



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 11 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JOSIAH MUTHIANI MAWEU.....ACCUSED

JUDGEMENT

1. The accused herein, **Josiah Muthiani Maweu**, was charged with two counts of Murder contrary to sections 203 as read with section and 204 of the *Penal Code*, Cap 63. It is alleged that the accused person, **Josiah Muthiani Maweu**, on the 25th day of November, 2012 at [particulars withheld] Village, Mananja Location in Masinga District within Machakos County murdered **W T** and **T N**(the Deceased). The Accused person denied having committed this offence and as such, a plea of not guilty was entered.

2. In support of its case the prosecution called 10 witnesses.

3. PW1, **J K**, testified that she was PW2's wife and a daughter in law to **W T** (hereinafter referred to as "the 1st deceased person"). On 19th November 2012 at 6 p.m. she was at her mother in-law's home together with the 1st deceased's grandson called **T**, the 2nd deceased person herein who was aged 13 years, amongst other family members. While there, the accused arrived on foot in the company of another person whom he introduced as **Lawrence** and the accused inquired where the 1st deceased person was. Upon inquiring who they were, the accused informed PW1 that they were from Thika and that they wanted the 1st deceased person, a traditional healer, to treat them. While they were talking the 1st deceased person arrived and PW1 informed them that since it was late, they should return another day and this was also the 1st deceased person's view. However, the two insisted that the matter was urgent since the accused said he wanted the 1st deceased to treat his home but the two did not disclose who had referred them to the 1st deceased. they said it was urgent. The 1st deceased declined to accede to their request after which the three, the accused, Lawrence and the 1st deceased entered the 1st deceased's house. After some time, the three came out and the accused left with the said Lawrence. The 1st deceased then informed PW1 that the duo wanted her to treat them at the accused's home.

4. On 22nd November, 2012 the accused returned and went to PW1's house inquiring where he could get a motor cycle. According to PW1, she was in the company of her husband, PW2 and offered the accused a seat and food. At that time the 1st deceased was at the shop buying paraffin. PW1 then called PW2 and informed him that the accused wanted a motor cycle to go to Kiatineni. She also asked the accused whether he had met with the 1st deceased and the accused informed her that they had met at the shops and they had talked. The accused then informed her that he was going Kiatineni to see Lawrence and that the accused had agreed with the 1st accused that he should return and collect her on Saturday (24/11/2012). The accused then disclosed to PW1 his phone number which PW1 gave to her husband, PW2. After that, PW2 took the accused to Kiatineni and returned back at 4.00 p.m. When PW1 inquired from the 1st deceased. The 1st deceased confirmed that they had agreed that they would go on Saturday (24/11/2012) at 2.00 pm.

5. According to PW1, on that Saturday they waited for the accused and he did not turn up and that the 1st deceased went to the shop and came back. On Sunday PW1 went to church and when she returned home at 12 p.m. she found the 1st deceased with her grandson, the 2nd deceased, who had a mental condition and after lunch, she left to look for firewood at 1.30 p.m. while PW2 who had arrived home earlier than her went to look for sand. At 2.00 p.m. the 2nd deceased went to call PW1 and informed her that the 1st deceased was calling her since the accused had arrived. Upon her return home, PW1 told his son to go and call PW2. According to PW1, the 1st deceased's home was not far from hers and when PW2 arrived, they proceeded to the 1st deceased's home where they found the 1st deceased with the accused outside the home. The accused was holding a bag with the 1st deceased's tools of trade and the 1st deceased informed PW1 that she was going on a safari and informed her to give the accused her phone number as well as PW2's in order to enable the accused communicate with them upon their arrival since the 1st deceased did not have a phone. According to PW1, the 1st deceased was always travelling with the 2nd deceased.

6. PW2 then looked for a motor cycle to take them for a vehicle and they got a motor bike rider, **Lukas Munyao**, PW5. According to PW1

when she asked the 1st deceased when she would return, the accused said that he would return her at 8.00 a.m. the next day (20/11/2016) and disclosed that they were going to Kangundo, a place called Kathama. However, they waited on Monday, Tuesday and Wednesday but the deceased neither returned nor did they receive any call from the accused. On Thursday at around 2pm, PW2 called the accused but the accused's phone was off air. The same thing happened when they called on Friday and the following days and during the entire month of December. When PW2 tried to send Kshs.20/= by Mpesa to the accused's phone and it came back with the name of **J M**. Being confused, they did not report the matter to the police till January, 2012 when PW2 made a report to the police. Later between January – February, 2013, PW1 received information from PW2 that the two deceased persons were later found dead.

7. In cross-examination, she stated that the 1st deceased used to treat many people some known to her and others unknown to her. Therefore, there was nothing abnormal for the accused to come to seek her treatment. She was not able to tell why the 1st deceased used to travel with the 2nd deceased but insisted that the 2nd deceased never used to carry the tools as he was a child. In her evidence, the 2nd deceased used accompany the 1st deceased to the shops since the 1st deceased never used to go to work outside. Referred to her statement where she stated that it is not allowed for traditional doctors to carry their medicines and that is why the 1st deceased used to go with the 2nd deceased, she admitted that the 1st deceased used to treat people outside the home.

8. According to PW1, the family of **Lawrence** had a land dispute with the 1st deceased in Machakos. She stated that Lawrence was the nephew of **T W N**, who as a neighbour. She however stated that she did not know **Lawrence** but was aware that **L** had built a house at home though he had not come home for a long time. PW1 was however aware that the said Lawrence used to visit and that is how she became aware that he was **T**'s nephew. She also saw him at the 1st deceased's funeral. She however denied the allegation that she said that Lawrence was involved in the murder of the deceased as contained in her statement.

9. In re-examination, PW1 stated that though the accused did not want the 2nd deceased to accompany the 1st deceased, the latter insisted that the 2nd deceased must accompany her as she was not allowed to carry her tools. At first, the 1st deceased refused to go but the accused insisted. It was her evidence that prior to **L** coming with the accused, she had seen **L** once before on the road but she only got to know his name on 19th November, 2012 though he did not go into details about his relationship with his own neighbours. She was however aware of his family's land dispute with the 1st deceased during the funeral arrangement when he came to their gate. It was her testimony that it was PW2 who informed her that **L** had an altercation with **T** when she told them she had seen **L** with the accused and that when the accused returned the 2nd and 3rd times he was not with Lawrence whom he had said was the one who took him to the home.

