



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI(MILIMANI)

CRIMINAL DIVISION

CRIMINAL CASE NO. 45 OF 2012

REPUBLIC.....PROSECUTOR

-VERSUS-

PATIUS GICHOBI NJAGI.....1ST ACCUSED

CAESAR WACHIRA MUTHONI.....2ND ACCUSED

JUDGMENT

1. **Patius Gichobi Njagi** the 1st accused and **Caesar Wachira Muthoni** the 2nd accused hereinafter referred to as A1 and A2 stand charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars are that A1 and A2 on the 17th day of August 2011 at Mwiki within Nairobi county, jointly with others not before the court murdered **VWT**.

2. They pleaded not guilty to the charge and the case proceeded with the prosecution calling seventeen witnesses. A1 gave a sworn statement while A2 gave an unsworn statement of defence. They did not call any witnesses.

3. A summary of the prosecution case is that A1 and the deceased lived together as husband and wife in Mwiki of Nairobi county. They lived with a sister to A1(Pw2), a house help (Pw3) and their two daughters. On **14th August 2011**, the deceased gave (Pw3) four days off duty and she was to resume duty on **18th August, 2011** which she did after the deceased sent her money for fare.

4. On **15th August 2011**, A1 and the deceased took their two children to the A1's parents in Kirinyaga. The deceased appeared not happy about this decision as she wanted the children to go for tuition, over the holiday.

5. It was Pw2's evidence that on **17th August 2011**, she went to work in the morning. Later in the afternoon A1 sent her to take medicine to their father in Kirinyaga. She reached there at 7:00 pm and called the deceased who told her she was cooking supper. The deceased later sent her an sms to say goodnight and told her that her husband (A1) had come home.

6. **Pw4 Winnie Ngendo Chege** a close friend of the deceased was with the deceased on 17th August 2011 at her shop at 6:00 pm – 7:20 pm when the deceased closed her shop. While still together the deceased received a call and she told her it was from A1 who told her to prepare rice and kachumbari for his dinner. After closing the shop, they went through the market and bought rice, tomatoes and onions after which they parted.

7. The next day the deceased never turned up to open her shop. Late afternoon when they were able to access the deceased's house she found the rice and kachumbari in their kitchen. She was able to identify the clothes the deceased had worn on 17th August, 2011; that is shorts, open shoes and a top. They were in her bedroom. Pw4 was in the presence of Pw3, Pw5, and A1 in the latter's house when she saw all this.

8. **Pw1 Joel Wanjau Gichuru** is a brother in-law to A1 as he is married to A1's cousin. He testified that the A1 visited him at his shop in Kutus Kirinyaga on 5th August, 2011 8:00 pm. They moved to Tellace Villa as A1 had an issue he wanted to discuss with him. They took some alcohol and he left A1 at the venue after he had told him what he wanted. The issue was that he needed two latrine diggers, and Pw1 promised to get them for him.

9. On **17th August 2011**, Pw1 left Kutus for Nairobi with A 2 and Chomba (*now deceased*). He was taking the two to meet A1 for the assignment of digging a latrine. They were in Nairobi at 9:00 am and he called A1 who told them he was at Roysambu at the Shell petrol

station. They went and found him there. They got into his car and as they talked he told them he had now changed the assignment from toilet digging to killing his wife. The reason for the change of plan being that his wife (*now deceased*) wanted to kill him.

10. Pw1 explained how A1 had then promised to pay the two men Kshs.5,000/= each and even employ them. A1 got another car and they all went up to Samton near his house. The time was about 6:00 pm. A1 took the two men to the bar and bought them alcohol. Meanwhile Pw1 and A1 went back to Roysambu where A1 bought a **small blanket, two knives, two packets of milk, and a cake**. They left for Samton where the other two men were. A1 still repeated that he was going to kill his wife. Pw1 was taken to Roysambu and he boarded a vehicle and went back to Kutus.

11. He met A2 and Chomba (*deceased*) when they came to his shop at Kutus on **18th August 2011 at 6:00 pm**. They confirmed having killed A1's wife and cut her into pieces and thrown her body into the river. They also told him that A1 had not paid them as agreed as he only gave them Kshs.2,000/= each, instead of Kshs.5,000/= each.

12. There was no communication between Pw1 and A1 for about a month when the latter called and they met. He told Pw1 to look for A2 and Chomba (*deceased*) in respect to the phone they had which he believed the CID were following up on. He found the two men who assured him they had thrown the phone away. He relayed the message to A1.

