



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRC 56 OF 2017

FORMERLY MACHAKOS HCCRC 44 OF 2015

REPUBLIC.....PROSECUTION

–VS–

GERALD MUTUKU NYALITA..... 1ST ACCUSED

JACKLINE MWENDE MUTUA Alias

JACKLINE MWENDE KITHOME.....2ND ACCUSED

JUDGMENT

1. **Gerald Mutuku Nyalita** and **Jackline Mwende Mutua alias Jackline Mwende Kithome** hereinafter referred to 1st and 2nd accused respectively are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that the 1st and 2nd accused on the night of 8th and 9th day of May 2015 at Makongo area, Mavia Meu sub-location in Kivani location of Makueni district within Makueni county jointly with others not before court murdered **Darius Kithome Munyaliti**.

2. They denied the charge and the matter proceeded to full hearing. The prosecution case is premised on the evidence of 14 witnesses.

3. **Pw1 Morris Muteti Peter** a boda boda rider testified that on 8th May 2015 at 8:30 pm he took the deceased to Mukuyuni market to meet his wife, the 2nd accused whom he knew as his customer at his shop. Upon arrival, they waited at a petrol station but later went to Kathekani bar where he was to book a room. The 2nd accused arrived at 10:15 pm and came to the bar. She paid him Kshs.400/= by Mpesa as transport charges.

4. The next day the deceased never came home as stated. On 10th May 2015 at 9:00 am the deceased's children came to his shop and asked him to call 2nd accused which he did. She told him to give the children food stuffs for a week and he did so. They costed over Kshs.1,200/= which she paid via Mpesa. He did not know where she was. That afternoon he received a report of the deceased's death. He did not know 1st accused but he knew 2nd accused as the deceased's wife though they had separated and she was living in Nairobi.

5. In cross examination he said he used to have five (5) motorbikes, but had none at the moment. The deceased's children live with relatives. He said the deceased and 2nd accused had told him they would come the following day. He knew 2nd accused well as his customer since 2011. He did not have statements for the payment. The deceased had told him he was to hire a room in the bar they were in. They did not take any alcohol while there.

6. **Pw2 Alex Muungu Mueti** owns Kenya bar / Kathekani bar. He stated that on 8th May 2015 at 2015 at 10:30 pm a man and his wife came to his bar and wanted a room. He asked his worker (Pw3) to attend to them. They got a room and went to sleep. The bar closed at 11:00 pm. At that time, 2nd accused came and knocked on his door saying she wanted to go and look for food. He did not open for her. Later she came knocking thrice and requested that he opens for her to leave. She left with her husband and they did not return.

7. In cross examination he said he did not look at what the lady wore. The 2nd accused next came to the place with two police officers. He said he only looked at the face of the 2nd accused as she was the one he talked to and there was electricity.

8. **Pw3 Beatrice Mbithe Albanus** was a worker at Kathekani lodge owned by Pw2 and was in charge of accommodation. She testified that on 8th May 2015 at 8:00 pm a man they referred to as "wa buni" came with a bodaboda rider and requested for a room. He said his wife would pay for it. The wife came at 11:00 pm and paid off the boda boda person, the room and alcohol which they had taken. They slept in room No. 12.

