



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 20 OF 2016 [MURDER]**

**CORAM: HON. R.E.ABURILI J**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH OWINO OTIENO.....ACCUSED**

**JUDGMENT**

**INTRODUCTION**

1. Vide Information dated 21<sup>st</sup> November 2016, signed by Ms Maurine Odumba Prosecution Counsel, Siaya, for the Director of Public Prosecutions, the accused person herein **JOSEPH OWINO OTIENO** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the charge are that on or about the night of 1/11/2016 and the 2/11/2016, at Nyandori Village, Mahola Sublocation, West Alego Location within Siaya County, he murdered one Roselyne Auma. Swamba. The accused pleaded not guilty to the charge on 29<sup>th</sup> November, 2016 before Hon James Aaron Makau J.

2. The prosecution called eleven witnesses in support of their case which is summarised herein below. Placed on his defence, the accused person gave evidence on oath and called no witness. The hearing and determination of this case, from the trial court record, was delayed to non-availability of counsel to represent the accused person. The first two counsel had to be discharged by the court for non-responsiveness.

**THE PROSECUTION'S CASE**

3. **PW1, Joseph Ochieng Juma**, a motorcycle and bicycle repairer, testified that on 2<sup>nd</sup> November 2016 at around 6.05 am, he was going to fetch water from the river when he noticed the body of Roselyne Auma whom he knew very well, lying beside the road prompting him to stop his bicycle and check whether she was alive because as he knew her very well as she used to cook chapatti and beans. Upon moving closer, he noticed that she was dead and was shocked because he had met her the previous evening. Mr. Juma further testified that the deceased was lying facing up and holding a phone in her right hand and that he rushed back to go and call the deceased's mother who is his sister in law with whom they were neighbours at home. Before reaching home, he met the deceased's mother who asked him whether he had seen her daughter the deceased and he took to the scene and on her seeing the body of her daughter, she screamed alerting people who went to the scene. The police arrived later and took the deceased's body to Siaya mortuary.

4. PW1 stated that he did not meet anybody when he left the scene of crime upon his first discovery of the deceased's body. This witness was not cross examined.

5. **PW2 Paul Ochieng Akwadha** testified that on the 2/11/2016 at or about 6.00 am, he was at Siaya Stage when one Ben Oyuya informed him that a lady had been murdered at Mahola Ulawe sub-location. He attempted to call the Assistant Chief but did not find him after which he went to the scene and found that the deceased, Nyar Char, whom he knew as she was married to his village mate, had been murdered. He proceeded to the Police Station at Mwer Chief's Camp where after waiting for a while the OCS came with 2 vehicles with officers and told him to escort them to the crime scene which he did. He added that the deceased's body was carried to the morgue and that the police searched for murder weapons but never found any. He stated that they then started looking for a suspect who could have murdered the deceased and people started saying that the deceased was in the company of a person the evening before she was found dead. Mr. Akwadha testified that the deceased's mother stated that the deceased had been in the company of her [deceased's] husband who had come home to pick her but she refused.

6. PW2 further testified that the deceased's husband was Ooko whom he had known from his childhood and whom he identified in court. He reiterated that he assisted the OCS and his officers to look for the suspect, Ooko and that the following day as he was at the Stage, one Samuel Omondi told him that Ooko whom the police were looking for had been seen at the Stage. Samuel took him to where Ooko was and he found him and spoke to him and questioned him as to where he was yet he being looked for. That he persuaded Ooko and carried him on a motorcycle and took him to the police station after giving him the option of going to the village. The witness later recorded his statement at

Siaya Police Station.

7. In cross-examination by Mr. Ogonda Advocate for the accused person, PW2 stated that he was told that the suspect was seen at the Siaya Stage and that he saw him walking around looking apprehensive. He stated that when he told the accused that he had to go to the village or police station, Ooko complied and accompanied him to the police station. He stated that he explained to Ooko the reason as to why he was taking him to the police. He stated that Ooko initially tried to resist getting onto my motorcycle but that at the Police Station, Ooko was very cooperative.

8. He stated that he went to the scene of crime sometime between 8 - 9.00 am before the police arrived and that the deceased's body was collected from the scene in his presence at around 11.00 am. He stated that he knew the deceased very well and that he knew her parents too.

