Joan his former wife. He said that he was angered by the fact that his sisters had refused to respect him and to delink their relationship with Joan whom they used to bring to the house in his absence.

41. Ruto recounted the events of 23<sup>rd</sup> July, 2011 stating that he was away in Eldoret chairing a board meeting at Kapkeben Secondary School when he received a phone call from Metrine. They did not converse but he overheard a scuffle in which he heard Priscilla's and Emmy's voices at the background and that Priscilla was trying to grab the phone from Metrine then the phone went off. He tried calling Josephine but he could not reach her until evening when she told him that she was at Stephen's(PW1) shop. He said that Josephine told him that there was no one in their house and that she did not find the key in the bucket where she had left it. Ruto said that he insisted that she goes back to the house and that when she went back with Stephen, she picked the key and gave it to Stephen to open the door. They later saw Metrine's body and informed him.

42. Ruto further stated that he travelled back to Nairobi from Eldoret on 24<sup>th</sup> July, 2011 and he was initially treated as a suspect by the police. He wrote his statement and accompanied the police to the house where the police recovered some clothing items, a masai rungu(MFI 11) and kitchen knife with a black handle(MFI 12). That evening, he accompanied Emmy to their house at Crescent Road and that when they got there she started crying and told him that she would tell him everything. He said that while inside the house, he saw clothes soaked in a bucket and the water appeared red. On asking her why they had killed his wife, she just cried.

43. He further alleged that he provided a car and a driver to drive the accused home but they failed to attend the burial even though they were at home. After the burial they returned to Nairobi but avoided him. He said that they were arrested on 23<sup>rd</sup> August, 2011. Finally, Ruto stated that the three accused had admitted to him that they killed his wife and that they had asked for his forgiveness. He said that in January, 2015 they sent a counsellor from prison called Peter to talk to him. He identified the phone, white Samsung(MFI13) which was recovered from a person from the department of defence(DOD) as the one he had bought for his wife.

44. Stephen Maritim Kimetto(PW1) told the court that he was aware that the three accused had previously lived with their brother Ruto under whose care they were, and that he enjoyed a good relationship with them all as they were the children of his aunt. He said he did not know why the 1<sup>st</sup> and 2<sup>nd</sup> accused moved out of Ruto's house.

### **The 1<sup>st</sup> Accused's defence**

45. Priscilla Cheroni Chebet (DW1) gave sworn testimony in her defence. She stated that she had just graduated from UON with a degree in sociology and psychology and she was living with the 2nd accused at Langton estate State house road courtesy of their brother Ruto. She disputed that she had ever lived with the deceased under one roof stating that she first lived with her sister Hellen Cheptoo in Upper hill from January 2007 and in July 2009 moved to her brother Ruto's house in Langata where she lived with his wife Joan Chelagat up to April 2011 when she and the 2nd accused moved to Langton Estate. She said that she had never lived with the deceased and that she started visiting the deceased's house at KMA in 2010 and that the relationship between her and the deceased was cordial.

46. Priscilla disputed the allegation by Ruto that she was disrespectful to Metrine and insisted that they had a cordial relationship. She admitted that she removed a laptop from Ruto's house which she gave to his first wife Joan Chelagat after requesting the deceased. She stated that the laptop belonged to Ruto's 1<sup>st</sup> wife and added that her (Priscilla's) relationship with her brother Ruto had not been good. She described him as short tempered and said that he would lock them out occasionally but that she persevered because he paid her fees. In cross examination, Priscilla insisted that Ruto and the deceased were not yet married. She however clarified that Ruto paid dowry and was allowed to bury her in their home.

## **The 2<sup>nd</sup> accused's defence**

47. Emmy Chepkosgei also gave a sworn statement in her defence. She said that she was the 6<sup>th</sup> born in her family of 8. She moved to Nairobi in January 2007 to live with her elder sister Hellen Cheptoo. Between July 2009 and April 2011 they lived in Ruto's Langata house and in April 2011 moved with the 1<sup>st</sup> accused to Langton estate while 3<sup>rd</sup> accused went to live in KMA with Ruto and the deceased. She started visiting the deceased's house in KMA in 2010 especially on Sundays and her relationship with the deceased was cordial.

48. On the events of the material date 23<sup>rd</sup> July, 2011, Emmy stated that she woke up at 8.00am and did some gardening in the morning. Josephine visited them at 10.30 and found them cleaning the compound. They had lunch together and in the evening they escorted her to the bus stop. She stated that she did not go to KMA at any point on that day. She learnt of Metrine's death through a phone call made to Priscilla by their cousin Kimetto (PW1). Thereafter they stayed together with the 1<sup>st</sup> accused until the time of the burial. They were arrested on 23<sup>rd</sup> August, 2011.