9. The witness went home and when she returned at 6:00 am she found room No. 12 empty. Later two police officers came to inquire about the couple. It was reported to them that wa-mumbuni's body was collected at a place called Makongo. She had never seen 1st accused before.
10. In cross examination she said she was seeing 2nd accused for the first time on the night in issue. She had worn a black and white dotted rinda. When the police came she did not see 2nd accused with them. She confirmed that she did not attend any identification parade nor issue any receipt for the payments made.
11. **Pw4 Simon Ndolo Mwanja** is a cousin to the deceased and was with him on 8th May 2015 at 8:30 pm in Kakusini market. While there the deceased was called by his wife and told they meet at Mukuyuni market. Pw4 advised him against going and proposed that he lets her come home as it was at night. The deceased talked to Pw1 who took him to Mukuyuni to meet his wife as he went home.
12. He knew the 2nd accused as the deceased's wife. On 10th May 2015 he got a call asking him to go to Kikusini as the deceased had not been seen. He also heard through radio of a body at Makongo. Together with his two cousins they went to Mukuyuni police station to confirm the report. They found Stephen Musembi Munyaliti (*deceased's brother*) there. The police informed them that the body collected had been taken to Wote mortuary.
13. They went to the mortuary and confirmed the body to be that of the deceased. He was naked with injuries on the eyes, ribs, on back of head and chin. He identified the 2nd accused as the deceased's wife who used to live in Nairobi as the deceased lived with the children. She would come home and go back to Nairobi.
14. In cross examination he confirmed having been with Pw1 and the deceased before they proceeded to Mukuyuni. He did not see the 2nd accused that day. His home to deceased's was a ten (10) minutes walk while Pw1 was on the upper side.
15. **Pw5 Jane Ndinda Kilonzo** was in a school meeting on 8th May 2015 at 6:00 pm when the deceased called her asking about his children who had not gone for food as agreed. She told him they were still in school. He told her he had been called by his wife asking him to go for her at Mukuyuni. He asked her to tell the children to wait for him at Mumbuni for the food. She advised him to come and give the children food then go for the wife.
16. The children later told her the deceased never came home. She identified the 2nd accused as the deceased's wife who lived in Nairobi and would visit home. She never saw the deceased again and later learnt of the death. She lived on the same compound with the deceased who used to be a drunkard.
17. **Pw6 Dr. Makau Alex** produced the post mortem report on behalf of Dr. Loiposha with the consent of the defence. The body had multiple cuts and bruises while ribs 7 and 9 were fractured. He had severe chest injuries and head injuries on occipital region which extended to the brain tissue. The cause of death was severe chest and head injuries. He said the injuries did not point to a traffic accident.
18. **Pw7 Benardatte Mbithe Musyoki** was 2nd accused's employer. She testified that on 8th May 2015 she was in Syokimau in her house when at 8:00 am the 2nd accused sought permission to travel home to sort out her domestic issue. She did not come back the next day and Pw7 called her and she confirmed her arrival. On 10th May 2015 she returned and told her of her husband's death. She asked her why she had come back. On 11th May 2015 she released her to go back home to arrange for the burial. After about 2-4 days she came back with police officers while in a stressed mood. She was aware 2nd accused had issues with her husband. She picked her items under police supervision. Pw7 had never met 1st accused.
19. **Pw8 Pastor Stephen Mutiso Mwangela** is cousin to the deceased. On 10th May 2015 the 2nd accused called him on phone and asked him to call for her MK her child. He did so the child came and they talked. He did not hear what they talked and the child left. At 3:30 pm after service he heard of a body which had been found and later learnt that it was the deceased's body.
20. The next day he spoke to the 2nd accused asking for Kshs.2,000/= to assist those who had gone to the mortuary. He identified 2nd accused in court. In cross examination he said M was aged ten (10) years then. That the deceased used to be a drunkard.
21. **Pw9 Grace Mumbua** said she was a witch doctor. It was not clear why she had been called as a witness. She did not say anything related to the murder or any of the accused persons.
22. **Pw10 S/No. 88725 Sgt. Amina Nassir Alumars** was in the investigation team. She recorded the statement of Pw7 and revisited the scene at Makongo with other officers. On 18th May 2015 she drew a sketch plan (EXB2) with I.P Katumo. They intercepted 2nd accused who had come to view the body and they went with her to Embakasi where she had rented a house.
23. They recovered a shirt (EXB3), stove (EXB4) a white plastic containing remains of burnt clothes bag (EXB5a) clothes contents (EXB5b), phones Nokia EXB6a, Techno – EXB6b. photos EXB7a – b. They later learnt how the deceased was run over by a car in Makongo along Mukuyuni-Machakos roads but the car was not recovered. 1st accused was later arrested by the flying squad.
24. In cross examination she said the murder weapon was never recovered. In her work of investigation she had never seen a body run over severally by a motor vehicle. She denied ever slapping 2nd accused. She said the deceased's body had no eyes. The recovered shirt had been soaked in water though not washed and had been interfered with. The two phones were recovered from 1st accused. She did not know whether the deceased's phone was recovered. They did not recover anything of the deceased at 1st accused's place.