9. **PW3, Millicent Anyango Swamba** testified that on the 1/11/2016 she was at home with the deceased who was her sister when around 6.30 pm the accused person Joseph Owino her late sister's husband called her sister and she [the deceased] went to meet him. She stated that they never saw the deceased alive again and that the following morning at 6.00 am, a relative, Ochiel, went and informed them that he had found her sister dead on the road after which they went and she saw the deceased's body with a cut on the deceased's mouth and further that as the deceased was lifted to be placed in the police vehicle, she saw stab wounds on her stomach.

10. PW3 further testified that the deceased and the accused were married and had not been living in peace as they had marital issues. She further identified the deceased's phone, a black Nokia on which she claimed that the deceased received a call from the accused.

11. In cross-examination by Mr. Ogonda counsel for the accused, PW3 stated that the phone that the deceased was using belonged to their mother and further that the deceased had been at home for the past week having disagreed with the accused, her husband. Ms. Swamba further stated that the accused would normally call the deceased with whom they could talk after which the deceased returned home.

12. Ms. Swamba further stated that the third time the accused called the deceased, she never returned home and subsequently her sister was found dead near their home. She further stated that she never heard any screams that evening from the direction where her sister was found dead and further that it was the phone conversation that the deceased received, that made her aware that the deceased and accused were going to meet but she could not tell if they met. She further stated that she saw injuries on the deceased's mouth and stab wounds on her abdomen. She was firm that she was sure it was the accused who killed her sister and further that the accused person ran away after killing her sister as she tried to reach him on phone but it was off. She stated that it was not possible that the deceased was killed by any other person other than the accused person. She stated further that when she went to where the deceased's body lay, she was in the company of her mother and the person who brought them the information of her sister's demise.

13. **PW4, Teresia Akinyi Swamba**, the deceased's mother testified that on the 1/11/2016 a Tuesday, she left her home at 2pm for the market and returned very late in the evening and that she left the deceased and PW3, Millicent Anyango at home. She stated that she returned at about 8.00 pm and found only PW3 Millicent Swamba at home, and not the deceased and that upon inquiry, Millicent informed her that Roselyne had been called by Ooko. She then waited for Roselyne but the latter never returned and that she even went to the road where the deceased frequented but never found her so she returned home. She asked Millicent as to who had called Roselyne and Millicent reiterated that it was Ooko who had called her. She stated that she slept worried because Roselyne never returned home and the following morning, she started walking, when her brother in law Joseph Ochiel –PW1 called her and told her to go and see something. When she went, she found her daughter lying down on the road near her home. The village elder called the Assistant Chief and the police were called to the scene. She further stated that it was Roselyne's husband who called her but she never returned so she was sure he was the one who killed her. She identified the deceased's husband as the man in the dock, the accused.

14. In cross-examination by Mr. Ogonda Advocate for the accused, PW4 testified that when she returned home from the market, she did not find her daughter Roselyne and was informed that she had gone to meet her husband. She reiterated that she found her daughter dead and that she did not see her being killed or hear her screams. She further stated that a neighbour had also died so there were noises but that she never heard her daughter's screams. She maintained that she was sure that the person who called her daughter, the deceased, was the person who killed her.

15. **PW5, George Ogola Nyawando** a security officer at Siaya Institute testified that on the 2/11/2016 at 6.00 am he left work on his bicycle to his home and arrived at about 7.30 am when he saw people gathered on the road (path) and when he went to the scene, he found the deceased, who was his niece, lying on the ground. He left the scene and as he was going to his home, a lady got out of her house saying, "our daughter cannot be killed and we ignore it, let us go to Kochere." He stated that other people started saying that they should go to Kochere and if they find the suspect they should administer mob injustice to him prompting him to call the police from Mwer Administration Police Camp who informed him that the police from Siaya were proceeding to the scene. That when he returned to the scene, he found police at the scene whom he accompanied to the deceased's home and also to the home of one Elizabeth who was said to have seen the deceased in the evening in the company of the accused. Later the body was taken to Siaya. He testified that he did not know the person who killed the deceased but that he knew the accused whom he regarded as his son in law because he had married the deceased who was his [PW5's] niece. PW5 went with the police to the accused person's home but they never traced any weapon. The witness was never cross examined.