10. PW1 however denied ever telling the police that Lawrence was involved in the murder but only informed them that the first time the accused went to their home he was with Lawrence.

11. PW2 who was by that time a motor cyclist (*boda boda* operator) was on 22nd November, 2012, a Thursday at 2 p.m. at home having returned from his shamba when he found his wife, PW1 and his children – **T** and **E K**. While waiting for lunch he saw the accused whom he did not know previously coming to his home and was offered a seat by PW1. Upon inquiring, he was informed by the accused that he was not a stranger and that he had come to see PW2's mother, the 1st deceased, to treat him and he had come earlier on Sunday. The accused stated that he had met the 1st deceased mother at the market and they had agreed on his treatment and he wanted PW2 to take him to Kiatineni to see a friend since he did not know the place. After they took lunch, the accused introduced himself **Josiah Muthini**. PW2 then carried him on his motorcycle to Kiatineni market and charged his Kshs.200/=. The accused was communicating with someone PW2 did not know on phone while on their way and when they reached the accused showed him the person he was meeting. According to PW2, at the time he was able to recognize his face having seen him in his home area but did not know his name. According to PW2, the person was constructing a home.

12. It was PW2's evidence that the 1st deceased was a traditional/witch doctor who used to do her work at home but on special matters she could be taken to people's house to work and she would be returned. The accused informed him that they had agreed with the 1st deceased that they would go to his home on 24/11/2012. On 24th November, 2012 the accused did not turn up but on Sunday after church, he was called from his shamba by his son, **T K**, who informed him that the 1st deceased was calling him since the visitor she was expecting had come and she wanted to leave. Upon returning home, he found the accused seated outside the 1st deceased's home which is about 50 meters from his home. By then, the 1st deceased had gone to get medicine from the shamba. The 1st deceased explained to him that she was going to treat the accused together with his friend and that she would return the next day. The accused informed him they were going to Kathama that day and that upon the 1st deceased completing her work the same day, he would return her the next day at 8.00 a.m. and the accused gave PW2 his contact number 0725324094 but said that his phone was not charged at the time.

13. PW2 carried the accused and the 2nd deceased on his boda boda and he called another boda boda for the 1st deceased. It was his evidence that the 1st deceased used to be accompanied by the 2nd deceased and she insisted she goes with him. At that time, he was 13 years old and was a bit mentally challenged. They were dropped on the tarmac road at a stage called Kiatineni – Embu – Nairobi Highway at 6 p.m. and PW2 left them there waiting for a vehicle with other people. On his way back he met with **John Mutave Mwinzi** and his wife on their way to the stage and he dropped them at the stage by which time the deceased and the accused were still at the stage and he still left them there.

14. According to PW2, that night when he called the accused, he was not available and the next day they did not come back. Despite him calling over ten times the accused's his number was not going through. Worried because that week the *matatus* were on strike for a week, in November – December, 2012, he went to Makuyu police station to report from where he was referred to Yatta police station where he went on 15th January, 2013 and reported. By then, the accused's phone was still not reachable. At Yatta, he was told to go to Matuu CID the same day which he did where they asked him for the accused's number and told him they would start investigations and would inform him of progress. Upon locating the accused's home in Kathonzwi, in Makueni, they called him and informed him to accompany them there. In the company of 2 CID officers from Matuu and his in-law they reached the accused's home after picking 4 policemen from Wote in a police vehicle. At the home of the accused, they found his mother, father, brother and nephew and they were informed that the accused was in Nairobi. In the accompany of the accused's father, brother and nephew they proceeded to Wote police station and then Nairobi, the same

night. It was PW2's evidence that he gave the CID the accused's number and name after he confirmed it was his number by sending 50 Kshs to the number and it showed the number was registered in the name of **Josiah Maweu**. They proceeded to Buruburu police station after which they went to his nephew's home at Embakasi who knew where the accused was living. The nephew took them to the accused's House at Umoja III at 4.00 a.m. in the morning where they found the accused at his home with his wife and 2 children but the deceased were not there.

15. According to PW2, when the accused went to his home, the accused informed him that he was working at Thika and his home was Kathama. Upon being asked where the deceased were, the accused said that he did not know though he admitted that he knew PW2. They then proceeded to Buruburu police station where the accused admitted that he knew PW2 and that he took the deceased and his nephew but did not know where they were. The accused was then taken to Yatta police station where he was charged with kidnapping at Kithimani. After taking the plea, at the beginning of February, 2013, PW2 was called by the OCS Yatta called David who asked him to go to Thika Level 5 Hospital the next day to meet with one of his officers whose number he furnished. At 10.00 a.m. at Thika Level 5 gate he met with the said officer who took him to the mortuary and at the reception they were informed that there were 2 unknown people found at Kilimambogo on 26th November, 2012 dead who were taken to the mortuary. Upon being shown the bodies which were not decomposed, he identified them as those of the deceased, **W T** and **T N**, the former by a necklace, bracelet, and scan on her leg and the latter by a bent finger and the clothes he was wearing when he left home. The 1st deceased however had no clothes on her. He also recognized their facial features. He however, did not see any injuries on their bodies, but there was foam from their nose and mouth. On 28th February, 2013 at Thika Level 5, he identified the two bodies for purposes of post mortem. It was his evidence that the doctor told them that the cause of death was strangulation and the towel that had strangled the 2nd accused was still on the neck.

16. While they were going on with funeral arrangements, PW2 stated that the person whom he took the accused to meet at Kiatineni was seen at the road near his home and PW1 also told him that he was the person who accompanied the accused to their home the first time when he was not there. PW2 stated that the said person whom he used to see before but did not know his name as he was building near their home, ran way. Upon making inquiries, he was informed that the person was called **L**, the same name of the person that the accused told him he was going to meet at Kiatineni. PW2 also found that **L** was the child of the sister of a man called **T W N** who had land dispute with the 1st deceased and who took her to court.