13. In **January 2012**, someone he did not know came to his shop and asked him why A1 wanted to kill him. He assured him that he did not know. He later called A1 on 0722 xxx xxx to inquire from him but he did not pick his call. It was then that he decided to spill the beans. He reported the matter at Kiambu CID office and further traced the home of the deceased's parents. He gave them the information in respect to their daughter's disappearance. He recorded a further statement on 20th June 2012. He went with A2 and Chomba (*deceased*) to Mwea from where they were arrested by the CID officers.

14. In cross examination, Pw1 confirmed that he didn't share with anyone about the deceased's killing. He did not report to the police what the stranger had told him about A1 wanting to kill since he first wanted to confirm from A1. He denied demanding any money from A1 to buy his silence. Upon his arrest A1 sent him a message via sms on 070 xxxxxx stating: -

“Ndungu umeniwekelea mengi umeniweza”.

He admitted that these words did not amount to a threat.

15. Before this report by Pw1, **Pw7 Ishara Ekida Meshack** had been arrested and charged vide **Makadara CMCR Case No.4118/2011** for being in possession of suspected stolen property. The phone he had picked along the road and was in his possession was identified as belonging to the deceased. The case was later withdrawn when the accused persons were arrested.

16. **Pw6 SW** a cousin to the deceased gave a detailed account of the marriage life of A1 and the deceased. She explained how A1 had been so cruel to the deceased and there is a time she ran away and lived with her and the child for a month. There was also a time he came and surrendered to her a kitchen knife (**EXB1**) he had intended to use for killing the deceased. He told her the two had however talked and made up. He requested her to keep the knife, which she did. On getting the report on the deceased's disappearance she took the knife (**EXB1**) to the police station.

17. **Pw8 Willy Obuya Misoga** worked at Tulip Guest House as a receptionist. He testified that on 17th August, 2011 at around 9:15 pm he was at the reception when A1 and a lady (*formerly accused 3*) came and booked a single room. The charge was Kshs.800/=. The lady paid by giving him Kshs.1,000/= and the change was given to her. He issued them with a receipt **No.2907** from the receipt book (**EXB3**). The next day he learnt from Pw12 who had taken over from him, that the room (**005**) booked with receipt **No. 2907** had been used by two men and not A1 and the woman he had come with.

18. On the other hand, **Pw12 Jackton Okoth Awena** testified that on 17th August, 2011 he was on night duty at Tulip guest house having taken over from Pw8, who gave him a brief. At around midnight two young men came with a receipt for room (**005**), and he gave them the key. They returned the key the next morning at 6:30 am and checked out. This witness identified A2 as one of the young men who slept in room 500 on the night of 17th August 2011. He admitted not having been subjected to an identification parade, to pick the persons.

19. **Pw15 No. 231840 Mwangi Gillon** Gitau is an assistant superintendent of police and a gazetted scenes of crimes officer vide gazette notice No. 407 of 18th January, 2010. He took a bunch of photos covering various scenes in this case. He explained that in this exercise he was accompanied by Corporal Martin Miguto and Clement Mwangi of DCI headquarters. Together with them was an accused called Chomba (*deceased*), and Caesar (*accused 2*). He produced a booklet of these photos as **EXB5**. The photos were taken on **23rd and 24th June 2012** and reprinted on 17th December, 2015.

20. **Pw16 IP Clement Mwangi** handles homicide cases at the DCI headquarters. He was the Investigating officer in this case and he worked with Chief Inspector Nyanguto and Sergeant Nicholas Ole Sena. He gathered all the necessary information as stated by the witnesses. On **19th June 2012**, he received a call from Pw9 who told him about Pw1. He advised them to come to his office and the three men; i.e. Pw1, Pw9 and Pw10 came and Pw9 narrated to him what they knew about this case. He organized for the arrest of the said Chomba and A2 which was done.

21. A1 was arrested on **22nd June 2011** as there was preparation for commission of the offence namely:

i. He took the children to Kirinyaga on 15/08/2011.

ii. The maid was released to go home on **14/08/2011** to return on **18/08/2011**.

iii. On **17/08/2011** at **3:30 pm** A1 sent his sister to Kirinyaga.

iv. On **17/08/2011** he called the deceased and confirmed he would go home which he did.

v. He concealed the murder by having the body cut into pieces and disposing it into Nairobi river.

vi. He reported the missing person on **19/08/2011** at Mwiki police station.

22. In cross examination he said the initial investigation was of a missing person. It later on turned out to be a case of murder.