16. **PW6, Benta Adhiambo Oduor** testified that on the 2/11/2016 she was at her home when at 7.00 am she was called as a village elder to go and view a dead body which she did. She stated that the body was about ½ a kilometer from her house and it was that of a dead lady lying on the ground. She identified the deceased as Roselyne Auma and further testified that she saw a cut on the mouth of the deceased. The witness was never cross examined.

17. **PW7, Dr. Collins Otieno Oginga**, a Senior Medical Officer at Siaya County Referral Hospital testified and produced a postmortem form prepared by Dr. Belinda Omondi who was in Cuba for further studies, as Pexhibit 2. Dr. Oginga testified that the postmortem form for Roselyne Auma Swamba was dated 11/11/2016.

18. He gave evidence on behalf of Dr. Belinda and stated that from the postmortem report, on examination of the body, Dr. Belinda found the

body was of a female African aged 24 years with good nutritional status, height of 5'8." Externally, there was a visible cut wound on the shin, a stab wound at the back of the neck, stab wound penetrating on the left breast, 5<sup>th</sup> and 6<sup>th</sup> intercostal space penetrating in the chest cavity and that the left lung was collapsed in the left chest. Intrnally, Dr Belinda found presence of pneumothorax and haemothorax (air and blood in the chest cavity), 200 mls of blood, fracture of 4<sup>th</sup> and 6<sup>th</sup> rib left side of chest. He stated that Dr. Belinda concluded that the cause of death was due to haemopneumothorax as a result of penetrating stab wound to the chest and that the injuries noted were inflicted by a sharp object.

19. In cross-examination by Mr. Ogonda advocate for the accused person, Dr. Oginga stated that the postmortem was carried out on the 11/11/2016 whereas the death was said to have occurred between the 1<sup>st</sup> and 2<sup>nd</sup> Nov. 2016. Dr. Oginga further testified that rigor mortis, a state of stiffness, sets in a dead body after 36 hours of death and that it is decomposition. Dr. Oginga further testified that haemopneumothorax could be treated and that had the patient been taken to hospital immediately she would have survived.

20. In re-examination, Dr. Oginga stated that the immediate cause of death was haemopneumothorax not failure to take the patient to hospital but that if acted upon urgently, the patient would survive.

21. **PW8, Martin Wekesa** from Safaricom Headquarters, Westlands Nairobi testified that he had worked with Safaricom for 3 years and his duty was to analyze data on call records and MPESA transactions. He stated that in the instant case, Safaricom Ltd received a requisition letter from OC DCIO Siaya County dated 15/11/2016 in respect of call data for mobile number **0710323270** and **0707511404**. He further testified that from Safaricom records, the phone **0707511404** was registered in the name of Anjeline Onyala using ID/No. 2786436.

22. Mr. Wekesa further testified that the request received was to ascertain whether the phone number **0707511404** communicated with **0710323270** between 1<sup>st</sup> Nov. 2016 to 15<sup>th</sup> Nov. 2016. It was Mr. Wekesa's testimony that the call data indicated in the aforementioned period there was communication three times, between the two mobile phones, on 1/11/2016 at 9.55.04 hours, at 10.08.28 hours and 10.08.32 hours. He produced call data for mobile No. 0707511404 as Pexhibit 1 (a) and the Certificate of electronic evidence as Pexhibit 1(b) while the letter from DCIO Siaya requesting for call data analysis was produced as Pexhibit 1(c).

23. In cross-examination, Mr. Wekesa stated that according to the telephone data, he analyzed 0707511404 and 0710323270. He stated that Phone No. 0707511404 was registered in the name of Anjeline Onyala whereas phone No. 0710323270 was not registered. He further testified that he could not ascertain ownership of mobile phone 0710323270 but that he was able to tell where the communication was taking place from, from Rabar where 0707511404 was being called from.