17. In cross-examination, PW2 stated that between him and PW1, none of them told the other about **L**.

18. According to PW2, when the accused gave him his number, he tried to call him but the accused told him that the phone was not charged as it had a problem and the call never went through. PW2 however confirmed that the accused gave him the correct phone number even if it was not being used.

19. In cross-examination, PW2 stated that he showed a friend **L** when he was standing outside their gate and told him that he is the one the accused told him was Lawrence and whom he was going to meet. PW1 then came out and shouted that **L** is the one who went with the 1st deceased when she saw him and that is when **L** ran away. He came to know PW1 had also met him when he shouted.

20. PW.8 **J L K**, the 1st deceased's nephew, confirmed that on 28/2/2013, he accompanied PW2 to Thika Level 5 Hospital and identified the bodies of both deceased for purposes of conducting post mortem. He confirmed that both bodies had no visible signs apart from the neck that had signs of strangulation. According to him, the 1st deceased had informed him that she had a land dispute but he did not ask her the details thereof though she mentioned that the land dispute was going to lead to her death. According to him, the 1st deceased had no dispute with anyone else.

21. PW.5, **Luka Munyao Kaseka**, a *boda boda* rider confirmed that on 25th January, 2012 he was at Kilunguni market when he got a call from PW2 who asked him to go to their home and take his mother to a bus stage at Katili. He proceeded to their home since he knew them very well and found PW2's mother ready and waiting together with other family members. He took her on the motor cycle to the bus stage where he PW2 with his sister's son called Tuta Ndinda having already arrived before them. Since it was getting dark, he asked to be paid and then left. Later on when he met PW2 after 2 days he asked PW2 if his mother had returned since she had informed PW5 that she would be returning the following day and he was informed by PW2 she had not. Later he was informed by PW2 that his mother had been found dead. Asked about the accused, he denied having seen him before.

22. According to PW4, **George Masava Mwinzi**, on 25th November, 2012 at 6 p.m. he was going to Thika with his wife when they were dropped at the bus stage at Kituri where they found many people since there was a problem with transport. There he found the 1st deceased, whom he knew as a traditional healer who used to prepare traditional medicine, with a young boy whom the deceased introduced to them as her grandson with another man who was unknown to him but who he recognised as the accused. The deceased informed him that they were going to Kathama with the man to treat someone and they would be back the next day. While they were waiting for the vehicle, the accused requested him if he could use his phone to make a call as his battery was down a request he accepted. The accused made a call and told the person he was calling that there was a problem getting transport and he would come when they got a vehicle.

23. Eventually they boarded the same vehicle together with the accused, the 1st and 2nd deceased and upon reaching Thika, the accused again asked for his phone to tell the person he had called that they had arrived after which the accused went to meet the person and he was left with the old lady and her grandson. Upon his return, the accused showed him a vehicle which had come to pick them up me. At around 8.30pm, he then left them and went home telling them that if they had any problem they would go to their offices which he showed them and the office would call him. Later on after some days he met PW2 who told him that the deceased she had not come back, and he explained to him how he had met them at the stage. According to PW4, he was with the accused for about 3 hours before he left for home.

24. In cross-examination, he admitted that he knew that the 1st deceased was a traditional healer who used to prepare traditional medicine. I do not know when the old lady or grandson died, or how they died, or who killed them.

25. PW9, **Martin Njogu Ngatara**, a village elder from East Thika, was on Monday, 26/11/2012 at about 12.00 p.m. Monday going to a meeting when he met a woman at the Dela Monte Forest. He was stopped and informed me there was a lady lying in the bush. He proceeded there where he found some people there with the body of a woman over 40 years old who was facing up with foam in her mouth. He then reported the matter at Fourteen Falls Police station after which he was dropped in Town as the police proceeded to the scene where they collected the bodies of the woman and that of a small boy which had been seen earlier.

26. PW.6. CIP **Yusuf Ali Abdi**, was in 2012 in Charge of Fourteen Falls Patrol Base. On 26/11/2012 at 12.40 hours he was contacted by PW9 through his cell phone that there was a body of a woman lying in a farm belonging to Del Monte Company. He proceeded to the scene which was in Gisheki Village accompanied by **PC. Tuwei** and upon arrival, he found the villagers and the dressed body of an elderly women lying facing upward with blood oozing from her mouth and there were strangulation marks on her neck. According to him, there were tyre marks of a small vehicle on the rough road. When they mounted a search within the forest, **PC. Yuwei** called him and informed him that there was another body of a male juvenile around 12 – 14 years lying sideways within the same forest around 50 – 70 metres away from the first body whose head was tied with a piece of blanket. They then called scene of crime personnel, **Corporal Mugendi**.

27. According to PW6, when they were trying to carry the body of the juvenile he saw fresh urine beneath his body so he suspected he was strangled. Since the bodies had no identification documents, they were taken to the Thika Level 5 mortuary as unidentified bodies on 8/3/2013.

28. At the said mortuary, PW 3, **Dr. Eunice Mugweru**, at Thika Level 5 Hospital on 28th February, 2013, conducted post mortem examination on the two bodies which were identified by PW2 and PW8 in the presence of **PC. Owiti**. According to her, the 2nd deceased's clothing were intact and not bloodstained. The sex was male and race African. The age was that of a teenage boy, nutrition was good, his physique was slender and his height was 138 cms. The body was decomposed and the external appearance of the body revealed horizontal groove around the neck (ligature mark) that had extended to the back. An examination of the respiratory system revealed that the 3rd and 4th tracheal cartilage at the front of the neck had fractured and separated while the examination of the cardiovascular system revealed a fracture of the vessels in the neck region. She therefore formed the opinion that the cause of death was asphyxia caused by ligature strangulation. The ligature was caused by something like a rope that had been tied around the neck. She signed and stamped the form on 28th February, 2013.

29. As for the body of the 1st deceased whose post mortem examination was done the same day, at Thika Level 5 hospital the body had no clothing and the sex was female of African Race African, elderly and with good nutrition, of medium build physique and height of 153 cms. According to her, the body had partly decomposed and she had a ligature mark on the neck an evidence by a deep horizontal groove that extended from the front of the neck to the back. The examination of the respiratory system revealed a fracture of the tracheal cartilage. She formed the opinion that cause of death was asphyxia caused by ligature strangulation. She signed the form and it was stamped on 28th February, 2013.