23. **Pw17 No. 69485 Daniel Hamisi** works for Safaricom security department. His duties include processing requests for call data records in respect of Safaricom members. The requests are usually from investigative agencies. He produced his oath letter dated 2nd May 2018 (EXB 13). The reports he produced had been extracted by his senior manager Mr. Weldon Songok. He had a certificate dated 2nd May, 2018 to that effect. The call data in respect to VM (deceased) I.D No. 14xxxxxx for the period **1/8/2011 – 23/8/2011** shows the following: -

i. Last communication on **17/8/2011** was an sms at 22.35 hours. It was from No. 071xxx xxx (Elizabeth Njage phone no. (071xxxxxx). Geographical location is Njiru Red Soil.

ii. 2nd last communication was an outgoing sms from 705 to 708 at 22:34 hours from Njiru Red Soil.

iii. 3rd last communication was at 22:10 hours which was an incoming voice call from **0722 xxx xxx** (Patius Gichobi Njage I.D No.10xxxxxx. it lasted 22 seconds. Location Njiru red soil. Report – EXB15)

24. The next call data is in respect of the account of Patius G. Njagi ID No.10xxxxxx. The data is from **01/08/2011 – 26/08/2011**.

i. On **17/08/2011**, 22.10 hours was a voice call to 072xxxxxxx (Njiru Makongeni) area. It lasted 22 seconds. No other calls were captured. Report EXB16.

25. The next call data is in respect to Elizabeth Njage telephone no. 071xxxxxx. (Report EXB17). He produced the certificate by Mr. Weldon Songok done under Section 65(8) as read with Section 106 (7) of the Evidence Act (EXB18)

26. In cross examination the witness stated that the content of an sms is unknown, and cannot even be read from the computer.

27. In his sworn defence A1 stated that he resided in his own house in Redsoil Mwiki and operated a number of businesses namely:-

- **Palyne Pharmacy in Kiambu and Githurai 44**

- **Clinic**

- **M-Pesa shops Broad Bridge Solutions Kiambu and Rumba Base Communications Kiamumbi.**

- **Cereals shop in Kiamumbi**

- **Farming in Mwea, Kirinyaga and Gichugu in rice and horticulture products.**

He lived with his wife (*the deceased*), his sister (Pw2) his daughters LW aged 18 years and MN aged 16 years.

28. Pw2 came to live with them in 2007 and she still lives in his house. He got married in 2002 after losing his wife Teresiah Njura, (**DEXB2**) who died of a brain infection (*meningitis*) on 24/9/2001. He lived with the deceased herein in Zimmerman, Maziwa Estate and lastly Redsoil. In 2003, he went to see the deceased's parents with his two friends.

29. He promised to go back with his parents which he did in 2004 alongside other persons. The deceased's parents demanded for a dowry of KShs.500,000/= and he paid KShs.150,000/=. The balance was demanded for through Dr. Kang'ethe (*now deceased*) and Pw10. The demands were with threats of the deceased being withdrawn. When the deceased disappeared is when he seriously reflected on the threats.

30. Schools closed on **12th** or **13th August 2011**, and as usual they took the children to Kirinyaga on **15/08/2011** arriving at 3:00 pm. They left at 11:00 pm after supper. On **16/08/2011** he dropped the deceased at the M-Pesa shop Kiamumbi and proceeded with Pw2 to work. He arrived back home at 9:00 pm and found the deceased and Pw2. He was not sure if Pw3 was there. On **17/08/2011** he notified the deceased and Pw2 that he would be taking his father drugs as he was unwell. He dropped the deceased at work and he went with Pw2 to the business. He became too busy with looking for motor vehicle spare parts and he cancelled the trip to Kirinyaga.

31. He called his wife to send her but she was not ready for that. He then called Pw2 with whom he organized to get the drugs to their father. This was at 1:00 pm and she left. He worked up to around 5:00 pm before leaving for the garage in Roysambu, barber's shop, finally to a nyama choma place. He was with his mechanic.