49. The 2<sup>nd</sup> accused narrated how they were arrested on 28<sup>th</sup> August 2011 from their house at Langton at around 5am. With respect to the confession which she was alleged to have made, she adopted her denial and testimony that she had given in the trial within trial. Emmy testified that there was no evidence that she was at KMA on 23<sup>rd</sup> July, 2011 as there was no call data to show she was there. She denied that there was any recovery of blood stained clothes from their house in Langton. With respect to the family relationships, Emmy said she had no grudge against her brother Ruto or her sister-in-law Metrine. In cross examination, Emmy stated that she came to know about the relationship between Ruto and Metrine in 2008. She denied that she had admitted in her statement that the relationship between herself and Metrine had deteriorated.

## **3<sup>rd</sup> accused's defence**

50. Josephine Chebet stated in her sworn statement that prior to her arrest, she was pursuing a diploma in criminology and social order at the University of Nairobi(UON). She said she wrote a statement on 24<sup>th</sup> July, 2011 which she wished to adopt in her evidence, (DW3 Exhibit No.1). She testified that no one saw her anywhere near the scene on 23<sup>rd</sup> July, 2011, that there was no forensic DNA that connected her to the murder, and neither had she made a confession statement. She testified that she spent the day at her sisters' house in Langton and that on going back in the evening, she did not find Metrine. Josephine's narration of the events thereafter mirrored the testimony of Kimetto(PW1).

51. Josephine denied that Ruto called her on the material date. She further stated that the relationship between her and Metrine was cordial and she could not have harmed her. On her relationship with Ruto, Josephine said that Ruto was harsh and would sometimes punish or beat her. She denied that they had sent an emissary to Ruto to seek his forgiveness but only to beg him to take their mother to hospital.

52. The three accused called their mother Jane Chebet Chumo as a defence witness and she testified as DW4. She told the court that she had 8 children and confirmed that PW14 and all 3 accused were her children. She stated that Ruto was her only son and was the one who supported the family and educated his sisters including all 3 accused. She said that Joan was his wife although they no longer lived together. She stated that she enjoyed a good relationship with Joan whom she pointed out in court stating that Joan had escorted her to court that day. DW4 was evasive on when she came to know about her son's relationship with Metrine insisting that she never met her until she was taken home for burial. In cross examination, DW4 said that Paul and her three daughters loved one another and that if there were any quarrels among them in Nairobi, she wouldn't know. In re-examination, however she said that the accused had informed her that Paul used to beat them but that she did not pursue the issue as she lived in Eldoret while they lived in Nairobi.

53. I considered the testimony of Ruto PW14 on the relationship between his wife Metrine and his sisters. It was apparent that the relationship was not good at all. Ruto narrated several incidences of discord which, according to his testimony, made him move the 1<sup>st</sup> and 2<sup>nd</sup> accused from his house and to rent for them a house at Langton crescent on state house road. I believed the testimony of Ruto in this respect. He was a candid witness and came through as a pained man who was keen to play the role of guardian to his younger siblings but at the same time protect his wife. Ruto's testimony on this aspect of their relationship was not controverted by the 1<sup>st</sup> and 2<sup>nd</sup> accused who only stated in their defence that they enjoyed a good relationship with the deceased.

54. It was evident to the court from the testimonies of various witnesses that the deceased's relationship with Ruto had faced opposition from his family as well as other known and unknown persons. In his testimony, Ruto introduced his first wife into the case. He told the court that he was married to one Joan Chelagat whom he had divorced and married Metrine. He further stated that he was unhappy with the accused because they had refused to cut links with his first wife and would invite her to his house in his absence. He told of an incident where Priscilla gave away his laptop to Joan. Priscilla on her part admitted to having given away the laptop but argued that the lap top belonged to Joan.

55. The deceased's mother Molie Imali(PW4) testified that sometimes in 2004, she received a call from a private number at about 4am. The unknown caller told her that her daughter Metrine had been killed for snatching somebody's husband. In panic, she called her daughter who informed her that she was well. Later she called her again and informed her what the caller had said. It was then that she learnt of the relationship between Metrine and Ruto whom Metrine confirmed was married. Later she received another call in 2007 telling her to tell her daughter to stop moving with her husband. This time the caller introduced herself as Mrs. Ruto. PW 4 said that she questioned her daughter who then informed her that Ruto was her boyfriend and that he had separated from his wife. PW4 further said that Metrine and Ruto went home in 2009 and told them that they were married and that Ruto indicated that he was in the process of divorcing his wife.