30. In cross-examination she stated that whereas some evidence might disappear with decomposition in especially soft tissue injuries involving the skin, one can still be able to seek skeletal injuries as bone does not decompose.

31. PW.10 **IP Elkana Onyango** was at that time in charge criminal intelligence unit, Yatta. On 15th January, 2013 he received report from PW2 who was sent to his office by the OCS Kithimani police station with a letter stating that the PW2's mother and nephew disappeared. It stated the mother was picked by someone to go and "treat" his home and the number of the person was given as 0705022834. Upon tracing the number using a locator gadget, it was tracked at Makueni area. In the company of PW2, he proceeded to Makueni where they found the father of the person who picked the deceased he told them that his son the accused who had left home three days ago, was staying in Nairobi Umoja Phase 3. With **Cpl. Limo** they left with PW2 and a son from that home and went to Nairobi Umoja estate where they were shown the house of the accused and the same day they found the accused in his house. They arrested him and took him to Kithimani police station where the incident was reported. Later on 26/11/2012, the bodies of the deceased who had been reported missing, were recovered at Gituamba area strangled. The day we went to Makueni is the day we went to Nairobi. It was his evidence that the day he got the report the phone was off and he tracked it the following day. According to the witness, the gadget locates either where the person is or where it was last switched off and in this case he relied on where the phone was switched off.

32. It was his evidence that by the time they arrested the accused the bodies of the deceased had not been found. That is why he was initially charged with kidnapping.

33. The Investigating officer, PW7, **C.I.P Michael Kahare**, who was attached at Yatta police station in charge of crime was on 15/01/2013 at work when a case of kidnap of PW2's mother **Catherine Wanza Tuta** and her grandson called **Tuta Ndinda** was reported by PW2. They commenced investigations and we found that the accused went to the home of the 1st deceased, a traditional doctor, of Ndela village in Mananja location, Masinga Sub-County, to consult her. Thereafter, the accused requested her to accompany him to his home where he wanted to construct called Kathama Biyoni so as to bless the home. She left with her grandson called **N** at 5.00 p.m. On 25/11/2012 she called her son PW2 and other family members and informed them about the intended trip with her grandson. She requested the said son who had a motor bike to take her to the bus stage to take a *matatu*. He took them there and they took a *matatu* going to Thika Town. In the same *matatu* was one called **George Masavu Mwinzi**, PW4, who was a villager to the mother with the accused. They went to Thika Town and alighted and PW4 assisted the accused with his phone to call a taxi to pick the mother and the accused to take them to Kathama since the accused's phone did not have power. At 9.00 p.m. the taxi came and PW4 saw him and the taxi man said he had a customer he was dropping first. PW4 then left and informed them that in case of problem since he was working at G4S Thika he could assist them. The accused then left briefly and thereafter the mother and the child were not seen again. So the family got concerned.

34. In January, 2013 PW4 met PW2 the son of the deceased and he explained how they parted ways with the deceased and the accused and that he assisted him with the phone to call the Taxi. PW2 recorded the statement of Kidnapping and they started searching for the deceased. The accused was thereafter arrested in Nairobi Umoja 3 Area after he was tracked using PW4's phone and was charged with kidnapping. Later they got the information that on 26/11/2012 dead bodies of a mother and child were discovered at Kilimambogo Area, Gitwamba police station and were taken to Thika Level 5 mortuary. The family of PW2 identified them as those of deceased and grandson and post mortem was performed which showed they were killed by being strangled. They then charged the accused with the instant offence.

35. According to the witness, during investigations they found there was a land dispute between the 1st deceased and a neighbour whom he could not remember, but they were unable to connect the two.

36. In Cross – examination, he stated that he was the investigation officer up to the point the accused was charged before the court. He stated that he recorded witness statement of PW1 who raised the issue of land dispute with one T W N and the deceased. PW.1 in the statement stated she knew L very well and he was the one connected with the murder. The witness did not however, investigate L. While it was disclosed that the dispute was the subject of a civil matter before Machakos High Court, he did not get the case number and he did not investigate the land dispute. After his transfer the matter was taken care by OCS Yatta.

37. In re-examination he stated that he was with other Investigation officers, OCS Yatta CID Officers, and those officers who collected the bodies and that the CID only assisted in tracking and arresting the suspect but did not investigate. It was his evidence that he recorded most statements but not all. From the statement of PW.1 and his investigations L and the W were not the ones who took the deceased and that they were neighbours but from another location. By the time he left he had not connected them with the murder and that the investigations were leading towards the accused. It was his evidence that her was investigating the criminal matter and not a civil one. It was his evidence that in his statement, the accused did not deny that he was with deceased and this information was also from the taxi and the person with them in the *matatu*.

38. Upon being paced on his defence, the accused testified that Pw1 connected the said Lawrence to the murder of the deceased and that he was not Lawrence. He exhibited PW1's statement.

39. According to him, on 25/11/2012 he was in Nairobi Umoja. He admitted that he had gone to the 1st deceased's home 3 times to request her to supply him with protection charms for his business and home, since she was a witchdoctor well known in the area. According to him, he was shown her place by a *boda boda* person. The first time he went for his business issues in Nairobi and the 1st deceased gave him protective charms for his business which he went and applied. That day he arrived during the day and stayed till 6.00 p.m. He disclosed that he also had another business at Kathama in Kangundo which he was desirous of being protected. Upon requesting for the same services, the 1st deceased decided that they go to Kathama.

40. The second visit, being a Thursday, they were to arrange how to go to Kathama and they agreed that he would return to pick her up on a Saturday. On that Saturday around 3.30 – 4.00 p.m. he found her with about 6 people including PW.1 and her husband and PW.2. and the 1st deceased told him something was missing and she had to go and look for them. He gave her 1,500/= for that purpose for preparing the same. After about 1 hour or 1½ hour she returned with a bottle of *changaa* and the charms for mixing and sprinkling on the business. She mixed and gave him to drink then told him to jump over it. At between 5.30 – 6.00 p.m. she then called PW.2 her son, to organize how to take them to the stage by *bodaboda*. Realising that he could not carry him with the 2 deceased, PW2 called two other motor cyclists and while PW.2 carried the deceased lady, the accused and the boy were carried by another motor cyclist after which they left. Shortly thereafter, they heard that PW.2's motor cycle overturned before reaching the stage. He carried the 1st deceased and returned her to motorcycle and sat with her upto Kitini stage. It was his case that it was him who paid for the transport and at the stage PW.2 left them there with the two deceased.

