



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**HIGH COURT CRIMINAL CASE NO. 113 OF 2014**

**LESIT J**

**REPUBLIC ..... PROSECUTION**

**VERSUS**

**EKK ..... ACCUSED**

**JUDGMENT**

1. The accused **EKK** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal code**. the particulars of the offence are:

**“On the 21<sup>st</sup> of august 2014 at [Particular Withheld] village in Kiambu within Kiambu county murdered RAW”**

2. The accused person was a child of 17 years when the incident occurred, however he has since passed the childhood age. In this case the prosecution called a total of 11 witnesses, stepping down one of them whose statement had not been provided to the defence. The accused on his part gave a sworn defence and produced two Statements under Inquiry taken from him by the OCS, Karuri Police Station, and a Further Statement taken by CID Kiambu.

3. In summary the prosecution case is that the deceased, W was 8½ years old when this incident occurred. On the material day PW5, a new house help at the deceased home because she had been there only for two weeks was left with the deceased and her brother T who was 4½ year old, by the mother of the children, PW1 and their father. PW5 testified that at about 8am, N a neighbour's child went to visit T. N was 3 years old. PW5 testified that the three children started playing until 9:30am when the accused went to pick his brother, N for porridge. PW5 stated that since N started crying, she allowed the deceased and T to accompany him to their home which was not opposed by them.

4. PW5 testified that after half an hour she went to pick the deceased and T to return home. She said that she knocked at N's home, it was the accused who opened the gate and immediately asked her whether W, the deceased had returned to her home. That the question surprised her and she asked the accused what he meant yet he left the deceased home for his home with all three children. PW5 stated that the accused then told her that W and T did not stay at his home but that they left saying that they were going to Mama K's place. PW5 said that she saw that the accused was with T and N.

5. PW5 said that she asked T to take her to Mama K's place which he did. She said that at K's home a little child opened the gate and informed her that the deceased had not gone there that day. When she could not get the deceased in Mama K's home, PW5 promptly telephoned and informed PW1 the mother of the deceased about her disappearance.

6. PW1 testified that she got the news of deceased disappearance from PW5 at around 11:30am. She said that before she got permission from her place of work, she called Mama K, the mother of accused and asked her whether W was in her home. She said that Mama K told her that W was not at her home. PW1 said that she requested her to send the accused to A's home to check. A was W's schoolmate. The results were negative. PW1 said that she called her Pastor's wife who lived behind her home. She too had not seen the deceased. That is when PW1 called her husband and told him about the missing child. She also got permission from work and embarked on a search for her in the area around their home and in the neighbors' houses near their home. It was fruitless.

7. Later that evening the deceased was found dead in a maize plantation adjacent to the accused homestead. It was around 2 or 2:30pm going by the evidence of PW2 and 3. The body was discovered by PW2 a girl of 12 years. The girl, K had gone to accused home to get S, PW3 the sister of the accused so that together they could help look for the deceased who had gone missing. The two girls had learned about the disappearance of the deceased from other children at around 1pm as they went home from school. PW2 said that she parted with S, PW3 so that they could each go home for lunch. They agreed to meet at PW3's home after lunch to help search for W.

8. PW2 testified that she and S PW3 were asked by PW3's mum to sweep the compound of the home before she could allow them to leave in order to assist look for the deceased. PW2 testified that S's mother asked her to sweep the compound while S was sent to sweep inside the house.

9. PW2 testified that after sweeping, the mother of the accused told her to go throw the rubbish in the rubbish pit. It was as PW2 threw the rubbish that she noticed legs of a person lying on the ground in the neighboring plot. The two plots were separated by a fence. PW2 called the mother of the accused to see. PW2 said that she heard her say that it was W and then started screaming. The evidence of PW2 was confirmed in the evidence of PW3.

10. PW4 was a next door neighbor to the accused. His evidence was that he had gone to visit his sister as he always did during the holidays. His evidence was that at 11:30 a.m. on the material day he was standing outside his sister's gate when the accused came out of the gate of their home. The accused asked him whether he had seen his brother N to which he, PW4 pointed the direction he had seen N take with T. PW4 stated that he was startled to see the accused walk towards the opposite direction to which he had directed.

11. A few days after the murder, a note was found posted on the main door to the accused home by PW7, the father of the accused. The note had a threatening message. The note also had a detailed explanation of what had happened to the deceased and the motive behind the perpetrators actions. The note read,

**“Hahaha what a surprising thing we did to that girl. Tumekula shida sana na mama yake. But surprising Tulimuona mtoi wa kwana. Na tukamuua ,tukambeba na ngunia. Tukamtupa kwa shamba hiyo. So their problem is solved. Tulimpitia kwa boma ya mangurue. Now the problem ni nyinyi familia ya daktari. Tumekuwa na shida pia na nyinyi kwa muda. So if you do love your wife and your loved ones hameni Kawaida na murudi kwenu Banana ama muhame Kiambu County. Koseni by Friday and we will do to you what we did to the little girl or will burn you alive. Do not worry how we assessed your house fail to do so you will face the consequences. We killed her near Wakajuri's home.”**

12. PW7 testified that upon seeing the content of the note he summoned the father of the deceased and also their pastor. He stated that the three of them agreed that they should call police to collect the note which they did.

