



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

HIGH COURT CRIMINAL CASE NO. 28 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

CHARLES LANGAT *alias* ZACHARIA.....ACCUSED

JUDGMENT

1. The accused, Charles Langat alias Zacharia is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 13th day of December 2015 in Eastleigh Village in Sorget sub-location in Londiani sub-county within Kericho County he murdered LC. The accused pleaded not guilty to the offence.
2. The prosecution case is that the accused was employed by the deceased's aunt as a herdsman. The deceased had travelled with her mother in the month of December 2015 to her aunt's house in Eastleigh village Londiani sub-county for the December holidays.
3. On 13th December 2015, the deceased had gone to church at St. Barnabas Catholic Church at Kamungi Centre within Londiani, while her mother and aunt had gone to church at the Kenya Assemblies of God, about 700 metres from the deceased's aunt's home. The accused was left at home doing his chores of attending to his employer's cows.
4. When the deceased's mother and aunt returned home at 2.00 p.m., they noticed blood stains inside and outside the kitchen. They did not bother to check as they thought that a cat had killed a rat in the kitchen. The accused was nowhere to be found at the time, nor was the deceased. They assumed that the deceased was still in church.
5. In the evening, the deceased's aunt decided to go and drive the cattle in as the accused had not returned home while the mother of the deceased went to the sheep's pen to ensure that the cattle shed was securely locked. When she opened the door, she found the deceased on the ground with no underpants and covered in blood. A post mortem examination of the deceased established that she had been sexually assaulted and stabbed several times.
6. The mother of the deceased had raised the alarm and neighbours came to the scene. The incident was reported to the police in Londiani Police Station, and officers had gone to the scene. In the course of their investigations, the police broke into the accused's house as it was locked. They found, among other things, a kitchen knife covered in blood. The accused did not return home and was arrested 3 days after the incident at his aunt's home in Kolale.
7. These were the facts of the case as they emerged from the prosecution's witnesses. PW1, Dr. George Biketi, a senior medical officer of health working for the County Government of Nakuru stationed at the Elburgon District Hospital produced the post mortem report in respect of the deceased. He had performed the post mortem on the deceased, LC, on 15th December 2015 at about 1.00 p.m.
8. Dr. Biketi had found that the deceased had bruises on the right sub-orbital region, above the eye, and the right submental region or below the lower jaw. She had a deep L-shaped cut wound on the occipital parietal region of the scalp measuring 8 cm by 6 cm. She also had an injured cricoid cartilage (what is referred to in men as the Adam's apple). She also had a stab wound extending from the spleen, the stomach, the omentum, and the liver.
9. An examination of the deceased's genital and urinary system found a torn hymen and semen in the posterior fornix, a hollow region in the vaginal cavity just below the cervix. The deceased had a deep cut wound and multiple scalp haematomas, that is collections of blood under the scalp. She also had congested scalp and meningeal vessels with subdural haematoma, a collection of blood under the layer casing the brain tissue. Dr. Biketi's conclusion was that there were three possible causes of death of the deceased-strangulation, penetrating abdominal injuries and severe head injuries.
10. It was his evidence that the penetrating stomach injuries and the injuries to the scalp could have been caused by a sharp object. The torn hymen, which was freshly torn, would have been caused by penetration by a male sexual organ and any other blunt object. Dr. Biketi had also collected samples which he had labelled and handed over to the police for submission to the Government Chemist.

11. PW2, Bernard Kiprop Rotich, was the father of the deceased. He had been called on 13th December 2015 at about 6.00 p.m. by his sister in law, Magdalene (PW4) and asked to go quickly to her home in Eastleigh, Kamuingi. He had gone there and found a crowd inside and outside the house. He had found his wife Josephine (PW5) who informed him that their daughter was dead. He had gone to the sheep's pen where he had been informed the deceased was and had found the deceased on the ground. He had taken the body of the deceased to St. Joseph's Mortuary in Molo. He stated that he did not know what had happened to the deceased. He had seen the accused, who used to work for his in-laws, the grandmother of the deceased, before.

12. Simon Birir Rotich (PW3), a brother of PW2, had been called by his brother, (PW2) who informed him that his daughter had been killed. On 14th December 2015, he had gone to the scene, then gone to the DCIO's office at Londiani Police Station to plan the post mortem of the deceased. He had attended the post mortem the following day, 15th of December 2015, at the St. Joseph Mortuary in Molo. He had witnessed the post mortem with PW5's son, Brian Rop. They had identified the body of the deceased.