41. According to the accused, they were to connect with Thika Road where they were to get a vehicle. He gave PW.2 his phone number 0725324094 as well as his wife, PW1 since his phone's battery was down. After 5 – 10 minutes PW.2 returned carrying 2 people dropped them then went away. The two seemed to be familiar with the deceased lady and later he came to know one of them was PW.4. They eventually left the 5 of them for Thika in a Nissan which they all boarded upto Thika, the accused seated behind them while PW.4 sat with the deceased lady.

42. Upon their arrival at Thika between 6.30 p.m. and 7.00 p.m. the rest seemed to be discussing their issues while he was standing afar from them. They stayed there till about 8.00 p.m. when he left them to go to look for a vehicle to Kangundo. Upon his return he found them there and he started looking for a taxi. About 100 meters away he got a taxi who said he already had a passenger but would return. PW.4 and his wife stayed briefly and left them with deceased. However, the 1st deceased informed him that since she had drunk all the *changaa* the accused should go and look for more spirits forcing the accused to go a little far about 150 metres away. After getting the spirit, he returned with it to the stage but did not find the deceased at the stage despite searching for them for almost 2 hours till about 10.00 p.m. Since his phone was off, he was unable to call PW.2.

43. Believing that the deceased had decided to go to PW.4. he then entered a bar next to the stage where he drunk till morning drinking. In the process he got intoxicated and when he came to in the morning he found that he had lost his phone and money. In the morning he never saw the deceased and after begging for transport, he boarded a vehicle to *Allsops*. Having lost his phone, with the number he could not call so he believed the lady and the boy returned home. He eventually got a handset in January. He however decided to finish Christmas and then follow up in February since he had other financial commitments. He was eventually arrested after his number which he had replaced was traced. He however denied that he was involved in the murder since the only thing that connected him to the 1st deceased was his business.

44. In cross-examination, the accused stated that he was tracked through his number 0725324094, the same number he gave PW1 and PW2. According to him, he went to deceased's home 3 times. On 19/11/2012 he found PW1 since PW2 was not present that day. The second time was on 22/11/2012 and PW1 and PW2 were present. The third visit was between 25th and 26th November, 2012 when PW1 was present but PW.2 came later. He admitted that PW1 saw him on the three occasions. He admitted that he never reported that his drink was laced and that he lost his phone. Neither did he report that the deceased went missing at the police or at their home. According to him, he was confused when he woke up in the morning and believed that it would be no use reporting to the police. He did not report to their home because he believed they had gone back home.

45. Though he admitted that it was him who took them from home, he denied that it was his duty to return them.

46. In the submissions made on behalf of the accused, it was contended that the investigations were conducted in a bias manner since it was simply based on the last known person who took the deceased in broad daylight and ignored the issue of the land dispute between the 1st deceased and one **T N**. It was submitted that the accused's mission at the 1st deceased's home was to seek the known services of the 1st deceased as a traditional rituals performer and he did this in broad daylight with the knowledge of the deceased's family and in full disclosure of his particulars. According to the accused, had his version been taken he would not have been charged with the offence.

47. According to the accused, it is trite that where the case against the accused depends entirely upon circumstantial evidence motive has to be considered in determining the issue and the accused relied on the case of **Libambula vs. Republic [2003] KLR 683**.

48. It was submitted that the evidence does not amount to a completely rationale inference of the accused's guilt since the facts do not lead to one irresistible conclusion that the accused and no one else could have committed the crime hence the evidence is not compelling, credible and cogent. It was noted that there was no evidence of the deceased's movements in Thika town after she left home or proof that the accused and deceased spent last hours of the deceased together. It was reiterated that no amount of evidence based on suspicion no matter how strong may be a basis for conviction. In support of this submission the accused relied on **Omar Mzungu Chimera vs. Republic Mombasa Criminal Appeal No. 56 of 1998** and **Sawe –vs- Rep [2003] KLR 364**.

49. The accused cited the case of **Pon vs. R [2009] KLR** and submitted that the court should consider that normal human conduct of a person who commits an offence is either to escape, surrender to authorities or cover up his tracks none of which can be attributed to the accused.

50. It was submitted based on the Nigerian case of **Moses Jua vs. The State [2007] LPELPC/CA/42/2006** that though the person alleged to have seen last with the deceased ought to offer an explanation, in this case the accused offered a reasonable explanation. It was therefore sought that the accused be acquitted of the offence.

51. On the part of the State, it was submitted that the death of the deceased persons and the cause of the death was proved by the evidence of PW3, **Dr Eunice Mugweru**, who conducted post-mortem after the bodies of the deceased were identified by PW 2 and PW8 in the presence of **PC Owiti**. PW3 testified that she is a doctor with 5 years' experience. Based on the said evidence, it was submitted that the prosecution evidence properly established death and the cause of deaths required by the threshold.

52. As for the question whether the accused persons committed the unlawful act which caused the death of the deceased persons, and that the accused persons had malice aforethought, the State relied on the definition of malice aforethought in Section 206 of the **Penal Code** as well as the holding in by the Court of Appeal in **Rex versus Tuper S/O Ocher [1945] 12 EACA 63**.

53. In this case, it was submitted that although the murder weapon used on **T** was not brought to court it was the evidence of PW2, PW3 and PW 7 that **T** had a towel wrapped around the neck and that the cause of death was strangulation. In this regard the State relied on **Karani – vs- Republic [2010] I KLR 73**.