32. His girlfriend **Catherine Nyagucha Wainaina** called to inquire if he was going to her that day. His response was in the affirmative. Catherine was like his 2nd wife. They did businesses together and his clothes were at her place, though the deceased knew nothing about it. He spent the night at Catherine's place.
33. When he woke up at 7:00 am he wanted to use his phone but he could not get it. He had left his vehicle at home because of the fanbelt. He realized the phone was in his vehicle. He went to the shop in Kiambu, then to Nairobi to order for drugs and Baricho road for the fanbelt. Thereafter he went to Roysambu to pick a mechanic when he learnt that the mechanic Ndegwa was in Nairobi for work. He called him and they met at his house at Redsoil and he gave him the fanbelt. He entered the house and took the car keys which he gave to Ndegwa who started connecting the fanbelt.
34. While there, he noticed a bag on the compound and the iron sheet fence had been interfered with. Pw3 then came with two other girls. As he drove out he was stopped by a man (Pw5) and woman (Pw4). They introduced themselves as friends of the deceased. He left for the shop at Kiambu and the time was 2:00 pm – 2:30 pm.
35. Pw2 called him and informed him she was trying to reach the deceased in vain. He stated that when he met Pw3 he had called the deceased but she never responded. Pw2 returned on 18th August 2011. He again spent the night of 18th August 2011 at Catherine's. He called his wife's sister in law Alice Kamunde and told her he could not get the deceased. She told him she was the one in the shop. He again called the deceased's elder sister (*J*) but she too had not seen her. His brother in-law Richard Thuku called him around 4:30pm – 5:00 pm inquiring about the deceased. He asked him to buy him beer which he did in the evening at a bar where he had come with his wife.
36. In the cause of their talk Thuku told him not to bother about the deceased as she was an adult. Alice Kamunde also told him the deceased's parents were aware as the deceased had spent the day of 17th August 2011 at their home.
37. He reported the matter to the police at Mwiki police vide **O.B NO.15/19/08/2011** and notified Thuku of the step he had taken. Later he met Thuku, Simon Nyoro (*cousin*) Pw9 and Pw11 but on the side Thuku was asking him why he was bothering. They went to the DCIO together and as they left Pw9 retreated to the DCIO's office. The DCIO wanted to know their relationship. He finally went to the Nation newspaper and Kameme radio station to report about the missing lady. He produced documents (**DXB 3a – c**) to confirm that. His action did not however go well with Pw9.
38. He testified that Pw2 and Pw3 were interrogated by the DCIO in his presence and later officers went to his house, on **23/08/2011** after others had been there on **19/08/2011**. A burnt body was recovered but after a DNA test it was found not to be the deceased.
39. His wife's phone was recovered from Pw7 and he was even a witness in that case. The case was later withdrawn and the Investigating Officer told him they had been ordered to withdraw because it involved influential people. An issue arose in respect to his daughter **MN**. His parent's in-law had made a report to the children's office in January 2012 and he had been summoned (**DEXB4**). He claimed that he has been severally threatened because of the custody of his daughter.
40. He was arrested on **22/06/2012** at 5:00 pm, and taken to Runda police station at 1:00 am. At 2:00 am an officer (**Martin Nyaguto**) came and asked him if he was willing to cooperate and give out the child. At 4:00pm he was taken to his house at Redsoil where photos were taken. A demand for a bribe was made but he refused to pay. Had he known this matter would take this long he could have paid even a million shillings.
41. Later he learnt of his wife's former boyfriend in Botswana. He was not aware if they were still relating. He however knew that the man in Botswana (**Geoffrey Muia**) was known to Pw7 who was found with the deceased's phone. The man should have been investigated he said. He denied being involved in the deceased's death, if at all she had died.
42. In cross examination by the prosecution he denied everything that all the prosecution witnesses testified on. He even denied that Pw4 was the deceased's friend and confidant and same to Pw6.
43. A2 elected to give an unsworn statement of defence. He said he used to live in **Ndia – Thangari village of Kirinyaga**. He stated that on **12/06/2012** he left home for Nguruvani market carrying bananas, pumpkins and pineapples. As his merchandise was being off loaded, he witnessed people being arrested by persons in civilian. He too was arrested and taken to Makutano town. The police branded them Mungiki and demanded for Kshs. 10,000/= from each of them. He only had Kshs. 3,500/= and was therefore not released. He was brought to Nairobi over things he knew nothing about. He denied the charge.
44. All counsel filed written submissions which they highlighted. M/s Onunga for the State submitted that the circumstantial evidence herein shows a complete chain of events that show the role of the accused persons in the deceased's death. She has captured all this by summarizing the evidence. It was her submission that Pw1 was an ordinary witness and not an accomplice as alluded to by the defence.
45. She further submitted that A1's defence was contradictory and should not be believed. That his urgency in advertising the matter was to hide it. She referred to the case of **Ndungu –vs- R (1985) KLR 487; R –vs- Harvy NZLR 11(3rd digest sup)** to show that death can be confirmed, without medical evidence. She also referred to Section 118 of the Evidence Act on that issue. That the fact that A1 demanded for his wife from Pw7 showed that he knew the wife was not in Botswana.
46. **Mr. Okatch** for A1 raised the issue of proof of death which he argued had not been proved by the prosecution. He referred to paragraph 4 of the case of **Dorcas Jebet Ketter and Anor –vs- R (2013) eKLR**, which has been cited by the prosecution. His submissions are that there must be evidence on the fact of death. He referred to **R-vs- Mohamed Dadi Kokane and 7 others (2014) eKLR**.
47. He also raised the issue of the man who lives in Botswana, saying the issue was never investigated. It was counsel's submission that