25. **Pw11 No. 63937 Sgt Samuel Mbat**i documented the murder scene at Makongo forest, Makongo sub-location, Kavaani location on 9th May 2015 8:40 pm. He was asked to do so by Cpl. Kioko of Makueni patrol base. He had the film developed under his supervision. The body had been on the cliff when first four photos were taken. He produced the photos (EXB7A) and the certificate (EXB7B).

26. In cross examination he said his assignment was only to take photos and he did not investigate the case. He was present when the body was retrieved from the cliff.

27. **Pw12 Benjamin Kingoo Katumo** was one of the investigating officers with Pw10. He found Pw1 who told them how he had taken the deceased to Mukuyuni from Kikusini which is 2nd accused's home. After hearing from him 2nd accused became a prime suspect. On 12th May 2015 2nd accused came to the station wanting to go

and view the body and she was arrested for interrogation. She took them to New Kenya bar Mukuyuni. They found the proprietor whom they interrogated. He pointed at 2nd accused as the woman who had been there with a man and he had opened the door to release them. He confirmed that the two had taken drinks.

28. A bar girl was called and she also confirmed that the 2nd accused had been there with her husband. She also identified the black and white dotted dress (EXB8) and black sandals (EXB9) which the 2nd accused wore on the material night. She was wearing EXB8 and 9 when she came with the police. After recording statements 2nd accused led them to Syokimau where she worked as a househelp. They arrived there at 9:00 pm and found her employer (Pw7) whose statement was recorded.

29. Upon further interrogation 2nd accused led them to 1st accused's house at Aviation estate – Embakasi Nairobi. Only the ground floor of the building was complete and 1st accused stayed in one room. There was no response from the room but the light was on and they broke into it. The rest of his evidence on recoveries is similar to that of Pw10 who recovered from 2nd accused the black dotted dress (EXB8) and back sandals (EXB9).

30. The 2nd accused later took them to the scene where the deceased's body was allegedly run over by a car driven by the 1st accused. Photos were taken and the 1st accused was later arrested. He knew 1st accused since he was a frequent visitor at the court when the witness was a prosecutor. He produced EXB2, 3,4 5a & b, 8,&9.

31. In cross examination he said he knew 1st accused because of criminal cases he had here in court. The blood at the scene was not taken to the government chemist. He did not know at what point EXB8 and 9 were gotten from 2nd accused. He admitted that as per

the postmortem report the cause of death was severe head/chest injury due to road traffic accident.

32. In re-examination Pw12 said the result of the postmortem had no relationship with the circumstances leading to the death.

33. **Pw13 Kopocha Galwersi** was involved in this case while working at the DCI cybercrime lab. He had received a Nokia mobile phone (EXB6a) and Techno phone (EXB6b) from the DCI Makueni. His assignment was to retrieve messages (both incoming and outgoing from April 2015 June 2015). He subjected the phones to a forensic lab device (UFEE). His finding was that only EXB6a was supported. From it 54 messages were extracted and majority were Mpesa messages. He produced his report (EXB10). There was no cross examination of him by the defence.

34. **Pw14 Kyalo James** a certified digital forensic examiner testified that EXB12 a& b which were phones were brought to the cybercrime unit. They were to retrieve incoming and outgoing calls between 1st and 15th May 2015. The phones were subjected to forensic examination. The messages from EXB12a and sim card were 5. Four (4) were from safaricom while the 5th one was from 070xxxxxxx (Kayane) and was incoming "please call me thank you" sent on 11/05/2015 at 18:06 hours. The 2nd phone had five messages all from the service provider. He produced his report as EXB11 and the two phones as EX12a & b).

35. The 1st accused **Gerald Mutuku Nyaliti** in his sworn evidence denied the charge. He stated that he comes from Mumbuni village and used to work with Venger hotels. On 8th May 2015 day time he was at Kenyatta National Hospital where his wife had been admitted on 6th May 2015 and she died on 27th August 2015. He was on duty on 8th May 2015 night. On 15th May 2015 at 3:00 am

while on duty his landlord called him and told him of police officers who were looking for him and had left him a message.

36. On 16th May 2015 at 9:00 am he left work and found the landlord at the house. His padlock had been broken and another one placed. It was opened by the landlord and they entered. He found his phone (Nokia) and his wife's (Tecno) two shirts, trouser and jacket missing. He changed his clothes and went to see his wife in hospital. He gave the landlord his contact incase the police returned. On 11th July 2015 he was called by a police officer, and they agreed to meet at Sarova hotel at 3:00 pm from where he was arrested, taken to his house then Makueni police station. He was beaten in order to admit the offence. He denied escaping from the police.