56. There was no call data to support PW4's allegation of threats against her daughter by an unknown caller. The Police seemed not to have followed the lead to establish whether the caller who identified herself as Mrs. Ruto was Joan or someone else. The matter seems to have rested with PW4 raising her concerns with her daughter when she also advised her to leave the married man alone. The court however, believed the testimony of PW4 that she did receive the threatening calls. PW4 was found to be a truthful witness.

57. Joan's name also came up in the testimony of DW4 Jane Chumo the accused's mother. In her testimony, DW4 recognised Joan as Paul's wife while stating that she had never met Metrine whom she only got to know after her death when the body was taken home for burial. The court formed the opinion that DW4 was not entirely truthful when she stated that she did not know Metrine. She initially denied knowledge of Ruto's relationship with Metrine and also denied any knowledge of a deteriorating relationship between her daughters and her son. Upon being cross examined, she admitted that her daughters had told her that Paul was harsh on them. She said that she did not wish to intervene as she lived in Eldoret. Her demeanor and insistence that Joan was Ruto's wife betrayed her unstated negative view of the relationship between Metrine and her son. She insisted that she was not his wife and that they were only allowed to bury her after paying dowry.

58. Considered together, the evidence of PW14 and that of the defence leads me to the conclusion that there were bitter feelings between the Accused and the deceased on the one hand and a bad relationship between the Accused and their brother whom they accused of high handedness on the other. The later bad relationship was still attributable to the deceased which compounded the Accused's bitterness against her. It is my conclusion that the relationship was so toxic that it provided a motive for the Accused to harm the deceased.

59. It appears from the evidence that Joan Chelagat, Ruto's 1<sup>st</sup> wife had a role in souring relationships in the Ruto home. In his testimony, Ruto detailed the struggles he had had with his 1<sup>st</sup> wife Joan and said that he had warned his sisters against entertaining Joan in his home but they continued inviting her in his absence. Priscilla admitted in her defence that she asked Josephine who lived in the house to get her a laptop which she passed on to Joan. She defended her action by saying that the laptop belonged to Joan. Although the prosecution did not pursue this angle, Joan's invisible hand was discernible in the deteriorating relationship between the Accused and the deceased. Might she have used the Accused to settle her marital issues with PW14 and the deceased? From the evidence of PW4, it is surprising that the investigators did not proceed to find out who had called PW4 with the threatening messages foretelling of Metrine's demise. It is my view that Joan Chelagat and DW4 ought to have been treated as persons of interest in the investigation.

### **Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused were present at the scene**

60. The Defence team submitted that no one saw the three accused attack the deceased or being present at the deceased's house when she met her death. They also submitted that each of the accused had a credible alibi that they were at the 1<sup>st</sup> and 2<sup>nd</sup> accused's house at Langton Crescent, state house road.

61. PW 3 Kilele Musyoki David, testified that he lived in the extension to house No. 30 as the deceased's tenant. He knew the deceased, her husband Ruto and the 3<sup>rd</sup> accused Josephine (who was referred to as 'sister') as the regular occupants of the main house. His testimony was that he conversed with the 3<sup>rd</sup> accused that Saturday morning at around 9.00am when the 3<sup>rd</sup> accused asked him what time he would be back and he responded that it would depend on the time his family would arrive from Malindi. PW3 said that he came back at about 10.45pm and he met Josephine at the parking. That Josephine asked him whether he had seen Metrine that day and he responded that he hadn't. He entered his house with his wife and baby and shortly thereafter, he heard commotion outside followed by screams that there was a body inside Ruto's house. He came to learn that it was Metrine. PW3 did not see the 1<sup>st</sup> or 2<sup>nd</sup> Accused at KMA that day.

62. The other witnesses who testified on the presence of the accused at the KMA estate on the material date were Ruto(PW14), and Kimetto (PW1). Ruto's evidence was that he called his wife Metrine at around 3pm and when she answered the phone, he overheard a scuffle in which the voice of the 1<sup>st</sup> Accused came through. Thereafter, the phone went silent and he was unable to communicate with his wife again. Ruto concluded that the scuffle is what turned out to be the fatal attack on his wife Metrine. Kimetto on the other hand testified that the 3<sup>rd</sup> Accused went to his house in the evening around 7pm to inquire about the whereabouts of the deceased and that he accompanied her to the deceased's house and later discovered the body in one of the bedrooms.