presumption of death under Section 118 Evidence Act is not automatic. All other circumstances must be ruled out, which has not been done in this case. He further stated that Pw4 and Pw5 were the last persons to see the deceased and they were the first to go to her house the next day. It was his submission that they knew what was happening in order to set up A1.

48. He submitted that the clothes that were found to have been worn by the deceased were not brought to court. He contended that Pw9 and Pw11 had issues with A1 and all this was set up in order to punish him. That they have even taken A1's daughter with Virginia. He pointed out that there was a contradiction in Pw1's evidence on the different motor vehicle registration numbers and the items that were allegedly brought. He therefore prayed for A1's acquittal.

49. Mr. Oundo for A2 associated himself with the submissions by Mr. Okatch. He submitted that Pw1's evidence should not be relied on as the role he played is very clear. That he did everything and asked A1 to take him to the stage. He made no attempt to report and never explained his failure to do so. On circumstantial evidence, counsel referred to the case of **Mwangi –vs- R (1983) KLR**. On corroborated evidence of an accomplice counsel referred to the case of **Watete –vs- Uganda (2000) E.A 559, Nasolo –vs- Uganda (2003)1 E.A 181**.

50. This is now the case before court for determination. A1 and A 2 are facing a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. Section 203 defines murder as follows:

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

For the prosecution to secure a conviction on a charge of murder, it has to prove **three (3) ingredients** against an accused person. The ingredients are as follows: -

a) Proof of the fact and 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.

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

51. It is not disputed that there is no direct evidence adduced to confirm the fact and cause of death of the deceased. What is before this court is pure circumstantial evidence. It is the case of the prosecution that the deceased was last seen alive on **17th August, 2011**. That A1 and the deceased were indeed together on this date. Thereafter her phone went unanswered and she has not been seen again. M/s Onunga for the prosecution has invited this court to make a presumption of death under Section 118A of Evidence Act following the disappearance of the deceased on 17th August, 2011.

52. On the other hand, the defence has submitted that the fact and cause of death were not established, as the investigating officer did not carry out sufficient investigation to establish the whereabouts of the deceased person.

53. It is true that in the case at hand there is no physical evidence to show that indeed VW died. Infact, the correct words to be used are ***“She went missing”***. The only form of ***“search”*** conducted by Virginia's family and A1 was indeed reporting to the police station and media. At one point a body was found and when a DNA was done it was found not to be Virginia's. There is also a time when some bones were found at a river but they were found not to belong to a human being.

54. From the evidence on record there is no witness who witnessed the deceased being killed and neither was her body found in order for an autopsy to be conducted on it. In the circumstances, no postmortem report showing the cause of death has been produced herein. The Court of Appeal has dealt with cases which have presented some exceptional circumstances in terms of proof of death.

55. In **Ndungu –vs- R 1985 KLR 487** the court stated: -

“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution”.

56. In the more recent case of **Chengo Nickson Kalama –vs- R (2015) eKLR** the Court of Appeal sitting in Malindi held as follows: -

“The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a postmortem exam report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt.”

Further in the **Ndungu –vs- R** case (*supra*) the court held: -

“..... Where a body is available and the body has been examined, a postmortem must be produced, the trial court having informed the prosecution that the normal and straight forward means of seeking to prove the cause of death is by regularly

producing the postmortem examination report as a result of which the medical officer who performs the postmortem examination is cross examined. Here, no postmortem examination report was produced. Very poor reasons were given for not producing it.”

57. The present case does not fall in any of the categories discussed above. It falls in the exceptional category where medical evidence cannot be produced because the body has never been found. The court has therefore to rely on other evidence to come to the conclusion that indeed VWM was killed on **17th August, 2011**. In trying to resolve this issue, M/s Onunga the learned prosecuting counsel asked this court to apply Section 118 A of the Evidence Act which provides as follows

“Where it is proved that a person has not been heard of for seven years by those who might be expected to have heard of him if he were alive, there shall be a rebuttable presumption that he is dead”.