54. The Respondent in their submissions relied on the doctrine of "last seen with deceased" and relied on the Nigerian Court cases of **Moses Jua vs. The State (2007) LPELRCA/ IL/42/2006**, **Stephen Haruna vs. The Attorney-General of the Federation (2010) 1 iLAW/CA/A/86/C/2009** and **Rex vs. Kipkerring** and submitted that his defence, the accused person did not give an explanation or even adequate evidence to dispute that he was the last person to see both deceased alive, or even reach out to PW2 to explain what had happened to both deceased. Prosecution's evidence places upon the accused a statutory burden to discharge a rebuttable presumption that having been the last person with the deceased before they died, he should explain how they died. According to the Respondent, the statutory rebuttable presumption is spelt out under Sections 111(1) and 119 of the **Evidence Act**.

55. Having been placed at the scene of the incident as the last person who was last seen with the deceased before they died, the accused must explain how the deceased met their death, or alternatively how they parted company. The accused in this matter, it was submitted, only stated that the deceased disappeared from the stage and never to be seen again and further that he looked for them then left later when he bore no fruits.

56. From the evidence, it was contended that the accused further lied to PW1 and PW2 about where he stayed when he said that he stayed in Thika but later it was discovered that he stayed in Umoja III Nairobi. He further did not deny that he knew the deceased and that he had visited her for her rituals to cleanse his business. Further, the phone number used to track him was his, he never tried to reach out to PW1 and PW2 when the deceased "disappeared" for a whole month but just assumed that the deceased had gone back home. He further testified that he got a phone in January but still did not contact PW2 and inquire whether the deceased persons had gone back home. Besides, the accused did not provide an alibi to attest to that he spent the night at a bar trying to look for the deceased persons or even he tried to look for them at all.

57. In support of the submissions, the Respondent relied on Section 9(3) of the **Penal Code** which stipulates that:

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

58. According to the Respondent, in this case, the prosecution need not prove motive for the accused to commit the offence of murder but it was the evidence of PW8 that the deceased had land dispute case that involved the family of **L** who had introduced the accused to the deceased **Wanza** and the same was corroborated by PW1. It was submitted that the injuries could only have been intended to cause the death of or grievous harm to the deceased persons and the Court was invited to find that there was malice aforethought on the part of the accused persons within the meaning of section 206(a) of the **Penal Code**.

Determination

59. The prosecution's case in summary is that on 25th November, 2012, the accused who had been seeking the services of the 1st deceased, a traditional medicine lady, left the deceased's home accompanied by the 2nd deceased who though mentally challenged used to accompany the 1st deceased whenever she was going out to render such services. According to PW2, the accused informed him that he was working at Thika and his home was Kathama in Kangundo. The accused, after giving PW1 and PW2 his telephone contact promised to return the deceased the following day. It would seem that that day, the accused's phone had problems with charging.

60. After being dropped at the bust stage they eventually managed to board a *matatu* which took them to Thika. In the said vehicle was PW4, **George Masava Mwinzi**, who the 1st deceased informed that they were going to Kathama with the man to treat someone and they would be back the next day. In between the accused borrowed PW4's phone saying that his battery was down.

61. Upon their arrival in Thika, the accused once again borrowed PW4's phone in order to relay to another person the information that he had arrived after which the accused left to meet the person. Upon his return, the accused showed him a vehicle which had come to pick them up. At around 8.30pm, PW4 then left them and went home telling them that if they had any problem they would go to their offices which he showed them and the office would call him. The following day, the deceased's bodies were recovered in a thicket strangled.

62. I have considered the evidence on record. Section 203 of the *Penal Code* under which the accused is charged provides that:-

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

63. Arising from the foregoing the ingredients of murder were explained in the case of **Roba Galma Wario vs. Republic [2015] eKLR** where the court held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

64. In **Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR** the elements of the offence of murder were listed by **M. Odero, J** as follows:-

- 1) **The fact of the death of the deceased.**
- 2) **The cause of such death.**
- 3) **Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly**
- 4) **Proof that said unlawful act or omission was committed with malice aforethought.**

65. In Mombasa High Court Case Number 42 of 2009 between **Republic vs. Daniel Musyoka Muasya, Paul Mutua Musya and Walter Otieno Ojwang** the court expressed itself as hereunder:

“The prosecution therefore is required to tender sufficient proof of the following three crucial ingredients in order to establish a charge of murder:

- a) *Proof of the fact as well as the cause of the death of the deceased persons.*
- b) *Proof that the death of the deceased's resulted from an unlawful act or omission on the part of the accused persons.*
- c) *Proof that such unlawful act or omission was committed with malice aforethought.”*

66. In this case, there was no doubt as to the fact of death of the 2 deceased persons. There was ample evidence from PW2, PW3, PW6 and PW8 that the deceased were found dead and that they had been strangled. Those witnesses clearly proved beyond reasonable doubt that the deceased died.

67. As regards the cause of death, according to PW3, the deceased's death was as a result of strangulation.

68. As to whether the deceased met their death as a result of an unlawful act or omission on the part of the accused person, it is clear that there was no direct evidence that the accused caused the death of the deceased. In criminal cases, it is old hat that the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not

made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

69. According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”

70. What then is the standard of proof required in such cases? **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64** stated that:-

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction... Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

71. In 1997, the Supreme Court of Canada in **R vs. Lifchus {1997}3 SCR 320** suggested the following explanation:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

72. In **JOO vs. Republic [2015] eKLR**, **Mrima, J** held that:

“It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.”

73. **Mativo, J** in **Elizabeth Waithiengi Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

74. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372** where he stated: -

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

75. Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness' testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence. Therefore, where circumstantial evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged. In fact, in Neema Mwandoro Ndurya v. R [2008] eKLR, the Court of Appeal cited with approval the case of R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20 where the court stated that:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

76. In this case, as stated above, in the absence of any direct evidence linking the accused with the death of the deceased, this court must rely on the circumstantial evidence if the case against the accused is to be proved. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In Sawe –vs- Rep [2003] KLR 364 the Court of Appeal held.

“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; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which 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.”

77. In R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135, in the Court of Appeal for Eastern Africa had this to say:

“In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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.”

78. In Abanga Alias Onyango vs. Rep CR. A No.32 of 1990 (UR) the Court of Appeal set out the principles to apply in order to determine whether the 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 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.”

79. In Mwangi vs. Republic [1983] KLR 327 Madan, Potter JJA and Chesoni Ag. J. A. held:-

“In order to draw the inference of the accused’s guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused.”