63. The prosecution evidence must be considered against the alibi raised by the accused. I have already set out the said alibi *in extenso*. Ruto's testimony that he called his wife and found her in distress was not backed up by data from the mobile service provider to confirm not just his call but also the location of the accused on the material day. His testimony was however consistent that he had tried to communicate with his wife that afternoon to no avail. His testimony also that he overheard Priscilla's and Emmy's voices at the background was believable. They were his younger siblings and he could not have mistaken their voices. Kimetto's evidence on the other hand was confined to the events of the evening after the 3<sup>rd</sup> accused Josephine checked into his house at around 7pm when she informed him that Metrine was not in the house and had not answered her calls.

64. The 1<sup>st</sup> and 2<sup>nd</sup> Accused stated that they spend the day at their residence, where they were visited by the 3<sup>rd</sup> Accused. The 3<sup>rd</sup> accused on her part said that she was on her way to school when she learnt that there were no classes and decided to detour to the 1<sup>st</sup> and 2<sup>nd</sup> Accused's place where she spent the day until evening when they escorted her to the bus stop. PW 12 Judith Chebet a friend of all the Accused and a former employee of Ruto testified that she visited the 1<sup>st</sup> and 2<sup>nd</sup> Accused's house on 23<sup>rd</sup> July 2011. That she did not find them at home and decided to visit Steve and Rugut who lived nearby. At about 1pm, the young men asked her to get for them flour from the accused's house. She went and pushed the door open and was surprised to find Josephine sleeping. She asked where the other sisters were and Josephine said that they were not there. Judith said that she observed that Josephine was not happy. Judith spent the day at the young men's place and went back to her house at Fuata Nyayo. She received a call from Priscilla the next day telling her that they would not meet that Sunday as something had happened. She learnt of Metrine's death from another girl called Tabi.

65. The evidence of Judith Chebet (PW12) demonstrates that the 1<sup>st</sup> and 2<sup>nd</sup> Accused were not at their Langton residence as they alleged. The only person who was at Langton was the 3<sup>rd</sup> Accused who was said not to be feeling well. Their alibi therefore was untrue and did not displace the prosecution evidence. Considered against PW14's evidence that he overheard the 1<sup>st</sup> Accused when he called Metrine, there's a possibility that the 1<sup>st</sup> and 2<sup>nd</sup> Accused were at the deceased's house on the material date. The evidence on the other hand supports the 1<sup>st</sup> Accused's alibi that she was at Langton Crescent between 10am and 7pm on the material date.

66. There was material corroboration on the type of injuries sustained by the deceased and detailed in the post mortem report (Exhibit 19). They accord with the description given by the 1<sup>st</sup> and 2<sup>nd</sup> Accused in their confessions. The masai rungu(Exhibit 11) and the blood stained

clothes(Exhibit1-6) recovered from the ceiling also accord with the confession statements giving them a ring of truth. Besides, there was the evidence of PW 8 Bernard Wechuli Wafula. PW 8 testified that he was on his way to board a bus to DOD when he heard a phone ring inside a dust bin near KICC. He picked the phone and after a day or two inserted his sim card into it. Even though no call data was produced, PW 8's evidence tallies with the confession of the 1<sup>st</sup> and 2<sup>nd</sup> accused that they threw the phone into a dustbin near KICC. This further makes the confession credible or as it were gives it a ring of truth. The phone Samsung Duos IMEI 355409049(Exhibit 18) was identified by PW14 as the one he had bought for the deceased.

67. The evidence analysed above though circumstantial corroborate the confession of the 1<sup>st</sup> and 2<sup>nd</sup> Accused. Taken together, they prove beyond reasonable doubt that it was the 1<sup>st</sup> and 2<sup>nd</sup> Accused who fought and fatally injured the deceased. They stabbed her, manually strangled her and clobbered her head.

#### **Whether or not the accused had *mens rea*.**

68. A charge of murder cannot be sustained unless the prosecution proves malice aforethought on the part of the accused. Under **Section 206 of the Penal Code**, 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.

69. In **Nzuki v Republic [1993] KLR 171**, the Court of Appeal stated that malice aforethought can be inferred from the acts of an accused person. The Court elaborated as follows:-

**“Malice aforethought” is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result.....”**

70. In the present case, I have agonized on whether or not the accused had intention to end the life of their sister in law. I have already made a finding that contrary to their defences that they enjoyed a cordial relationship with her, they never really acknowledged her as their sister in law preferring instead their brother's 1<sup>st</sup> wife Joan with whom they had a cordial relationship. They had a deteriorating and finally toxic relationship arising out of the alleged false reports which the deceased made to their brother and guardian Ruto who in turn treated them harshly or even beat them. I have found this to be a motive for them to not only dislike her but to harm her.