37. In cross examination he denied being in Mukuyuni on 8th May 2015 and his phone was not traced in Mukuyuni. He said the deceased was his cousin and so he is closely related to 2nd accused. He denied owning any car or having hired any car that day or even knowing how to drive. He said Pw10 and Pw13 confirmed there being no communication between him and 2nd accused and his clothes were never taken for DNA testing. He denied having been in a relationship with 2nd accused and he had no problem with the deceased nor 2nd accused.

38. The 2nd accused **Jackline Mwendu Mutua alias Jackline Mwendu Kithome** in her sworn defence denied the charge. She said she used to work as a house help in Syokimau Nairobi. On 8th May 2015 she took an off and went to see her grandmother in Machakos. She reported back on 10th May 2015. On 11th May 2015 she was on duty when at 11:00 am her brother in-law Stephen Musembi called her and told her, the deceased was admitted at Makueni referral. She reported this to her boss at 7:00 pm when she came home.

39. She was given permission and she called Stephen Musembi and informed him. They met together with their cousin (Ndolo). As they reached the gate a motor vehicle with officers stopped them and they went to the police station from where she was interrogated. Her phone and other personal items were taken. Three (3) days later she was taken to Mukuyuni.

40. While there a man and girl came and said they did not know her and they were taken inside some office. After two weeks she was again interrogated. She said her husband was a drunkard. She was taken to a scene where she was asked to point somewhere and photos were taken and they returned to the station. They asked about 1st accused and where he lived. She was asked to take them to where he worked. Pw10 would beat her and she informed the OCS. She took them where she worked in Nairobi.

41. Pw7 (her employer) came and she was thrown down and stepped on and she returned to the car. She took them to 1st accused and thereafter they left for Makueni. Three days later she was taken to Machakos law courts.

42. In cross examination she said she was married to the deceased in 2002 under customary law and they have three children born in 2003, 2005 and 2008. She went to work in Nairobi in 2013 and she would come home after two months. By 2013 the deceased had become so bad such that he would not provide for them and would drink and beat people. The deceased was a boda boda person. Pw5 cared for the children.

43. She denied having been called by Pw7 after she went to see her grandmother. She also denied ever agreeing to meet the deceased in Mukuyuni and spend there. She had never met the deceased since going to Nairobi. She never paid for any boda boda for the deceased. She also stated that Pw1 and 1st accused are the

deceased's cousins and she used to visit the latter when his wife was alive. She did not have anything to show that she was in Machakos on 8th May 2015. According to her all the witnesses including the police lied. When she arrived in Makueni she had not known of her husband's condition.

44. At the close of the defence case the prosecution elected not to file any submissions while the defence filed theirs through Mr. Nthiwa advocate. Mr. Nthiwa submits first by outlining the critical elements of the offence of murder as set out in the case of **Republic –vs- Nicholas Onyango Nyolo (2014) eKLR**. They are as follows:

a) Proof of the fact and the cause of death of the deceased.

b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the “*actus reus*” of the offence.

c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the “*mens rea*” of the offence.

45. He submits that Pw1 did not avail details of his motorbike that he allegedly used to transport the deceased to Mukuyuni. He did not also produce proof of receipt of any payment by Mpesa by 2nd accused. The Mpesa messages availed by the prosecution did not establish any such payment. Counsel has raised the issue of identification parade considering that Pw2 and Pw3 had not known 2nd accused before. Secondly Pw2 and Pw3 did not attend the post mortem to identify the person they had seen at the bar if indeed it was the deceased.

46. Counsel has also referred to the evidence of Pw4, Pw6, Pw10 and Pw11 and contends that the deceased was said to be a drunkard and would arrive home late. The murder weapon was never recovered. That the photos EXB7a and b were taken on two different days. Further he contends that the evidence in respect to

the phones did not show that the accused was anywhere near the vicinity of the murder. No pin point location or geographical location data was provided to prove this. It's his submission that the identification of the accused was not satisfactory.