80. Therefore, for this court to find the accused guilty the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of Simon Musoke vs. Republic [1958] EA 715 as follows:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

81. In Teper v. R [1952] AC at p. 489 the Court had this to say:

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

82. In this case, the prosecution’s case seems to be hinged on the fact that the deceased were last seen with the accused before their bodies was found strangled and dumped in a thicket. Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of Moses Jua vs. The State (2007) LPELR-CA/IL/42/2006. That court, while considering the ‘*last seen alive with*’ doctrine held:

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

83. In yet another Nigerian case the court considering the same doctrine, in the case of [Stephen Haruna vs. The Attorney-General of the Federation \(2010\) 1 iLAW/CA/A/86/C/2009](#) opined thus:

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

84. It was however held in the case of [Ramreddy Rajeshkhanna Reddy & Anr. vs. State of Andhra Pradesh, JT 2006 \(4\) SC 16](#) that:

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

85. Lesiit, J in [Republic vs. E K K \[2018\] eKLR](#) held that:

"The prosecution has adduced evidence which establishes that the deceased was last seen alive in the company of the deceased. That was in the evidence of PW5. Time was 9.30 a.m. Her evidence was not corroborated by any other witness. The accused has denied that and has countered the evidence of PW5 by stating that in fact, it was PW5 he saw with the deceased last. Given that the evidence is the word of the accused against that of PW5, the court has to look for corroboration or other evidence implicating the accused. I am persuaded by the Indian case that even where evidence establishes that an accused was last seen with the deceased before she met her death, it is advisable to exercise caution and look for some other corroboration. I will get back to this later."

86. In this case, was there any corroboration? The meaning of corroboration as defined or stated in the Nigerian case of [Igbine v. The State {1997} 9 NWLR \(Pt.519\) 101 \(a\), 108](#) is thus:-

"Corroboration means confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses."

87. In [Mukungu vs. Republic \[2002\] 2 EA 482](#), the Court of Appeal citing [Mutonyi vs. Republic \[1982\] KLR 2003](#), held that:

"An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See Republic vs. Manilal Ishwerlal Purohit [1942] 9 EACA 58, 61."

88. However, as was held in [Khalif Haret vs. The Republic \[1979\] KLR 308](#):

"What then, is corroboration? As was put succinctly in R vs. Kilbourne (at page 263) it means "no more than evidence tending to confirm other evidence". It is not, as the judge-advocate correctly stated, confirmation of everything, so that it amounts to a duplication of the evidence needing corroboration."

89. It is therefore important for there to be corroboration that the material corroborating the evidence be such that it confirms in some material particular not only the evidence that the crime has been committed but also that the accused committed it. It need not duplicate the evidence requiring corroboration but it must confirm that other evidence in material aspects.

90. In this case there was clearly no corroboration. The evidence was that the accused left Mananja, Ndele Village in Masinga District accompanied by the two deceased persons and according to PW4 were last seen together in Thika that night. Based on the decision in [Moses Jua vs. The State](#) and [Stephen Haruna vs. The Attorney-General of the Federation \(supra\)](#) where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, it is the duty of the accused to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.

91. The first question is whether the circumstantial evidence was overwhelming in this case. It was contended that the conduct of the accused in not calling PW1 and PW2 and informing them about the whereabouts of the deceased was such evidence. It however comes out from the evidence that right from the start of the journey the accused informed the said witnesses as well as PW4 that his phone had charging problems. It was also his evidence that his phone was stolen after he was drugged in a bar. The next issue was why the accused never reported the disappearance of the deceased to the police. According to the accused, when he failed to trace the deceased that evening he thought that the deceased had gone with PW4. It was admitted that PW4 knew the deceased very well and according to the accused they had been talking. It is also true that PW4 had informed them that if they encountered any difficulties they should go to his place of work which he showed them and he would be called. It was therefore the accused's evidence that he believed that the deceased must have gone away with PW4 and eventually returned home. The other issue was that the accused had informed PW1 and PW2 that they were going to Thika yet it turned out that he was going elsewhere other than Thika. From the record, it comes out that the information that the accused gave was that they were going to Kangundo, a place called Kathama. In his evidence the accused explained that he had business at Kathama in Kangundo as well and that was where they were proceeding to. In these circumstances, can it be said that the circumstantial evidence against the accused was overwhelming? In other words, can these facts be said to be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt? Or can it be said that there exist other existing circumstances either

from the prosecution or the defence that weaken the chain of circumstances relied on?

92. In this case there was evidence that when the body of the 2nd deceased was found the head was tied with a piece of blanket. This blanket was never produced in evidence and no explanation was offered for that omission. Was this blanket examined to find out whether it could be connected to the accused person? In my view an examination of this piece of evidence might have given a clue as to whether the accused was placed at the scene where the bodies were found or otherwise.

93. Having considered the evidence before me, both from the prosecution and the defence, I must say that the same cannot be said to amount to overwhelming circumstantial evidence for the purposes of invocation of the doctrine of “last seen with”.

94. Whereas the conduct of the accused in carrying on with his business may well have roused some suspicion on the part of the investigating agencies, that suspicion alone cannot be the basis of a conviction. I rely on the decision of the Court of Appeal in PON vs. Republic [2019] eKLR where the Court expressed itself as hereunder:

“We are of the considered view that the instances of what was presented as circumstantial evidence were below the threshold enunciated in the leading cases we have cited in this judgment, namely Rex V Kipkerring (supra), Simoni Musoke V R. (supra) and Omar Mzungu Chimera V. R (supra). The evidence does not amount to a compelling rational inference of the appellant’s guilt. The facts do not lead to one irresistible conclusion that the appellant and no one else could have committed the crime, taking into consideration the natural course of human conduct. The evidence was not compelling, credible or cogent. There was no evidence of the appellant’s or the deceased’s movement prior to the incident. There was no proof that the appellant and the deceased spent the last hours of the deceased together. In conclusion, and to reiterate what the courts have stated time without end, no amount of evidence based on suspicion, no matter how strong may be a basis for a conviction. See: Sawe V. Republic [2003] KLR 364. Suspicion, even reasonable suspicion is a legal standard of proof not known in our criminal law. Either a fact is proved beyond reasonable doubt or it is not. The appellant may have acted strangely upon his return from Sierra Leone, for instance, walking with a metal bar and sleeping in the guest house yet he had a house. His warmth and attitude towards the deceased may have changed; he may have had little interest in the issue of the lost child; he may even have denied knowing J. But all these only amount to suspicion and not evidence upon which a conviction may be found.”