71. With respect to motive, **Section 9(3) of the Penal Code** provides that **“unless otherwise expressly declared by law, 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”**. Further, **Section 8(1) of the Evidence Act** provides that **“Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.”** In this case, I considered motive to be a relevant factor because, other than the confession statements, the rest of the evidence was circumstantial.

72. But did the Accused intent to kill her? In ordinary circumstances the answer to this question would have been a 'No' for it is not usually uncommon for in - laws to have a less than cordial relationship or differ over family issues. I have however, considered that the 1<sup>st</sup> and 2<sup>nd</sup> Accused left their residence at Langton Crescent, State House Road to seek out the deceased in her home at KMA Estate South C to fight her, let themselves into her house, waited for her to arrive home and attacked her viciously. I have also considered the type of weapons used. They stabbed her with a kitchen knife(Exhibit12) and hit her head repeatedly with a masai rungu(Exhibit11), wrapped her head in a mosquito net and left her dead. According to the pathologist(PW16) the body had marks of torture. All these actions bring this case within **section 206 of the Penal Code**. They intended to kill or cause her harm and they did not care about the consequences of their action.

73. With respect to the 3<sup>rd</sup> Accused, I have already found that the prosecution did not displace her alibi. In fact, PW 12 testified that she found her at at the 1<sup>st</sup> and 2<sup>nd</sup> accused's house in Langton Estate at about 1pm on the material date. Indeed, the 1st and 2<sup>nd</sup> Accused exonerated her in their confession statements. They stated that they had left her in their house sleeping as she was not well. I have however considered the 3<sup>rd</sup> Accused's conduct on the material date. She was keen to know the time that the tenant Kilele David (PW3) would be back to the house although there was no evidence that she was required to let him in since his house was detached. PW3 stated that she was usually quiet and they did not converse much. It was also curious that when he returned in the evening, he found her outside at the parking and she inquired of him whether he had spoken to Metrine to which he answered no and asked her whether there was something that he needed to discuss with her.

74. The testimony of Kimetto shows that the 3<sup>rd</sup> accused acted strangely that evening. She first went to his house around 7pm and informed him that Metrine had not shown up at home and was not responding to her calls. They went with him to the house. Initially, she pretended not to know where the keys were. She later picked the keys and they opened the outer door. It is my deduction that she may not have been physically present but that she had knowledge of Metrine's death before the door was broken by the police and her body discovered in the

locked bedroom. It is also telling that she remained at her sisters' house the whole day only to end up in Kimeto's house in the evening ostensibly to look for Metrine. Her conduct shows that she was covering up for the 1<sup>st</sup> and 2<sup>nd</sup> accused. Indeed, the evidence raises deep suspicion in the mind of the court that she was an accessory to the heinous crime. The evidence however does not meet the threshold of proof beyond reasonable doubt. As stated in **Sawe v. Republic(supra)**

**‘The suspicion may be strong but this is a game with clear rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt. ....suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.’**

I therefore find the evidence against the 3<sup>rd</sup> Accused insufficient. I grant her the benefit of doubt as required by law.

75. In the final analysis, I find that the prosecution has proved beyond reasonable doubt that the 1<sup>st</sup> and 2<sup>nd</sup> Accused caused the death of the deceased Metrine Litsusa Khavai with malice aforethought. The 1<sup>st</sup> and 2<sup>nd</sup> Accused are convicted of the charge of murder contrary to section 203 of the Penal Code. The 3<sup>rd</sup> Accused is acquitted for lack of sufficient evidence. She is set at liberty forthwith unless otherwise lawfully held.

76. As I end this judgement, I acknowledge with regret the delay in the conclusion of this matter which was caused by factors beyond the control of the court. I thank the parties for their patience.

Orders accordingly.

**Judgment delivered, dated and signed this 29<sup>th</sup> day of May, 2020.**

.....

**R. LAGAT KORIR**

**JUDGE**

**Due to COVID – 19 pandemic, this Judgement has been delivered in the presence of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused (virtually linked at Langata Women GK Prison), their respective counsel M/S. S. Nyaberi, Mr. S.Wamwayi, and Mr. Katwa Kigen, (all virtually linked); Mr.Juma (Court Assistant), and in the absence of Mr. Okeyo Prosecution Counsel who failed to join the link.**