13. The note was examined by a handwriting expert, PW8, against specimen writings taken from the accused and the mother of the accused by the Investigating Officer, PW11. Without giving any explanation PW11 said he treated both the accused and his mother as suspects. After examining the documents PW8 the Handwriting Expert formed the opinion that the handwriting on the note matched the handwriting of the accused.

14. The accused was placed on his defence. He opted to give a sworn defence. The accused in his defence started by saying that he could not recognize the writings in the note containing the threatening messages that was posted on the main door to their home and produced in court as P. Exhibit 2. He said that he only recognized the paper on which it was written as the one he gave to PW5. However, in cross examination he admitted having written the note. He however explained that during the mourning period for the deceased, he escorted his friends who had come for the prayers at the deceased home. That after escorting them to the stage and on returning to his home he met three men at his gate. He said that they asked him to follow him to the public ground near his home. That it is then that they produced a note and asked him to copy the contents before letting him go. He said that he was let to go but told not to close the corridor door to his home that night which he obeyed.

15. The accused stated that indeed on the morning of the day in question, his brother went to the home of T and his sister the deceased from 8 a.m. After 20 minutes he warmed porridge then went for his brother from the home of the deceased so that he could drink it. He said that T and W came to their home and started playing in their compound near an incomplete structure. The accused said that PW5 later went and took away the deceased. He said that she also told him to collect his charger from deceased home which she had sent W to get from him earlier that morning.

16. The accused stated that he went for the charger from PW5 and that on arrival at the gate he met the deceased running towards the gate crying. He said that PW5 told him to hold the deceased which he did and gave her over to her. He said that PW5 told him that she had not completed with the charger and so he returned back home. He said that at his home he allowed his brother and T to leave for K's (PW2's) home where the two told him they wanted to go and play. He said that half an hour later when he went to check on them, PW4 guided him on the direction they had taken and that on following that direction he found the children playing alone. That when he asked them why they were alone they told him that W had told them that she would go to K's place but that they did not find her there. The accused said that he went by K's home to confirm whether W had gone there and was told that she had not been seen there that day.

17. The accused stated that on returning to his home with the boys he met PW5 who asked him why he was not with the deceased. To which he told her that at K's place he was informed that W had not gone there. The accused said that after 20 minutes PW5 went to his home and asked him to go and look for W. He said that he went to look for her following same direction he had used earlier to get the boys. He said that he went up to PW2's place then returned to find PW5 still waiting at the gate to the deceased home. He said that he told PW5 that he did not find W and that he then returned to his home. It was around 12pm. He said that when he opened the gate to his home, he found three men who were strangers to him. Just as he turned to go back, PW5 entered the compound.

18. The accused said that the three men accosted him then showed him the dead body of the deceased. He said that they told him they wanted the mother of the deceased but were relieved when they saw the deceased instead. The accused said that the three men also forced him to smoke a whole stick of cannabis before threatening him of unknown consequences in the event he told anyone about the incident.

19. The accused said that he then went out of their compound and remained outside from 1pm. He said he walked home with his brother and T and a young man, one Kimani. He said that the four of them remained at home until 1:30pm when his mother came home. He said that he told his mother that the deceased was missing after which his mother sent him and Kimani to look for the deceased, which he said they did. The accused stated that at 4pm he and Kimani parted ways after a fruitless search only to return to his home to find a huge crowd of people.

He also found that the body of the deceased had been found behind his home.

20. The accused produced three statements he made with the police. The first one he produced was a statement under inquiry dated 22<sup>nd</sup> August, 2014. He said that he made the statement to the OCS, Karuri Police Station in the presence of his mother. It was marked D. Exhibit 1. The second one was dated 29<sup>th</sup> August, 2014 made with the OCS at Karuri Police Station. It was D. Exhibit 2. The third one was a further Statement of the accused dated 6<sup>th</sup> October, 2014 made at CID Kiambu. It was D. Exh. 3. The accused stated that his statements were not tallying because at the time he made them he was confused and was afraid to say anything which could have made the murderers come after him.

21. The State was represented by Ms. Onunga, learned Prosecution Counsel. On the other hand, Mr. Githinji learned defence counsel acted for the accused. The parties filed written submissions which I have considered. I have summarized their submissions as follows.

22. Mr. Githinji learned defence counsel in his filed written submissions on behalf of the accused urged that none of the prosecution witnesses gave direct evidence linking the accused to this offence. Counsel urged that the prosecution relied on circumstantial evidence but failed to meet the test of circumstantial evidence laid down in the case of **Rep. vs. Catherine Karimi Nyaga HCCRC NO. 28 of 2015** which, he urged set out the principles that govern circumstantial evidence. Counsel also relied on the case of **Peter Mugendi Mugambi & another vs. Rep. C.A. NO 72 of 1997** and urged that the case refined the rules on circumstantial evidence.