24. **PW9, George Ochieng Swamba** testified that he knew the deceased who was his sister and that on the 2/11/2016, he received information early in the morning, while he was in Kisumu, that she was dead. That on the 11/11/2016 at about 3 pm he was at Siaya Mortuary where he identified the body of the deceased to the Doctor who performed an autopsy on her.

25. **PW10 No. 48210 Sgt Maurice Mang'oli** attached to DCI Siaya sub-county testified that on the 2/11/2016 at about 8.00am, former DCIO Mr. Mwangela instructed him to accompany the now retired OCS to the scene of murder which was reported at Mwer area. Sergeant Mang'oli testified that he accompanied the OCS and PC Wamalwa of Scenes of Crime to the scene and found the deceased lying along a foot path with multiple injuries on her body. Sergeant Mang'oli noted that the deceased had injuries on her left ribs, left hand and at the back of the neck.

26. Sergeant Mang'oli further testified that the scene was photographed, the sketch plan drawn and they proceeded to the deceased's parents' home about 100 metres away from the scene where they met the deceased's sister who told them that on the night of 1<sup>st</sup> and 2<sup>nd</sup> Nov. 2016 at about 6.30 pm, the deceased received a call from phone number 0710323270, through her mother's phone, from the accused person, the husband to the deceased.

27. PW 10 further testified that the deceased's sister informed them that she knew the number which the accused was using to call her sister so she handed over the phone to the deceased after which the deceased left to meet the accused person but she never returned. Sergeant Mang'oli testified that the deceased's sister informed them that when she sent a message to her sister, there was no response.

28. That at the scene, they were shown where the accused was standing with the deceased and were by passed by one of the witnesses in this case. Sergeant Mang'oli further testified that that evening as they took the body of the deceased back to Siaya, they decided to pass by the home of the accused person but they did not trace him. They then left the body of the deceased at Siaya Mortuary and returned to the police station.

29. Sergeant Mang'oli further testified that he then located the accused person's number and found that he was at Ndere area but after a short while, that number, **0710323270**, went off but that the following morning of 3/11/2016, the accused was arrested in Siaya town by his village elder and escorted to Siaya Police Station and when he checked the accused's phone, he found that he had changed the line prompting him to write the two numbers to Safaricom Liaison Office to indicate if there was any communication between the two phone numbers.

30. The witness further testified that he confirmed from Safaricom Liaison Officer that there was communication between the two numbers. He further testified that he found the deceased holding in her hand a black Nokia phone with the number **0707511404**. He produced the Nokia Phone with Simcard **0707511404 Imei No. 358781062172385** as **Pexhibit 2**.

31. In cross-examination by Mr. Ogonda advocate for the accused person, Sergeant Mang'oli testified that the body of the deceased was recovered about 100 meters from her home. He stated that nobody told him that they heard noises from the scene but that there was telecommunication between phone numbers 0707511404 and 0710323270.

32. Sergeant Mang'oli further stated that he wrote to Safaricom but they could not tell the registered owner of 0707511404 but that they later

located the later number at Ndere. He stated that he did not arrest the accused person however, the accused was arrested by the village elder. Sergeant Mang'oli further testified that a witness, Elizabeth Auma Otieno, told him that he bypassed the accused and deceased standing on the path. He stated that when the accused was arrested, he was searched and a phone recovered and inside the phone was an Airtel simcard but that he had a Safaricom line which he was communicating with the deceased. Sergeant Mang'oli further testified that he did not recover the simcard for telephone no. 0710323270. He stated that the reason why the accused was arrested was because he was suspected that he communicated with the deceased last, who went to meet him but she never returned alive.

33. In re-examination, Sergeant Mang'oli stated that they found the link between the deceased and the accused which was phone numbers 0710323270 belonging to the accused person and 0707511404 which the deceased had and used to communicate with the accused.

34. **PW11 Elizabeth Auma Otieno** from Ulaw Kolao sub-location testified that she ran a mandazi kiosk and that she knew the deceased Roselyne Auma Swamba as a villager for two years. The witness further testified that on the 1/11/2016 she was returning from buying paraffin at Mwere trading centre at around 8pm when it was dark and that on the way, she found two people standing on the road. She greeted them in Dholuo but they did not respond so she proceeded on. She stated that the following morning she woke up and went to the farm when she heard screams and heard that Roselyne had died. She stated that she did not know how the deceased died or who killed her.