47. He has referred to several decisions which have spoken to the issue of identification e.g **Wilson Kamotho Giuthi (2018) Eklr; Riria –vs- Republic 1967 E.A 584; Paul Etole & Reubben Omkima –vs- Republic Criminal Appeal No. 24 of 2000 (Court of Appeal); Wamunga –vs- Republic (1989) KLR 426; Nzaro –vs- Republic (1991) KAR 212; Kiarie –vs- Republic (1984) KLR 793; Republic –vs- Turnbull & Others (1976) 3ALL E.R 549.**

48. This is now the case before this court for determination.

Analysis and determination

49. The 1st accused and 2nd accused are facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. Murder is defined under section 203 of the Penal Code as:

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

Malice aforethought is defined under section 206 of the Penal Code as:

a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by

indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c) An intent to commit a felony;

50. For a charge of murder to be proved the following must be established:

i. The fact and cause of death.

ii. Death caused by the unlawful act of commission or omission of the accused person (actus reus)

iii. The unlawful act of commission or omission was accompanied by malice aforethought/intention (mens rea).

Issue no (i) The fact and cause of death.

51. There is no dispute that indeed Darius Kithome Munyaliti was found dead on 9th May 2015. Pw1 – Pw12 have spoken to that fact. A post mortem was conducted by Dr. Loiposha after the body was identified by Samuel Kingoo Kimeu and John Kilonzo Munyaliti. The report (EXB1) shows that the cause of death was severe chest and head injury secondary to road traffic accident which was the finding by Dr. Loiposha who was not available to explain how he came to that conclusion.

52. This report (EXB1) was produced by Dr. Makau Alex (Pw6) and he was of the view that the injuries were not pointing to a traffic road accident. The lead investigating officer (Pw12) was of a similar view to that of Pw6 in respect to the circumstances leading to the death. The bottom line is that the deceased had multiple injuries on his body but what caused the death were the severe chest and head injuries. There is no one who testified as to having witnessed how the injuries were inflicted. Had Dr. Loiposha testified he would have explained to the court how he came to the conclusion that the injuries were secondary to a road traffic accident.

Issue no. (ii) Death caused by the unlawful act of commission or omission of the accused person (actus reus)

53. As stated above there is no one who witnessed the killing of the deceased. What has been produced before this court is therefore circumstantial evidence. In the case of **Republic –vs- Taylor Weaver & Donovan (1928) 21 Cr. 20** the court stated:

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

54. In **Abanga alias Onyango –vs- Republic Criminal Appeal No. 32 of 1990** (U.R) the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is 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.”

55. Later in Republic –vs- **Michael Muriuki (2014) eKLR** the Court of Appeal held –

“In **Sawe –vs- Republic (2003) KLR 364** 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 hypothesis than that of his guilt.

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

3. *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.*”

56. I will first deal with the evidence in respect of the 1st accused. Pw4 who was with the deceased and Pw1 at Kakusini market did not see 1st accused at the said market. Pw1, Pw3 and Pw4 who were in Mukuyuni with the deceased and another denied seeing 1st accused anywhere in the vicinity.

57. The only evidence linking 1st accused in this matter is the finding of the deceased's shirt and charred remains of deceased's shoes, clothes and phones in the building where 1st accused lived upstairs. It is 2nd accused who took them there. These items were produced as EXB3, 5a & b, and a stove (EXB4) whose paraffin was allegedly used to burn the deceased's items was also recovered. There was also mention of 1st accused having run over the deceased with a hired car and he disappeared. Finally was the issue of a love affair between 1st accused and 2nd accused. It was 1st accused's wife who informed Pw10 about it.

58. The 1st accused in his defence denied all this and stated that he was on duty at Venger hotels JKIA at the reception on the night of 8th May 2015. During the day he had been at Kenyatta National Hospital where his wife was ailing and had been admitted.

59. From the evidence of Pw12, the recovery of these items linked to 1st accused was done in the absence of the suspect. It is 2nd accused who had taken them to that house. Further from his evidence these items in particular EXB3,4,5a & b were found upstairs. It's not clear in whose room or what place they were found because Pw12 said the house in which 1st accused lived was an incomplete one and it is only the ground floor that was complete. He was also clear that from 1st accused's room which they broke into they only took phones and batteries.