23. Mr. Githinji cited **Joseph Khatiakal vs. Rep C.A. No. 2 of 2013** and **Musili Tulo vs. Rep C.A. No. 30 of 2013** for the proposition that even though it was not a must to prove motive, in a case depending wholly on circumstantial evidence such as the instant one, it was essential to look out for it in the chain of presumptive proof where the case rests on circumstantial evidence. Counsel urged that no motive was attributed to the accused and that the prosecution evidence adverted to the cordial relationship between the families of the accused and the deceased.

24. Mr. Githinji submitted that the prosecution had not proved that the accused had malice aforethought to commit this offence. Counsel relied on the case of **Nzuki vs Rep 1993 KLR 171** where the court held:

**“No doubt, if the prosecution prove an act the natural consequence of what should be a certain result and no evidence or explanation is given, then the court may, on proper discretion, find the accused guilty of doing the act, but if on the totality of the evidence there is room for more than one view as to the intent of the accused, the court must direct itself that it is for the prosecution to prove the necessary intent to its satisfaction, and if, in view of the whole evidence, it either thinks that the intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of doubt.”**

25. Counsel urged that the accused had given his defence explaining what transpired on the day in question and that he had denied the charge. Counsel urged that the accused explained why his statements under enquiry were inconsistent and that the court should find that he was in a confused state arising from the threats meted to his family.

26. Learned defence counsel further urged that the investigations carried out by the police fell below the required standard. Counsel urged that there was a strong but untested theory of PW5 involvement in the murder of the deceased. He urged that PW5 was the only other person closely involved in the events leading to deceased death and she was generally a stranger to everyone. Counsel urged that if the said theory had been looked into with a keen eye, then a more believable and cogent case would have been established.

27. Ms. Onunga, learned Prosecution Counsel in her filed written submissions urged that the prosecution had proved their case beyond reasonable doubt. Counsel urged that the accused left the deceased homestead in company of three children, the deceased amongst them and that was the last time the deceased was last seen alive. Counsel urged that the accused had been placed at the first scene of crime which was the accused homestead, a fact the accused did not dispute. Counsel further urged that the accused failed to give an explanation as to the whereabouts of the deceased having admitted he was with her at their homestead.

28. Learned prosecution counsel further urged that the note produced by PW8 linked the accused to the crime as his handwriting matched that on the note. Counsel urged that the accused admitted having written the note and that the said note had clearly described the manner in which the deceased was murdered and disclosed where the body had been disposed of. Counsel urged that this admission placed the accused at the scene of crime a second time.

29. Ms. Onunga urged finally that the accused explanation of how he was accosted by three men was a lie and an afterthought. Counsel urged that in any case there was no reason for the three people to have threatened the accused as he claimed since he was not known to them. Counsel agreed that the motive for this offence was not clear as the two families of the deceased and the accused were close friends. Ms. Onunga urged the court to find that the prosecution had sufficiently discharged its burden of proof and to enter a conviction against the accused.

30. Having carefully considered the evidence adduced by the prosecution, the accused defence and submissions by the counsels for the accused and the prosecution, I find the following are the issues for determination:

**i. Whether the circumstantial evidence adduced by the prosecution met the requisite tests to justify a conviction.**

**ii. Whether the prosecution main witness PW5 was credible.**

**iii. Whether malice aforethought has been established.**

**iv. Whether motive for the offence was essential and whether it had been established in this case.**

**v. Whether the accused defence is plausible and tenable.**

**31. As to whether the circumstantial evidence adduced by the prosecution met the requisite tests to justify a conviction. I will consider this with the other issue of whether the prosecution main witness PW5 was credible.**

32. The defence has cited good authorities regarding what constitutes circumstantial evidence, how it should be tested in order to discern whether it would justify a conviction. I have considered each of the cited cases.

33. There was no eye witness of the incident. The prosecution is relying on circumstantial evidence to prove the charge against the accused in this case. The Court of Appeal set out the test of determining whether the prosecution has established its case against an accused based on circumstantial evidence in the case of **Abanga alias Onyango vs. Republic CR A NO.32 of 1990(UR)** in the following terms:

**a) The circumstances from which an inference of guilt is sought should be drawn and must be cogently and firmly established.**

**b) The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused person.**

**c) 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.”**

34. Seven years later the Court of Appeal while considering a case in which the prosecution was relying on chain of circumstantial evidence in the case of **CHARLES MATHENGE MWANGI & ANOTHER –V- REP CA NO. 72 OF 1997** (unreported), (OMOLO, TUNOI JJA and RINGERA Ag. JA) held:

**“The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example REX vs. KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135.**

**With profound respect to the learned Judge, it was his duty to himself and to the assessors to specify which circumstances he was relying on and what inference(s) he was drawing from those circumstances. We have ourselves set out what we think were the circumstances the prosecution was relying on and we have come to the conclusion that those circumstances are not necessarily incompatible with the innocence of the appellant. We do not know if the Judge would have come to the same conclusions had he set out each individual circumstance and analysed it as we have done. Nor was it fair to the assessors to be given directions on the general principles applicable to circumstantial evidence without explaining to them the individual circumstance and asking them what inference they thought could be drawn from the circumstance.”**

35. The prosecution majorly relied on the evidence of PW5 It was the evidence of PW5 that at 8:30am the young brother of the accused, N went to visit the deceased and her young brother, T. The children remained together until the accused picked N his brother so that he could have porridge at their home. N refused to go alone and so was accompanied by T and W. According to PW5, she waited half an hour then went to pick W and T to take them back home but did not find W at the accused home. PW5 testified that she was startled by the accused when he asked her whether the deceased had returned to their home yet he, the accused was the one who went away with her and the two boys. Also startling to her was the fact that even though the accused told her that T and W left his home together, she could see T inside the accused compound. PW5 testified that she took T away with her as she went to look for the deceased.