58. There is no application that has been made before this court or any other court for consideration in the first place. The provision states that it must be proved, by those who might be expected to have heard of him if he were alive. The charge against the accused persons was filed in **December, 2012**. By the time the charge was filed it was clearly indicated that the accused persons had murdered VWM. This meant that the prosecution had all the evidence to prove the fact of death and its cause.

59. The prosecution is asking this court to make a presumption of death under Section 118A of the Evidence Act. Why at this time? Is it because the defence has seriously raised the issue? By the time the murder charge was being preferred against the accused persons in 2012, the prosecution ought to have known that the seven (7) year period for one to be presumed dead was far from being reached. Section 118A Evidence Act could therefore not be applied to this case in December 2012 when the accused were charged. Can it be applied now? The evidence on record will tell.

60. In the absence of any documentary evidence to confirm the fact and cause of death, I will now turn to the circumstantial evidence and see what it avails. The key evidence on which the prosecution has premised its case is that of Pw1. Mr. Okatch and Mr. Oundo for the defence have submitted that Pw1's evidence is accomplice evidence which is inadmissible. On the other hand, M/s Onunga for the prosecution contends that Pw1's evidence should be treated like evidence of any other witness.

61. Who then is an accomplice? The Court of Appeal in the case of **Antony Kinyanjui Kimani –vs- R (2011) KLR (Cr. Appeal No.15 of 2007)** had this to say of such a witness: -

“What legally constitutes an accomplice is not defined in our statutes but Section 20 of the Penal code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal code also defined an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of Watete v Uganda (2000) 2 EA 559, the Supreme Court held that “in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial”, The same definition was restated by the same court in the case of Nasolo v Uganda (2003)1 EA 181 where the court further stated:

‘On the authorities, there appears to be no one accepted formal definition of “accomplice”. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case. In Davis of Director of Public Prosecutions (supra), the House of Lords said at 513:’

‘On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as falling within the category: (i) On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons, committing, procuring or aiding and abetting (in case of misdemeanors).’

62. I have in the summary above stated what the evidence of Pw1 is. I will however for emphasis chronologically restate it here as follows:

- On **5/8/2011**, A1 comes to his shop/house in Kutus of Kirinyaga county.
- They leave for a quiet place for a drink and discussion on the issue of latrine diggers.
- On **17/8/2011**, Pw1 takes A2 and Chomba (deceased) to Nairobi to meet with A1 for the assignment.
- They meet and the assignment turns from latrine digging to killing A1's wife.
- Pw1 does nothing but asks his boys to decide as they are adults.
- He goes with A1 to Roysambu at a supermarket to buy the items/weapon to be used in killing A1's wife.
- He later leaves for Kutus and does not mention this to anyone, let alone his wife, or the police.
- On **18/8/2011**, the two young men come to his shop and report to him what they have done and how their dues

were not fully paid. After a month he meets A1 and they discuss the issue of the phone in possession of A 2 and Chomba (deceased). They confirm they threw it away.

- He gladly takes back this information to A1. Up to this point, he has not mentioned this to anyone.
- In **January 2012**, he is visited by a stranger in his shop. The stranger asks him why A1 wants to kill him, and he gets shocked, but does nothing.
- On **19th June 2012**, he reports the matter to Pw9, Pw10 and Pw11 and to the police.
- It took Pw1 ten (10) months to ever open his mouth to tell the police what he allegedly knew about Virginia's disappearance.

63. If Pw1 is to be believed, then he is one person who could have stopped what he says happened from happening. What stopped him from reporting to the police that an offence was about to be committed? In cross examination he said he did not take A1 seriously when he talked of killing his wife. He even participated in the purchase of the murder weapons and availed the labour according to his evidence. He was not threatened by anyone. He never tried to find out who this alleged stranger was and who had sent him. Infact in cross examination he said had the stranger not given him that information he would never have reported this matter to Pw9's family and the police.

64. Faced with a similar scenario, the Court of Appeal sitting in Mombasa in the case of **Ngala Chirongo Mwamee –vs- R (2018) eKLR** had this to say: -

“(iv) While a person who aids and abets the commission of a crime or assists the guilty person to escape punishment is always an accomplice, a person who merely acquiesces in what is happening or who fails to report a crime is not normally an accomplice but the weight to be given to such person's evidence should vary according to the reason for the acquiescence; if the acquiescence was based on approval of the crime, the evidence should be treated as no better than that of an accomplice; if, however, the acquiescence was based on indifference, the evidence should be treated with considerable caution; but if the acquiescence was a result of fear then there is no reason why the evidence should not be relied upon;”

65. In this particular case Pw1 abetted the commission of this offence and his evidence is that of an accomplice and nothing less. Nobody threatened him and so had nothing to fear. He really has no reason for conducting himself in such an indifferent way. Having found so, then how is his evidence supposed to be treated?