60. Besides not even establishing where EXB3,4,5a & b were found the prosecution never tried to have EXB3, 5a & b identified as truly belonging to the deceased person. Furthermore it is not even stated which is this day when the items were recovered from 1st accused's house. Further on this issue of police breaking into his house the 1st accused testified that on 15th May 2015 3:00 am he was called and informed of police officers who were looking for him and when he went home the next morning after reporting off duty at 9:00 am he found his padlock broken with a different one on the door. It's the landlord who opened for him.

61. Since the prosecution witnesses never indicated when they broke into his house this court takes it that it was on the night of 15th and 16th May 2015 which was never rebutted. 1st accused must have been highly suspected since it was believed he was in a romantic love relationship with 2nd accused who had left her husband and children to come and work in Nairobi. The 2nd accused herself told the court that since she came to Nairobi in 2013 upto the time of incident she had not set her eyes on her husband, the deceased.

62. Does that in itself link 1st accused to the killing? Suspicion however strong cannot be the basis of a conviction. The Court of Appeal in the case of **Sawe –vs- Republic** (supra) stated this:

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

63. With the above analysis, my finding is that the prosecution did not prove its case against 1st accused.

64. There is no dispute that 2nd accused was the deceased's estranged wife and she had worked in Nairobi since 2013. She told the court in her evidence that the deceased had become so bad and irresponsible by the time she went to work in Nairobi. Pw4 who is a cousin to the deceased said he was with Pw1 and the deceased at Kakusini market, when 2nd accused called the deceased asking that they meet at Mukuyuni. Pw4 tried to dissuade him but he was not able to. He confirmed that Pw1 left for Mukuyuni market with the deceased and it was around 8:30 pm. Pw1 gave similar evidence to that of Pw4 on this bit.

65. At Mukuyuni they (Pw1 and deceased) had to wait for 2nd accused since she was the one paying the rider's charges plus the accommodation. Pw1 stated that they went to Kathekani bar to wait for 2nd accused and also to book a room. The 2nd accused eventually arrived at 10:15 pm, paid his charges and he left the two at the counter. Pw1 did not require an identification parade to identify the deceased and 2nd accused because he knew them.

66. Pw2 and Pw3 are the proprietor and worker at Kathekani bar. They identified 2nd accused as the woman who had been at the facility with her husband on the material night. It is true the police should have organized for an identification parade for the court to be

satisfied of their identification. However that may not be fatal since Pw1's evidence is one of recognition. He knew both the deceased and 2nd accused and he left them in Pw2's facility as they prepared to go and sleep. I find Pw2's and Pw3's to be only corroborative to that of Pw1.

67. Pw5 who used to take care of the deceased's children testified that on 8th May 2015 at 6:00 pm the deceased called her and told her that he was going to Mukuyuni for his wife. So he was giving her directions about the children's food stuffs. Therefore the people who were aware that the deceased was meeting 2nd accused on 8th May 2015 were Pw1, Pw4 and Pw5. Among the three (3) Pw1 is the one who witnessed the meeting of the 2nd accused and the deceased.

68. Pw2 testified that he was bothered about opening the door for 2nd accused to let her out. The next time she came it was around 1:00 am and she knocked his door three (3) good times. He opened the door and she left with the man he was with whom he knew as her husband.

69. In her defence she said she went to visit her grandmother in Machakos on 8th May 2015, and returned to Nairobi on 10th May 2015, and received a report of the husband's death on 11th May 2015 as she took care of Pw7's child. She denied ever being called by Pw7 while at her grandmother's.

70. Pw7 in her evidence stated that she gave 2nd accused permission to go and sort out some domestic issue on 8th May 2015. She did not come back the following day. This means she was expected back in Nairobi on 9th May 2015 but she did not return. Pw7 then called her to confirm if she arrived and she confirmed. She instead returned on 10th May 2015 and told her that her husband had

been murdered. Pw7 even asked her why she had come back if that was the case. She was released by Pw7 on 11th May 2015.

71. It is therefore not true when the 2nd accused pretends in her defence that when she returned to Nairobi on 10th May 2015 she had no idea that her husband had died. She further lied that when she was called by Stephen Musembi on 11th May 2015 he only told her the husband was admitted in hospital so she was not aware of what had happened to him. My finding is that 2nd accused was not being truthful. She all along knew what was happening, and that's why she did not go back to her work place on 9th May 2015 as expected.