36. The accused on his part contradicted PW5 saying that after he took N to take porridge, the three children played in the backyard of their home. The accused stated that PW5 went for the deceased saying she wanted to send her to K’s home. The accused said that at 11am, he went to the deceased home to collect his charger from PW5 and that he found the deceased in tears and trying to run away from PW5. He said that he restrained the deceased from running away and left her with PW5 in the deceased’s home. He said that he went back to his home. The accused stated that few minutes later he found T and N playing alone near K’s home. He said that when he asked them why they were alone they told him that it was because the deceased did not go to K’s place as she had said she would.

37. According to the accused, he met PW5 at the gate of deceased home and she promptly sent him back to look for the deceased which he obliged. He said that when he could not find her, he went to tell PW5 who insisted to him that he must continue to look for her, which he obliged.

38. The question is in whose hands did the deceased disappear? PW5 and the accused blame each other as the persons in whose company the deceased was last seen alive. Who could be telling the truth between them?

39. I considered the conduct of both the accused and PW5. If indeed the accused last saw the deceased with PW5, and if at the time the deceased was crying and trying to run away, why would the accused agree to go and look for the deceased when asked by PW5 to do so? That does not make sense. He should have raised his concerns then. That is because the accused had a ready answer for PW5 that he last saw the deceased in her company and therefore she should know where to find her. PW5 on her part did not say that she sent the accused to look for the deceased at any time. All she said was that she took T from accused home and went to look for the deceased, first in K’s home. I considered the fact that when she could not find the deceased she promptly reported to deceased mother PW1 that was about 12.30 p.m. or so. That is so because PW1 called accused mother and found her in her home. From evidence of PW2, 3 and accused, accused mother returned to her home at around 12.30 p.m.

40. There is also the evidence of PW4. PW4 did not witness the incident but he sheds some light on accused conduct on the material day. PW4 said that he was standing outside his sister’s house, adjacent to accused home when he saw the accused emerge from their gate. It was

11:30am. The accused asked him if he had seen his brother N and he, PW4 pointed to the direction N and T had gone. PW4 testified that the accused walked towards the opposite direction. The accused contradicted PW4 in his defence saying that he in fact walked towards the direction PW4 had pointed and managed to get the two boys whom he promptly returned to his home. The significance of PW4's evidence is to show that the accused was only asking about whereabouts of N and T and not W. It also shows that he did not look for his brother, T or W contrary to his defence. That is quite telling. I find prosecution has established that deceased was last seen alive in accused home and that accused was with her and the two boys. The accused was 17 years old and between him and T and N who were 4 ½ years and 3 ½ years old he was the only older person there.

41. I find that the 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 she died, he should explain how she died. The statutory rebuttable presumption is spelt out under **Sections 111(1) and 119 of the Evidence Act**. These sections stipulate as follows:

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

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

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

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

42. Having been placed at the scene of the incident as the oldest person who was last seen with the deceased before she died, the accused has a duty to give an explanation of how the deceased met her death, or alternatively how they parted company.

43. Regarding the doctrine of "last seen with deceased" I will quote from a Nigerian Court case of [Moses Jua V. 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."**

44. In yet another Nigerian case the court considering the same doctrine, in the case of [Stephen Haruna V. 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."**

45. Quoting from another jurisdiction, to be specific India, the courts there have developed that doctrine further. In the case of [Ramreddy Rajeshkhanna Reddy & Anr. v. State of Andhra Pradesh, JT 2006 \(4\) SC 16](#) the court held:

**"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."**

46. 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.

47. 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 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) ...”

48. Malice aforethought can be inferred from various circumstances as set out under **Section 206** of the **Penal Code**. The Court of Appeal in **Rex versus Tuper S/O Ocher [1945] 12 EACA 63** ruled thus:

**“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick...”**

49. The murder weapons in this case were not recovered. However, the weapons used could be inferred from the injuries inflicted on the deceased as noted by the pathologist in the Post Mortem Form produced as P. Exhibit 11. The child had severed neck blood vessels with through and through stab wound from left to right of the neck. She also had ligature compression around the neck. She also had depressed fracture on left temporal region of the skull and fracture at the base of the skull. According to the doctor the cause of death was neck compression due to ligature strangulation; neck injury due to sharp force trauma; and head injury due to blunt force trauma. The doctor explained that any one of these injuries could have caused the death of the deceased. The pathologist stated that it was not possible to say which of these injuries singly caused the death of the deceased. Neither could he tell the order in which they were inflicted.