66. In the case of **Karanja & Another –vs- Republic, Criminal Appeal No. 92 of 1990**, the Court of Appeal appreciated that accomplice evidence generally requires corroboration and set out the reasons as follows: -

- a) He/she is likely to swear falsely in order to shift the guilt from self;***
- b) As a participant in the crime, he is an immoral person who is likely to disregard the sanctity of the oath;***
- c) She/he gives evidence either under a promise of a pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution.”***

It is therefore clear that Pw1's evidence must be corroborated by independent additional evidence. This brings me to the second ingredient of murder which is :-

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.

67. Pw3 the househelp left A1's home on 14th August, 2011. This had been an arrangement between her and the deceased. In her evidence, she stated that when she entered A1's house on 18/8/2011, she found dirty dishes in the sink, she said nothing more on this. The next day as she made the children's bed she discovered a blanket missing. It was the prosecution evidence that the children had been taken to Kirinyaga on **15/8/2011**. So who had been using the bed she was allegedly making? Pw3 also said she missed a duster and jembe on 18/8/2011. There is no indication that this information was given to the police. If it was then it was ignored.

68. According to Pw2(A1's sister), she was in communication with Virginia that night. The last communication was when Virginia indicated that A1 had come. Pw4 told the court that on 17/8/11 at around 7:20 pm when Virginia had closed shop and as they talked Virginia received a call. She told Pw4 that it was her husband (A1) who had called and was asking her to prepare for him rice and kachumbari.

69. The prosecution presented to the court an officer from Safaricom (Pw17) who presented the call data in respect of Virginia, A1 and Pw3. Nowhere did he point out to the court any communication between Virginia and A1 around the time stated by Pw4. The only time mentioned was 17/8/2011 at 22:10 hrs a voice call lasting 22 seconds from A1 to Virginia.

70. A1 denied calling Virginia as alleged by Pw4 and asking her to prepare rice and kachumbari. I therefore find that Pw4's evidence on this issue of a call, rice and kachumbari is not supported by the call data EXB 15 and 16.

71. It was Pw4's evidence that on 18/08/2011 as they checked A1's house they found the following: -

i. The kitchen had clean utensils, milk in the jerry can and the rice and kachumbari were there.

Pw3 found dirty dishes in the sink. She never made mention of rice and kachumbari.

ii. In A1's bedroom were the clothes Virginia had worn the previous day. They were a pair of green shorts and a beige top, behind the door where dirty clothes were kept. Her handbag was on the table and it was empty.

72. It is clear that the evidence of Pw2 and Pw3 on the condition in the kitchen is not the same. Pw4 testified that she spoke to Virginia while on her way to Mwiki. They did not talk again but after seeing the rice and kachumbari in the kitchen of A1's house and the clothes she wore the previous day she was convinced Virginia had reached home.

73. The clothes worn by Virginia on the date of her disappearance were not produced as exhibits before this court, yet they were readily available in A1's bedroom, according to Pw4. A1 has denied that the clothes alleged by Pw4 to have been found in his bedroom were ever there. How does the court establish the truth of Pw4's or A1's assertions without the exhibits? This is one case where every bit of evidence mattered. Failure to avail these clothes and even photos of the rice and kachumbari in the kitchen was a serious omission.

74. It was the evidence of Pw4, Pw5 and Pw6 that A1 was cruel to his wife Virginia, and used to beat her and threaten her. Pw6 handed over to the police a knife A1 had allegedly surrendered to her after planning to use it to kill Virginia. She however confirmed that A1 and Virginia had made up for their differences. In any event, she did not say that the knife (EXB1) is the murder weapon in this case.

75. A huge bunch of photos were produced before this court by Pw15 an assistant superintendent of police Mr. Mwangi Gillon. They are photos he took from spots allegedly visited by A1, A2 and the late Chomba. At every scene him and other police officers made either A2 or Chomba (*deceased*) to pose for a photo. There are some photos where the A2 was taken to A1's house and made to pose in various postures including pressups as Pw15 took shots. With all due respect to Pw15, it was not shown by him what the prosecution intended to prove to the court vide these photos. I find them to have no evidential value in this matter at all.