95. In Trikabi vs. Uganda [1975] EA 60, it was held that:

“[The appellant] left the village and his home very soon after the fatal attack, and could not be found until he returned several months later. The assessors and the Judge were satisfied that this conduct on the appellant’s part was indicative of his guilt and corroborative of the truth of the deceased’s dying declaration. They were satisfied that the appellant’s explanation for his sudden departure, and long absence, from his home, that he had gone to look after a sick sister, was a lie; and explanation first put forward in his own unsworn statement in his defence. This case has caused us much concern, but we are unable to say, after anxious consideration, that the judge was wrong in holding that the appellant’s conduct, in leaving his house and disappearing for several months, knowing of the attack on the deceased, was sufficient corroboration of the deceased’s dying declaration that he (the appellant) was the man who had attacked him, a declaration which the judge believed to be true. The attack took place in broad daylight and the appellant was well known to the deceased, so that the deceased’s identification of the appellant as his attacker is unlikely to have been mistaken.”

96. Similarly, in Malowa vs. The Republic [1980] KLR 110, Madan, Law and Potter, JJA held that:

“The judge held, on the authority of Terikabi vs. Uganda [1975] EA 60, that corroboration of the evidence of Paulina and of the dying declarations of Blazio was provided by the conduct of Malowa, in disappearing from his home immediately after the murder to avoid arrest, and in remaining absent for six months; and he was left with no reasonable doubt that Malowa was guilty of the murder of Blazio. We see no reason to differ.”

97. In Robert Achapa Okelo vs. Republic Kisumu Court of Appeal Criminal Appeal No. 3 of 1999 the Court of Appeal expressed itself as hereunder:

“In this appeal the superior court convicted the appellant of the murder of Margaret Atieno Ouma which was said to have occurred at Kondele Estate in Kisumu District on 14th June, 1993. The evidence relied on by the trial Judge (Wambilyanga, J) in convicting the appellant was all circumstantial. That evidence did not, however, irresistibly point to the appellant to the exclusion of any other hypothesis as the killer of the deceased. It was mostly guess work based on traditional values and principles like failure by the appellant to attend the deceased’s funeral, the appellant’s going away from and returning to the place where the other members of the family were seated and so on. We agree with Mr Karanja for the State that these activities did not constitute evidence from which an inference of guilt could be safely drawn. The State having conceded the appeal there was no need for Mr Menezes to argue his grounds of appeal. Consequently, the appeal is allowed, the conviction quashed and the sentence set aside. The appellant shall be set free forthwith unless he is otherwise lawfully held.”

98. As was held by the Court of Appeal in Joan Chebichii Sawe vs Republic [2003] eKLR:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt...Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

99. In that case the court relied on Mary Wanjiku Gichira vs. Republic, Criminal Appeal No 17 of 1998, where it was held that:

“suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused’s freedom and at times life.”

100. The rationale for this position was explained in **John Mutua Munyoki vs. Republic [2017] eKLR** where the Court of Appeal opined that:

“...in all criminal cases, the prosecution has the task of proving its case against an accused person beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged.”

101. As was held by the Court of Appeal in **Moses Nato Raphael vs. Republic [2015] eKLR**:

“What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-

‘That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.’”

102. It is however not enough to simply prove that the action of the accused caused the death of the deceased. In **Joseph Kimani Njau vs. Republic [2014] eKLR** the Court of Appeal stated that:-

“In all criminal trials, both the *actus reus* and the *mens rea* are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the *actus reus* and *mens rea* have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific *mens rea* required for murder had been proved by the prosecution...In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that *mens rea* for murder was not proved. Failure to prove *mens rea* for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.”

103. A charge of murder may therefore not be sustained unless the *mens rea* for murder is proved. The element of intention in committing the offence was examined in the English case of **Hyam vs. DPP [1974] 2 ALL ER 41** where **Lord Diplock** observed as follows:

“No distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequent, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act.”

104. As to whether malice aforethought has been established, Section 206 of the **Penal Code** sets out the circumstances which constitute malice aforethought as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(a) An intention to caused death or to do grievous harm to any person whether such 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 such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.

(c) An intention to commit a felony.

(d) An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.

105. In the case of **Nzuki v. Republic [1973] KLR 171** the Court of appeal stated that in the commission of the offence of murder it must be committed with the following intentions: -

“(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;
(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue his acts, and commits

those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those circumstances to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder."

106. It is true that Section 9(3) of the *Penal Code* which stipulates that unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility. However, in offence of murder there is an express requirement that malice aforethought must be proved. In Nzuki vs. Republic (1993) KLR 171, the Court in substituting Nzuki's charge of murder with manslaughter observed:

"there was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter."

107. In this case, the only evidence tending to prove malice aforethought was that there existed a land dispute between the 1st deceased and the family of L, the person who allegedly accompanied the accused to the deceased's home the first time and the person who the accused told PW2 that he was going to meet. It was contended that the dispute actually pitted the 1st deceased and an uncle to the said L one T W N, who as a neighbour. However, the investigations seemed not to have connected the said person to the death of the deceased. In light of that missing link, it is my view and I hold that the ingredient of malice aforethought was not proved.

108. In a criminal trial, the evidence presented in proof of a charge is critical. For the prosecution, the evidence, whether direct or circumstantial must show beyond reasonable doubt that the person charged was involved in the commission of the offence.

109. That is what section 111(1) of the *Evidence Act* demands:

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."

110. Based on the holding in Nzuki vs. Republic (supra) I am unable to find that the ingredients of murder have been proved and having considered the totality of the evidence placed before me, I find the accused person not guilty of the offence of murder.

111. Accordingly, I acquit the accused of the charges against him and direct that he be set at liberty unless otherwise lawfully held.

112. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 26th day of October, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muema for Mr Tamata for the accused

Mr Ngetich for the State

CA Geoffrey