35. In cross-examination, PW11 stated that it was very dark that night and so she could not recognize anyone.

### **DEFENCE CASE**

36. At the close of the prosecution's case, the accused person gave a sworn statement of defence and stated that he was Joseph Owino Otieno and that he hailed from Kodiene sub-location and was a bicycle repairer. He further testified that he knew the deceased Roselyne Auma Swamba who was his wife for the past four years. He stated that on the night of 1<sup>st</sup> and 2<sup>nd</sup> November 2016 he was at his home and that on the morning of 2/11/2016 he was coming from his home to Siaya. He further testified that his wife was not at home as she had gone to visit her parents in the month of October 2016 on the 15/10/2016.

37. Mr. Owino Otieno further testified that when he reached at the bodaboda stage where he worked, he was surprised to be arrested by two bodaboda men who told him that they had two issues: heading downwards or to go to the police.

38. The accused stated that when he inquired from them as to why they were arresting him, they told him that he knew at the police station. He stated that he went with them to the police station where he was not told anything and he was subsequently held in the police cells for 29 days and later was told that he had killed his wife which he denied. He stated that the police recovered an ITEL Mobile phone from him, that was produced as Exhibit No. 3 which had Airtel line No. 0770599345. He further testified that other than being told of his wife's death at the police station, nobody else told him of her death.

39. He further testified that he did not call his wife at all using any other line and that he was last with his wife on 15/10/2016, when she left for her home. He further testified that he and his wife had no conflict prior to her leaving for her home where she visited her parents which was normal. He further testified that as he stood before court he did not know who killed his wife and that he did not kill his wife.

40. In cross-examination by the prosecution counsel Mr. Okachi, the accused person stated that the deceased was his wife and that they had one school going child aged 7 years old with whom the deceased went with to her home. He further testified that from his home to his parents in law's home was far and one had to use a vehicle.

41. He stated that during the period when the deceased was at her home, he did not have any communication with her and that she informed him that she would return after two weeks from 15/10/2016. He denied ever calling the deceased but admitted that he attempted to escape from police custody. He stated that on the 3/11/2016 he was not found at Ndere but at the Siaya Bus Stage and that he did not know whether his wife had a phone. He further testified that he never contacted his wife on phone for the 4 years they were married.

### **SUBMISSIONS**

42. The accused person's counsel Mr. Ogonda filed written submissions urging this court to find that the prosecution had not proved its case against the accused person beyond reasonable doubt and to acquit him of the offence of murder.

43. According to Mr. Ogonda, the prosecution had not met the evidence threshold for proof of the charge of murder under section 203 as read with section 204 of the Penal Code. Counsel set out the ingredients for murder which must be proved beyond reasonable doubt by the prosecution namely:

- a. The fact and the cause of death of the deceased.
- b. The fact that the said death was caused by unlawful act of omission or commission on the part of the accused person- "actus reus"
- c. That the unlawful act of omission or commission was committed with malice afore thought- "Mens rea."

44. On the fact and cause of death of the deceased, counsel submitted that the same was proved by the evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7 Dr. Collins Otieno Oginga, who produced the Post mortem report on behalf of Dr. Belinda Omondi who conducted the autopsy on the deceased body, but was away in Cuba at the time of the hearing. He submitted that PW8 and PW9 also proved the fact of death of the deceased.

45. Counsel submitted that of all the 11 witnesses called by the prosecution, none was an eye witness to the offence. He reiterated the

evidence adduced by the prosecution witnesses and contended that the only issue for consideration by this court was whether the said death was caused by unlawful act of omission or commission on the part of the accused person.

46. On the aforesaid issue, counsel submitted the prosecution case against the accused person was purely based on circumstantial evidence and reiterated that there was no eye witness produced by the prosecution to the alleged murder and the only link between the accused person and the offence is that he was the husband of the deceased and that on the evening of 1<sup>st</sup> November 2016, he allegedly called the deceased using telephone No.0710323270, which was allegedly known by PW3 to be his telephone number, and that after the deceased left to meet the accused, she did not return, and her body was discovered dead, 100 meters from her home on the following day at around 6:00a.m.