76. A1 gave a sworn statement of defence denying any involvement in his wife's disappearance and/or death. He explained his movement from 15th August 2011 upto the date of his arrest. He had sent Pw2 to take drugs to his ailing father because of commitments he had and his wife was not ready to assist. That after a long day of activities on 17th August 2011, he went to visit his girlfriend/2nd wife Catherine Nyagucha Wainaina in Kiambu. He said he even had his clothes at this lady's place. He again spent the following night at Catherine's place. Pw2 confirmed that A1 did not spend the night of 18th August 2011 at his house.

77. He was in touch with his in-law's over his wife's disappearance. He reported the issue of her disappearance to the police and media on 19th August 2011. He testified how his in-laws had been harassing him over their daughter's marriage to him and said they may have played a role in her disappearance. He also wondered why a **Mr. Muia** a former boyfriend of Virginia and living in Botswana was not investigated.

78. Pw4 said she had been told by Virginia that in the event of her being killed Mr. Muia of Botswana whose contact she gave her should be informed. Did she suspect she would be killed and if so by who? Was any report made to the police? Why was Mr. Muia of Botswana the one to be told and not her parents? The investigating officer should have had Mr. Muia interrogated on what he knew about A1 and Virginia. This would have cleared the air on this matter. Pw16 (investigating officer) saw no need of doing so which is unfortunate.

79. The position of the prosecution is that A1's defence is a cover up as he is the one who killed Virginia assisted by A2 and Chomba (*deceased*). The investigating officer Pw16 in his evidence stated this at Page 288(v):

"He concealed the murder by having the body cut into pieces and disposing it in Nairobi river".

80. The said witness was the investigation officer and he never presented any single witness or any material to support this strongly worded statement. He was well aware that the confession they allegedly took from A2 was rejected because it was not taken in accordance with the set rules for the recording of such statements. In any event he should have used that information to carry out more and better investigations in this matter. He did not.

81. A1 raised an *alibi* in his defence. He denied spending the night of 17th August, 2011 at his house in Mwiki Red Soil, with his wife. He testified that the woman whose house he spent the night Catherine Nyangucha Wainaina recorded a statement with the police. She was however not called by the prosecution to testify. Another woman called Alice Kamwende Thuku who is Virginia's sister in-law recorded a statement but she was never called to testify. This lady (*Alice*) is the one Virginia spent the day with at her parents home on **17th August 2011**.

82. I am aware that under Section 143 Evidence Act there is no set number of witnesses to be called to prove a fact. Section 143 Evidence Act provides that: -

"No particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact".

83. However, when the prosecution fails to call a crucial witness the interpretation is that there is something it is hiding. A1 raised an *alibi* defence and indicated where he allegedly was on the night of **17/8/2011**. The police recorded a statement from the lady Catherine Nyagucha. Why was she not called to give whatever evidence she had?

84. The case of **Bukenya –vs- Uganda (1972) E.A 549** lays down the test to apply in considering whether a failure to call a certain witness was prejudicial to the A1's case. He stated thus at page 550;

"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call but this needs to be qualified in three ways. First there is the duty on the Director to call or make available all witnesses necessary to establish

the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

85. The prosecution would not be heard to argue that A1 should have called her. It is not upon the accused to prove an alibi, rather it is always up to the prosecution to displace it. What evidence is there to show that A1 spent the night with the deceased at their house in Mwiki Redsoil and not in Kiambu at the house of Catherine on the night of 17th August 2011? It has not been shown that this assertion by A1 was ever put to test. None of the witnesses has attested to this.

86. A2 in his unsworn defence only talks about his arrest and no more. The confessions that were taken in this case could have very well assisted the police in their investigations but they were not taken in accordance with the laid down rules. The investigating officer then used whatever he got from the confessions to create photos while using the scenes of crime officer (**Pw15**). As stated hereinabove, these photos do not add any value to the evidence adduced. What Pw15 and others did was wrong.

87. Pw1 was a very serious accomplice and from my assessment should have been charged alongside the accused persons. At the end of the day Pw1 exhibited real motivation to clear himself of this matter. The evidence adduced does not point to death or the manner or cause of death. The suspicion exhibited against the accused is very high. However, under the law suspicion however strong cannot by itself be a reason for conviction. See **Sawe v R (2003) eKLR**.

88. After due consideration of the entire evidence, I find the case against both accused not proved to the required standard. For my part, I find both of them not guilty and I acquit them under Section 322 (1) Criminal Procedure Code.

DATED THIS 22ND DAY OF JULY, 2019 AT MAKUENI HIGH COURT.

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H. I. ONG’UDI

JUDGE

DELIVERED ON 24TH DAY OF JULY 2019 AT NAIROBI HIGH COURT BY

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JUDGE