50. The conclusion one can make from these doctor’s findings are that the weapons used were a blunt object heavy enough to cause fractures to the head; a sharp object sharp enough to cut through all the blood vessels and muscle around the neck from left to right; and, a rope or ligature strong enough to cause compression to the neck area enough to cause death. Any person arming themselves with either of these weapons and applying the kind of force that was applied on the deceased cannot have had any other intention but to cause either death or grievous harm to the deceased. Malice aforethought can thus be inferred not only from the weapons used to inflict the injuries but the nature of the injuries that were actually inflicted on the deceased resulting in the deceased death.

51. *Regarding the failure by the prosecution to produce the murder weapon(s) in the case of **KARANI V. REPUBLIC (2010) 1 KLR 73** the Court delivered itself as follows:*

***“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit”.***

52. I find that even though the murder weapons were not produced as evidence in this case the weapons used to commit the offence were established in the evidence of the pathologist. I find that failure to produce the weapons did not prejudice the accused defence, neither was it fatal to the prosecution case.

53. **As to whether motive for the offence was essential and whether it has been established in this case.** It is trite law that motive need not be proved. This is evident under **section 9(3)** of the **Penal Code** which stipulates thus:

***“(3) 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.”***

54. That provision was the subject of interpretation in the case of **Chogo Vs Republic (1985) KLR1**, where the Court of Appeal held as follows:-

***“Under section 9(3) of the Penal Code (cap 63), the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1<sup>st</sup> appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.”***

55. I am well guided. It is clear that where motive is proved it may, when taken with other circumstances constitute such circumstantial evidence as to furnish some corroboration to establish accused culpability to the offence. Failure to prove motive is however not fatal to the prosecution case. In the instant case motive against the accused was not proved. In fact, the evidence adduced painted a very positive picture of friendship and good neighborliness between the family of the accused and that of the deceased. No motive was established for the attack. That notwithstanding, I am satisfied that, as far as this case is concerned, failure to establish motive is not fatal to the prosecution case.

56. **Whether the accused defence is plausible and tenable.** The accused stated in his defence that at about 10:20am he went for his brother N from the deceased home, returned with him to their home and gave him porridge. Immediately he finished his drink, N left for deceased home only to return soon thereafter with T and the deceased. He stated that after a short time, PW5 went and took the deceased saying that she wanted to send her to K’s place. The accused stated that he later went to deceased home and met the deceased at the gate running away from PW5. He said that on PW5’s request he prevented the deceased from running away and left her with PW5. The accused said that when he returned to their home, he gave T and N permission to go and play at K’s place.

57. The accused said that at 11:00am on the same day, he decided to go check on the kids as they had not returned. He stated that he met his friend Maina (PW4) and asked him if he had seen N. PW4 pointed towards the direction where he saw the children go. The accused said that, contrary to what PW4 stated in his evidence, he walked towards the direction he had pointed and that he found where the children were playing. The accused said that he noticed that the deceased was missing and T and N were playing alone. He stated that he went back home together with the two boys and that as he entered into their compound, he met PW5 who came looking for the deceased. Together with PW5, they started a search for the deceased to no success.

58. The accused stated that on returning to his home, he met three strangers in their compound who had hooded faces. He stated that as he tried to run away from them, PW5 came and stood by the gate. It was at that time that the accused was threatened by the strangers and taken behind his home where he was shown where the deceased was lying dead. Soon thereafter the three strangers wiped their hands with a cloth, threw shoes and a cloth belonging to the deceased into a pit latrine and lit a roll of cannabis sativa which they forced him to smoke. The accused stated that he was so frightened of the strangers that he decided not to inform anyone of the incident.

59. The accused stated that two days after the deceased was discovered murdered, the three strangers whom he had met in his home compound took him to a river bank where they forced him to copy a message onto a piece of paper. He stated that this time round they warned him of untold consequences to be meted upon his family if he mentioned PW5's involvement in the matter to the police. He stated that he was further ordered not to close the main gate to their homestead that night as they needed to access it too. The accused denied killing the deceased and explained that he kept silent over the knowledge of the actual murderers because he was fearful of their threats towards his family.

60. The accused in his defence claimed that PW5 went to his home and took the deceased and asked him to go collect his charger from her. PW5 on her part stated that on reaching the accused home between 9:00 and 10:00am, the accused opened the door and immediately asked her where the deceased was as she had left with T for Mama K's home. PW5 said that she was startled as she could see T still inside the accused home.

61. According to the accused defence, since the deceased and T had already left before PW5 went to collect them, that would mean only N was left at the accused house. Therefore, it could not have made sense for the accused to later state in his defence that he gave permission to both his brother N and T to go to Mama K's house. Further the accused does not say where his brother and T were when the three men in company of PW5 accosted him.

62. We turn now to the two statements under inquiry and the further statement made to the police by the accused and which the accused produced as his defence exhibits. In his statement D. Exh. 1 dated 22<sup>nd</sup> August, 2018 the accused stated that he allowed the deceased to go to K's place at 10:30am. Then at 10:40am he gave permission to N and T to go play at K's place. He said that after sometime he went to check on the children and on getting out of their gate, he found PW4 outside. He said that he asked him which direction the two boys went and he pointed to the direction and he followed that direction and found the boys. He stated that he found the boys alone and upon asking them where the deceased was they told him that they did not find her there. The accused stated that he went to K's home and that K's mother told him that she was not seen there that day. He stated that he found PW5 at their gate and the boys entered there to play. At 12:45pm his mother came back home and upon informing her that deceased was missing, she told him to go search for her which he did until 4:30pm.