47. According to Mr Ogonda, PW9, the investigating officer stated that when the accused person was arrested, a phone was recovered from him and the phone had an ITEL line, not Safaricom line. Further, that the Liaison Officer from Safaricom testified, but did not link telephone No.0710323270 to the accused person. That the witness did not tell the Court, in whose name telephone No.0710323270 was registered and that neither did he link the telephone number the phone (ITEL make) which was recovered from the accused person, and the one produced in court. Counsel submitted that the evidence before the Court was therefore purely circumstantial. He relied on the case of **SAWE V/S REPUBLIC [2003] e KLR** where the Court of Appeal had this to say on circumstantial evidence:

***“In order to justify on circumstantial evidence, the inference of guilt, the incompatible facts must be incompatible with the inference of the accused and incapable of explanation upon any other reasonable hypothesis that of his guilt. These 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 exclusion of any other reasonable hypothesis of innocence remain with the Prosecution. It is a burden which never shifts to the party accused.”***

48. Counsel submitted that the accused person in his defence stated that the deceased was his wife and at the time of her death, she was at the home of her parents. She had been there for some time. He had not met her since she left matrimonial home upto the time of her death. He also stated that when he was arrested, he was never told why he was being arrested, and he only learnt of the death of his wife, (the deceased) at the police station. He relied on **NAIROBI HIGH COURT CRIMINAL CASE NO.11 OF 2014, REPUBLIC V/S ELIZABETH ANYANGO OJWANG, where WAKIAGA** J at page 9, paragraph 29 of his judgement stated:

***“In cases like this where the prosecution case is solely based on circumstantial evidence, it is very important for the prosecution to establish motive as one of the chains linking the accused to the crime. Where the prosecution is not able to establish a motive behind the alleged crime it assumes importance as the proof of motive on the part of the accused to commit the offence satisfies the judicial mind about the authorship of the crime. In the absence of motive the court is required to have a deepest search into the circumstantial evidence tendered so as to link the accused to the crime.”***

49. Counsel further submitted that the conduct of the accused person is inconsistent with guilt because as at the time of the death of the deceased, the accused person was at his home while the deceased was away at her parents' home and that there was no eye witness to the offence. He further submitted that when the accused person was arrested, he co-operated with the police, simply because he did not know the reason for his arrest. Counsel maintained that the evidence adduced by the prosecution in this case being purely circumstantial, cannot sustain a conviction in the case of murder. He urged the Honourable Court to acquit the accused person under Section 215 of the Criminal Procedure Code.

50. The prosecution did not submit.

#### **ANALYSIS AND DETERMINATION**

51. I have considered the evidence for the prosecution and the defence. I have also considered the submissions filed by the defence counsel. In my view the issue for consideration in this matter is whether the prosecution proved its case against the accused person beyond reasonable doubt. To sustain a conviction on a charge of murder under **Section 203** of the **Penal Code**, the prosecution is required to prove beyond reasonable doubt the following ingredients of the offence:-

**a. The fact and the cause of death of the deceased.**

**b. The fact that the said death was caused by unlawful act of omission or commission on the part of the accused person - “actus reus”.**

**c. That the said unlawful act of omission or commission was committed with malice aforethought - “mens rea.”**

52. The fact and the cause of death of the deceased was proved beyond reasonable doubt by the evidence of **PW1, PW3, PW4, PW5, PW9** and **PW10**. The cause of death was confirmed by the evidence of **PW7 DR. COLLINS OTIENO OGINGA**, who produced a postmortem form prepared by Dr. Belinda Omondi who conducted a post-mortem examination on the deceased's body.

53. The only issue is whether the said death was caused by unlawful act of omission or commission on the part of the accused person. There was no eye witness called by the prosecution to the alleged murder of the deceased and the only link between the accused and the offence is that he was allegedly the last person with the deceased prior to her death.

54. For the prosecution to sustain a conviction on circumstantial evidence the Court of Appeal in the case of **Sawe v Republic [2003]e KLR** stated:

***“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 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 shifts to the party accused.”***

55. 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 gets 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.