72. Besides her word of mouth there is nothing at all to show that from 8th May 2015 upto the time she left for Nairobi on 10th May 2015 she was at her grandmother's in Machakos. I find the evidence of Pw7 to be more reliable on 2nd accused's movement during the period in question. Pw6 testified that 2nd accused talked to her child MK aged 10 years, on 10th May 2015. Nobody knows what the talk was about. Had she testified she may have told the court the truth.

73. The deceased's naked body was found on a cliff in Makongo area. The photos show it was hanging on some trees before it was brought down by the police. It is not clear where the theory of RTA emerged from. If indeed as insinuated that because he used to be a drunkard and could have been knocked by a car, then he should have been found lying dead on the road and in his full clothes.

74. I am satisfied that Pw1 dropped the deceased at Mukuyuni market at Kathetani bar, 2nd accused found him there and paid him his charges; the deceased and 2nd accused booked room No. 12 at the facility; Both of them left (walking) out of the facility at around

1:00 am. The next day the deceased's body was found hanging on some trees at Makongo area.

75. The last person to be seen with the deceased alive was none other than his beloved wife Jackline Mwendu Mutua alias Jackline Mwendu Kithoome the 2nd accused herein. She has not given any explanation as to what happened to him when they were together that night. I therefore find that she is the one who through her act of commission or omission killed the deceased. Actus reus has been established.

Issue no. (iii) The unlawful act of commission or omission was accompanied by malice aforethought/intention (*mens rea*).

76. In the case of **Republic –vs- Tumbere S/O Ochen (1945) 12 EACA 63** the Court of Appeal in determining whether malice aforethought had been established, considered the following:

- i. The nature of the weapon used.
- ii. The manner in which it was used.
- iii. The part of the body targeted
- iv. The nature of the injuries inflicted either a single stab wound or multiple injuries.
- v. The conduct of the accused before, during and after the incident.

77. Later in the case of **Nzuki –vs- Republic 1993 KLR 171** the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions the test of which is always subjective to the actual accused:

- Intention to cause death.
- Intention to cause grievous bodily harm
- Where accused knows that there is a risk that death or grievous bodily harm will ensue from this acts an commits them without lawful excuse.

78. Further in the case of **Daniel Muthee –vs- Republic Court of Appeal No. 218 of 2005 (U.R) the Bosire, Okubasu and Onyango Otieno JJA** while considering what constitutes malice aforethought observed as follows:

“When the Appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victim. We are therefore satisfied that malice aforethought was established in terms of section 206 (b) of the Penal Code.”

79. There is no dispute that the deceased and 2nd accused were not living together as husband and wife for what 2nd accused says was bad and irresponsible behaviour by him. She even confirmed that she could go home after two months but had not seen him since she left in 2013.

80. From the evidence of pw1, Pw4 and Pw5, 2nd accused called the deceased to meet him in Mukuyuni. Despite Pw4 trying to discourage him from going to Mukuyuni he could not listen. He must have been looking forward to meeting his “lost” wife. Little did he know that he was taking himself to an already finalized deal. The postmortem report EXB1 has outlined the multiple injuries he suffered including those that caused his death.

81. With the severe injuries on the chest and head there was no way the man could have survived. The report shows something about the eyes confirming what Pw4 and Pw10 said about the eyes and injuries to the same. The intention was for the deceased to die. The 2nd accused said she was beaten by Pw10 and Pw12. Despite being represented she never raised this before the court until five years later when the two witnesses testified. This was just an afterthought.

82. Having found that the deceased died out of the injuries he sustained and the manner he was lured to his death and the several severe injuries he suffered I am inclined to conclude that the intention was to cause his death. There was no way he could have survived.

83. I find the offence of murder as defined in section 203 of the Penal Code proved beyond any reasonable doubt. I find the 2nd accused guilty as charged and convict her accordingly.

84. On the other hand the charge against 1st accused is not proved and I acquit him of the charge of murder contrary to section 203 of the Penal Code. The 1st accused shall be released forthwith unless lawfully held under a separate warrant.

Delivered, signed & dated this 13th day of November 2020, in open court at Makueni.

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H. I. Ong’udi

Judge