63. In this second statement, D. Exh. 2 dated 29<sup>th</sup> August, 2014 the accused stated that on 21<sup>st</sup> August which is the day the deceased met her death, he went to look for the deceased at Milimani near Kawaia. He said that he was not successful. He said that he met PW5 standing at the Kiosk outside their gate. The accused stated that PW5 asked him to follow her and she led him to valley behind accused home. There he said they found three men who had hooded heads. He said that the three men told him that they are the ones who had killed the deceased but that it was he mother that they wanted. The accused stated that he was warned not to include PW5 in his statements to the police otherwise his family would face dire consequences. He said that he went home where his mother told him that the deceased had been found.

64. The accused continued to say that on the 24<sup>th</sup> August, 2014 at 7:30pm PW5 went to his house and asked him for an exercise book paper and 4 pieces of cello tape. He said that he gave her the items. He continued to say that on Monday his father woke in the morning to find the main door open and a written note pinned to their door. (P. Exh. 2). He said that the father woke up everyone before calling their Pastor, father of the deceased and the police in that order. The accused stated that he could recognize the paper on which the message was written as the same one he had given PW5. He said that on 27<sup>th</sup> August, 2014 he called the Pastor and told him about the hooded men. He was picked up by police on 29<sup>th</sup> August. He said that he did not talk about the hooded men and PW5's role because he was scared.

65. In this second statement, the accused wrote that he could only recognize the paper on which the threat was written but not the message on it. It is significant to note that on 29<sup>th</sup> August when accused made his second statement, the note had just been recovered but had not been examined by the handwriting expert. By that time therefore it was not known as yet who had written it.

66. The accused made a third statement on the 6<sup>th</sup> October 2014, D. Exh. 3. This is approximately a month or so after PW5 had quit working for PW1 the mother of the deceased, and about seven weeks after the deceased death. For the first time the accused implicated PW5. The first accusation was that PW5 went to pick up the deceased from their homestead around 10am so that she could send her to K's place. This was after the accused went for N to take porridge after which the deceased and T followed him home. The second accusation was that as he entered the deceased home at around 10:30 same morning he bumped into the deceased running away from PW5.

67. The accused stated that at the time, he had gone to pick up his charger from PW5. The accused further stated that later same morning PW5 asked him to help search for the deceased and upon returning to his home at around 11:30am, he found three masked men. He said that the three men led him to the place where the body of the deceased was lying. He said that he was warned not to mention it to anyone.

68. Considering the accused evidence in defence and the three statements he produced in his defence, I find material differences in them. In his statement D. Exh. 1, the accused stated that he gave the deceased permission to go to K's place at 10:30am on the material day. He ends by saying that at 12:45pm the deceased had not been found so when his mother came home at that time, he told her about it. He was then sent

by his mother to look for the deceased, which he said he did up to 4:30pm.

69. In the second statement, D. Exh. 2 the accused stated that he went to look for the deceased at Kawaida and did not succeed. He stated that he met PW5 at the kiosk and that she asked him to accompany her to the valley at the back of deceased home. Accused placed the time at 7pm. The accused stated that at the valley he said that they met three men who were hooded. These three men told him that they were the ones who killed the deceased. He said that they warned him not to mention PW5 in connection to deceased death and warned him of dire consequences if he did. The accused said that on 24<sup>th</sup>, two days later at 7:30pm, PW5 asked him for a piece of paper and cello tape which he gave her. He said that the same paper was found pinned on the door of their home on 27<sup>th</sup> August.

70. Between the first and second statement, the variation is significant as in the later one the accused brings up PW5's association with three hooded men, whom he introduces and implicates as having confessed to him that they were the killers of the deceased. In same latter statement the accused also introduces the paper on which the threatening note was written and states that PW5 went for it from him at his home on 24<sup>th</sup> August. There was no mention of PW5's association with the three men, or of taking him to a valley where he met the three men or of asking for the paper on which the threatening note was written.

71. The last statement, D. Exh. 3 the accused brings in a new dimension saying that actually PW5 went for the deceased from his, accused home shortly after 10am. The accused states that he saw the deceased again at the compound of her home as she tried to run away from PW5. He said that he prevented the deceased from running away from PW5 and left them together. That was the last time he saw her alive. He continues to say that later that morning, PW5 asked him to go look for the deceased, and that when he could not get her anywhere, he returned home to find PW5 waiting at the deceased gate. He then says that he entered his home compound followed by PW5, only to find the three hooded men who took him to where the deceased body was lying, claiming responsibility for it.

72. Considering the totality of the statement D. Exh.3, the facts enumerated by the accused make no sense. For instance, why he agreed to be sent to look for the deceased by PW5 when according to him he left the deceased with PW5 the last time he saw her alive. Furthermore, according to him, at the same time he saw the deceased trying to run away from PW5. Having known the two facts, the accused ought to have declined to be sent to look for the deceased and should instead have reminded PW5 that the last time he saw the deceased she was with her.