56. Thus, the trial court has to judge the total cumulative effect of all the proved circumstances each of which reinforces the conclusion of the guilt of the accused person and if the combined effect of such circumstances is taken to be conclusive in establishing the guilt of the accused, the conviction would be justified.

57. In **Republic – V- Michael Muriuki [2014]eKLR** the court stated:

***“In Sawe – V- Republic (2003) KLR364, the Court of Appeal held:***

***1. 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 hypotheses than that of his guilt.***

***2. Circumstantial evidence can be a basis of conviction only if here is no other existing circumstances relied on.***

***3. The burden of proving facts will justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.***

4 .....

5 .....

6 .....

***7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”***

58. In **ABANGA alias ONYANGO V REPUBLIC CR. ANO.32 OF 1990 (UR)** the Court of Appeal set out the principles applicable in order to determine whether circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (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 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 was committed by the accused and none else.”***

59. In this case the only circumstantial evidence linking the accused to the commission of the crime is the testimony of PW3, Millicent Swamba who stated that the accused called the deceased and the deceased left to go and meet him, a practice that PW3 testified had developed between the accused and the deceased, as the deceased had disagreed with her husband, the accused and that she was living at her home so he used to call her, she goes to meet him and return to her home.

60. Sergeant Mang’oli the investigations officer corroborated Ms. Swamba’s testimony when he revealed that during the search for the accused, he located the accused person’s number 0710323270 which he had, according to PW3 been using to communicate with the deceased, at Ndere area but after a short while that number was shut off. Further, Sergeant Mang’oli testified that when he checked the accused’s phone at the police station, he found that he had changed the line.

61. PW8 Martin Wekesa, a data analyst from Safaricom testified that on the 1/11/2016 there was communication three times, between the two mobile phones, No.0707511404 that was used by the deceased and belonged to her mother and 0710323270 that was being used by the accused person herein. He produced a call data showing that there was, on 1<sup>st</sup> November 2016 and prior to that date, communication between the two mobile phone numbers although the line 0710323270 was not registered.

62. **PW11 Elizabeth Auma Otieno** testified that on the 1/11/2016 she was returning from buying paraffin at Mwere trading centre at around 8pm when it was dark when she found two people standing on the road at the crime scene whom she greeted but they remained silent. Mrs. Otieno however admitted that she did not see who it was that she greeted as it was dark.

63. The accused on his part testified that the deceased was his wife and that he had not communicated with her since she left for her home in

October 15<sup>th</sup> 2016. Further, that she never had any phone which he could communicate with her and that throughout their marriage he had never called her on phone. He stated that on the night of 1<sup>st</sup> and 2<sup>nd</sup> November 2016 he was at his home which he stated was a distance away from his in laws home.

64. The evidence adduced by the prosecution in my opinion establishes without doubt that the accused was the last person with the deceased. And that he called her on her mother's mobile number 0707511404 using mobile phone number which was not registered, No. 0710323270 on the evening of 1/11/2016 and on several dates between 1<sup>st</sup> November 2016 and 15<sup>th</sup> November 2016 as per the call data produced by the Safaricom Liaison Officer as PEX1 a. PW3 was categorical and she even told her mother that the deceased had gone to meet her husband who had called her that evening as was the norm. I had the opportunity to see and hear PW3 testify and I believed that she was truthful and candid. Under Sections 111 (1) and 119 of the Evidence Act, a statutory rebuttable presumption exists. In this case it exists against the accused person. The two sections stipulate as follows.

***“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:***

***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:***

***Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”***

***“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”***

65. The accused had a rebuttable burden to explain either how the deceased whom she had called that evening using an unregistered mobile phone died or met her death; or, how he, the accused parted with the deceased. The accused did not give any explanation of how deceased died. Neither has he claimed that he left her alive. What the accused did was to deny meeting the deceased. PW3 Millicent Swamba as well as the call data records produced by PW8 Mr. Wekesa proved that the accused indeed called the deceased and as customarily as she had done in the previous occasions, the deceased went to meet up with the accused. The phone telephone line number used by the accused to call the deceased was not registered although the deceased's sister knew it very well. In my view, the accused person used a non-registered line purposely to lure the deceased to her death in the belief that he would not be traced using that line.