73. Regarding the note, P. Exh. 2, the accused admitted writing the note in his defence in court but said he did so under duress. However during cross-examination the accused kept changing the story about the note between admitting writing it to denying writing it and saying he could only recognize the paper itself. Where the accused admitted in his sworn defence that he authored the threatening Note, P. Exh. 2 he explained that he did so under duress from the three masked men. He also admitted in his defence that had the knowledge that the deceased was dead by the time his mother got home at 12:45pm and sent him to search for the deceased within Milimani Area on the material day.

74. It is evident from the entire evidence adduced in this case that the accused modified his statement each time something implicating him was discovered or came up. His various statements were clearly orchestrated to hide certain facts. However, the moment the facts came to the fore, the accused quickly changed his story in order to accommodate the new discoveries. Is it coincidental?

75. The accused claims that PW5 was the last person seen with the deceased but his recollection of the accounts of the material day of the deceased death did not add up. From the evidence before this court it seems that the deceased went missing at around 10 am. At that time, the deceased was at the accused house. This is the time when PW5 went over to the accused home to collect the deceased and her brother T. It is not in dispute that the deceased went to accused home that day. Having been placed at the accused home on that particular day and also being the last person with the deceased, the accused had a duty to give an explanation of how the deceased died or how they parted ways. The accused explanation was that PW5 went to his home and took away the deceased. The accused said this for the first time in his third statement D.Exh.3 made seven weeks after the deceased death. He repeated same explanation in his defence in court.

76. The court has to consider accused explanation alongside other evidence before the court noted some discrepancies as to the time when the accused found out about the death of the deceased. The statements he made to the police were not consistent. Initially he stated that he did not know of deceased death until 4pm after the body was discovered. In the second statement he said he learnt of the death from three hooded men at a valley where PW5 led him. In his statement in defence in court, he said that three hooded men plus PW5 had accosted him at around 11:30 a.m. more than four hours earlier than he claimed in his second statement to the police. The accused confessed that he knew about the death of the deceased earlier and yet he kept it to himself and pretended to search for the deceased when his mother sent him to look for her at around 1pm. In the last statement he said he came to know of deceased death at 11:30am when three hooded men he found inside his compound led him to the back of their home where the body was lying. In this last statement D.Exh.3 the accused contradicted his second statement D.exh.2 when he said that he actually met the 3 hooded men inside his home, not in the valley behind PW1's home as claimed in D. Exh.2.

77. It is clear that the accused was not consistent in his explanations. The variations in his statements were so varied and glaring that it is incredible. These statements demonstrate that the accused knew how the deceased met her death. Considering the evidence of PW4 that at about 11:30am the accused emerged from inside the gate of his home and asked him if he had seen the boys N and T but did not ask about the deceased. By the time the accused emerged, the deceased was already dead as per accused defence in court. Further, PW4 did not notice anything unusual about the accused. There was nothing untoward in accused appearance to PW4. This is a far cry from the allegation by the accused in his sworn defence, and in his third statement that he had just been accosted by three hooded men and threatened.

78. I find that the only conclusion one can make from all these facts is that the accused was fully aware of what had happened to the deceased. He had full knowledge of the time the death occurred. He knew where the body was lying, yet he remained composed, cool calm and collected. He agreed to be sent to look for the deceased without disclosing what he knew about her in speech or even in his conduct. Only explanation for this is accused was a principle party in the acts leading to deceased death.

79. Considering that in addition to the knowledge the accused had of the deceased death, the accused did not implicate PW5 or anyone else until seven weeks after the deceased death. It is significant to note that at the time the accused implicated PW5, PW5 had already left

working for PW1 and so was no longer around the area. It is also significant to note that the accused denied knowledge of who wrote the note and only said he gave the note in form of a plain paper to PW5. The accused contradicted himself in the two statements that followed. First stating that he gave the paper to PW5(D.Exh.2) then stating he was forced to copy the words from a note given to him by the hooded men (D.Exh.3). Considering that the accused had denied he had anything to do with the note P. Exh. 2 until after the handwriting expert found that it was written by him; it clearly shows that accused was hiding the truth. I find that the reason the accused did not divulge all these information in his first statement to the police was because he was deliberately hiding the truth and the only reason for it is because he was a principle offender and it was in his interest not to divulge any information.

80. Mr. Githinji for the accused urged that police did not investigate the case to required standard for failing to look into role by PW5. There was no evidence against PW5 except accused in his second and third statement several days after deceased death. Police investigated PW5 from the word go as she and accused were interrogated both on 21<sup>st</sup> August and also on 29<sup>th</sup> August. It is not true that police never investigated PW5.

81. Mr. Githinji and also accused implied that PW5 suddenly left employment. PW1 her employer told court that at no time did she suspect PW5 of involvement in deceased death. Further when cross examined for reasons of her leaving employment, PW5 said she left due to illness of her child. That explanation was not controverted.