66. I am satisfied that the accused person lied in his defence that he spent the night of the incident at his home and that he had no contact with the deceased on the 1<sup>st</sup> or 2<sup>nd</sup> of November 2016. Having considered the evidence of PW1, 3, 4 and 8 I have no doubt that the deceased was last in the company of the accused prior to her death and that the accused did not discharge the statutory burden created under Sections 111(1) and 119 of the Evidence Act.

67. In **Ernest Abanga alias Onyango v R CR. A NO.32 of 1990(UR)**, the Court of Appeal observed:

***“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:***

***The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.”***

68. I have considered the defence by the accused person which attempted to explain facts which he was reasonably expected to be able and interested to explain. However, the explanation he gave was obviously false. I find no reason why the deceased's sister would lie that the accused used to call and speak to the deceased who was his wife and that she used to go meet him and return but on the material evening she went to meet him after a telephone conversation but she never returned alive. The accused person gave obvious falsehood that he had not seen his wife since 15/10/2016 and that he had never called his wife on phone and as such he therefore did not know how his wife met her death. That was an obvious lie. In my humble view, the lies by the accused person becomes of substantive inculpatory effect. I find that all the circumstantial evidence adduced in this case points irresistibly to the accused person's guilt beyond reasonable doubt. Accordingly, I find and hold that it was none other than the accused person herein that committed the unlawful act of killing the deceased.

69. On whether the accused had malice aforethought when he unlawfully killed the deceased, the prosecution bears the burden of establishing facts that are consistent with existence of malice aforethought on the part of the accused. The Eastern Court of Appeal in the case of **Republiv v Tumbere S/O Ochen [1945] 12 EACA63** in determining whether malice aforethought had been established, considered the following elements:

**(1) The nature of the weapon used.**

**(2) The manner in which it was used.**

**(3) The part of the body targeted.**

**(4) The nature of the injuries inflicted either a single stab/wound or multiple injuries.**

**(5) The conduct of the accused before, during and after the incident.**

70. In the instant case, PW3 testified that the deceased had come to her home after a disagreement with the accused who was her husband and that the two did not live in peace. The accused person used a non-registered mobile phone to communicate with the deceased from time to time and on the 1/11/2016 he called her, she went to meet him but never returned alive. According to the post-mortem report produced as exhibit, the deceased was found to have sustained various deep stab wounds caused by a sharp object which was never recovered. She had fractured ribs. To be precise, Dr. Belinda on conducting post mortem found that the deceased had the following injuries, as testified by Dr Oginga:

***“There was a visible cut wound on the shin, a stab wound at the back of the neck, stab wound penetrating on the left breast, 5th and 6th intercostal space penetrating in the chest cavity and that the left lung was collapsed in the left chest. Internally, Dr Belinda found presence of pneumothorax and haemothorax (air and blood in the chest cavity), 200 mls of blood, fracture of 4th and 6th rib left side of chest. Dr. Belinda concluded that the cause of death was due to haemopneumothorax as a result of penetrating stab wound to the chest and that the injuries noted were inflicted by a sharp object.”***

71. The above stated injuries were multiple and were targeted at parts of the body where the deceased could not have survived. The weapon used was sharp. The intention of the accused person was from the above cited injuries, to cause grievous harm or to ensure that the deceased would not survive after the attack. Malice aforethought can be deduced from the type of injuries sustained, where the accused targeted on the body of the deceased and the type of weapon used to inflict those injuries. The accused person upon being arrested escaped from lawful custody and was rearrested. His conduct after the incident is a clear indication that he wanted to escape justice.

72. I am satisfied that the accused person had malice aforethought when he unlawfully killed the deceased Roselyne Auma Swamba. I find the accused person Joseph Owino Otieno Guilty of the offence of murder contrary to section 203 and read with section 204 of the Penal Code. I convict him accordingly.

73. Sentence shall be passed after mitigation and a pre-sentence report and victim impact statement being filed in court, on 29/9/2020.

Orders accordingly

**Dated, Signed and Delivered at Siaya this 27<sup>th</sup> Day of July, 2020.**

**R.E. ABURILI**

**JUDGE**