82. PW5 was consistent in her evidence in court. She was straightforward. There was an untested bit of her evidence. PW5 claimed that accused mother gave her a daughter to help her look for the deceased around the area at around 1pm. PW5 did not say who the alleged daughter of accused mother was. The only daughter who testified was PW3 who made no mention of being sent with PW5 to look for the deceased. From her testimony, PW3 did not leave home after going back from school and the deceased body was found within the hour. It remained unclear whether accused mother gave PW5 a child to help look for the deceased. It is however not of material importance whether or not such a search took place. Having considered the entire evidence I find that there was no evidence adduced implicating PW5 with this offence. I find that PW5 remained consistent and impressed the court as a credible witness who was worthy of believe.

83. After having carefully analyzed all the evidence and considering all the exhibits produced in evidence including the statements and submissions by the defense and the prosecution witnesses, I find that there is no doubt that the prosecution has adduced evidence to prove that the deceased was last seen alive entering the accused home accompanied by T and N. The deceased was not seen alive again. The only mature person in that home was the accused. The prosecution has shown that the accused sent off T and N to play at K's home between 10:30 and 11am. When the accused came out of his gate soon thereafter he asked PW4 for T and N only, meaning he was only interested with the two boys.

84. The prosecution has also shown that the deceased body was found at the back of accused home, across a live fence, very near to the fence. That was around 2pm, within four hours of the time she disappeared.

85. The accused explanation about how the deceased left his sight that morning was inconsistent and untrue. In his own defence, the accused gives account upon account, some inconsistent, but nevertheless details of events which demonstrate clearly that he knew how the deceased met her death. The accused did not give direct account of the events but did so in bits, over a period of a month and a half. He however maintained that he was a victim of other hooded people who were the actual perpetrators of the crime. He also implicated PW5 as being a collaborator with the hooded men.

86. I am very much aware that the accused has no burden of proof. He has no burden to prove his innocence. He has no burden to prove his defence. I find that the accused was placed at the scene of murder. It was also established that he was the last person with the deceased the last time she was seen alive. In these circumstances the accused had a statutory burden to dislodge a rebuttable presumption as stated earlier in this judgment. The statutory burden is on a balance of probabilities. The principle applicable was well explained in the court of appeal case of **Ernest Abanga Alias Onyango v Republic CA NO.32 OF 1990**.

**“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial Evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that: The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”. This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But it's a basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available”.**

87. Guided by the above case, of **Ernest Abanga Alias Onyango**, supra, I find that the accused both in his defence and in the various statements which he produced in court as defence exhibits, gave explanations which beyond any doubt demonstrates that he knew what caused the deceased death. That also shows that the accused was not forthright but disclosed information in small bits, initially feigning ignorance, and eventually implicating other people for the deceased death. It is however clear that the information he had was first hand. And that he could not have come across that information by any other means except as a principle perpetrated. That explains why he did not give this information to anyone until the events started unfolding, and as circumstantial evidence irresistibly pointed at him. It is clear that the accused lied, gave false impressions and also tried to cover up information every time something new came up that implicated him.

88. In addition to being the last seen with the deceased when she was still alive, and in addition to the deceased body being found behind the home of the accused, there is the evidence, undisputed, that the accused wrote a threatening note, P. Exh. 2. That note was posted on the main door of accused home. The accused did not mention about the note until after police took possession of it. The accused then implicated PW5 as the one who took the paper on which the threats were written from him. After the Handwriting Expert declared that the note was in accused hand writing is when the accused admitted writing it.

89. I am convinced beyond reasonable doubt that all the circumstantial evidence points to the accused and that it satisfies the principles of circumstantial evidence as set out in numerous authorities including the case of **R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135**, in which the court of appeal East 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.”**

90. Evidence of the surrounding circumstances to a crime is said to be the best evidence. Locally courts have taken cognizance of this fact in various decisions. In **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R v. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** thus:

**“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.”**

91. However, caution is called for when relying on circumstantial evidence. While recognizing the dangers of relying on circumstantial evidence the Court in **Teper v. R [1952] AC 489** 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.”**

92. I am well guided. I have closely examined the evidence before the court. I find that his explanations surrounding the deceased death are both unbelievable and incredible for reasons I have stated herein. I find accusations against PW5 were an afterthought. I have exercised caution and also considered whether there could be other facts that may destroy the inference of guilt, together with the issue whether the facts and circumstances could be capable of an innocent explanation.

93. Having considered entire evidence in this case I am satisfied that the circumstances of this case points irresistibly towards the accused person to the exclusion of any other person as principal offender in deceased death. He was last person with the accused before he died. He knew how deceased died with so much detail as to time and place that he could only have known of as a principal offender. He wrote a threatening note giving details of how and why the deceased was murdered. He kept the information about deceased and the note a secret until police uncovered it in investigations. I find he was fully involved in deceased death as a principal offender. He was not a victim of other persons as he tried to say. However, I have no doubt in my mind that he was a principle offender in the deceased death.

94. Having come to this conclusion, I reject accused defence. I find the accused guilty of the offence of murder **C/S 203** of the **Penal Code** and convict him accordingly under **Section 322** of the **Criminal Procedure Code**.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>st</sup> DAY OF MAY 2018.**

**LESIT, J.**

**JUDGE**