13. Magdalene Chepkorir, (PW4) was an aunt of the deceased. On 13th December 2015, she was at home at around 7.00 a.m. with her daughter Sandra Chepngeno and her sister Josephine Rotich (PW5), as well as PW5's daughter, L C, the deceased, and the accused.

14. While the deceased had gone to a Catholic Church, Magdalene, her sister Josephine and Sandra had gone to the Kenya Assemblies of God Church which was 700 metres from PW4's house. After church, they had returned home, but on the way home, they had seen the accused walking towards the Kamuingi shops. He was far, so they did not speak to him. It was a Sunday, and so it was his day off.

15. On returning home, PW4, her sister Josephine and niece Sandra had opened the kitchen and found clothes in a bucket which had been taken from the drying line. While they were in the kitchen, they had seen some blood. It was not a lot of blood so they thought a cat had killed a mouse.

16. After having lunch, they wondered where the deceased was, and PW4 called the accused and asked him about the clothes which had been taken down, and also about the deceased, and he said he had not seen her. He said he had taken down the clothes from the line, which PW4 found strange as the clothes included underpants.

17. PW4 called an aunt, one Anne Soi, who was a Catholic and asked her about the deceased. Her aunt informed her that the deceased had been to church, but had left for home. PW4 also enquired from neighbours, among them Mama Mwangi who lived a short distance away, and she said she had seen the deceased in church and then running home as it was raining. PW4 then asked another neighbour, a Mama Wainaina, who said she had not seen the deceased. PW4 called the accused again and asked him to come as the cows needed milking, the time then going towards 5.00 p.m. He did not, however, return home.

18. PW4 had gone to get the cows, leaving her sister and daughter at the house. On the way back, she heard screams and left the cows and ran home. She got to the house to find her sister, Josephine, screaming that the child had been killed. PW4 had gone to the shed where she had found the body of the deceased inside a sheep's pen.

19. The police, chief and assistant chief came and asked her to open the accused's house, which was inside her compound. She had a spare key so she opened the house. Inside the house, they found a kitchen knife which had blood on it. The knife, which she recognised and identified in evidence, was bent, though it was usually straight. PW4 also saw a pair of gumboots which had sheep droppings, as well as socks which belonged to the accused.

20. PW4 also saw inside the house a pair of black trousers which belonged to the accused. The trousers had dirt from the sheep's pen. A maroon t-shirt and open plastic shoes with blood on them, which she testified belonged to the accused, were also found in the house, as was a roll of bhang.

21. According to PW4, they had also found in the house a black slip (petticoat) which belonged to the deceased. The police and the assistant chief had continued searching the house, then had taken various items belonging to the accused, as well as the body of the deceased, and left.

22. PW4 stated that the accused was their worker and had worked for them for 9 months. He had been brought to work for them by the deceased's mother. His work was to look after cows and sheep, and the farm. He was living in PW4's compound in a house that was near the kitchen. The accused had been left at home on the material day. He did not work on Sundays so he would go after letting out the cows.

23. In cross-examination, PW4 stated that when she, Josephine and Sandra had returned home, they had found that clothes had been taken down, which was not normal. The accused had said that he had taken down the clothes, but did not say why. He also said that he did not know where the deceased was when PW4 called him on the phone. He was the only one who had remained at home when everyone else went to church.

24. PW4 confirmed that the knife found in the accused's house was a knife they used in the kitchen, though it was normally straight, not bent as it was when it was found in the accused's house. She also testified that the accused's house had a padlock to which he had a key. She also confirmed that the gumboots belong to the accused, though she could not remember whether she had bought them. She had, however, bought the socks. The gumboots had sheep's droppings. She had seen the accused in the morning wearing the plastic slippers, saying that he was going to wash clothes as there was a borehole nearby.

25. She also confirmed that the accused had been wearing the trousers found in his house after it was opened. He had been wearing the trousers when he went to wash clothes. He had, however, changed his trousers as he was wearing a different pair when she saw him from a distance at the Kamuingi Centre.

26. Josephine Chepkemai (PW5) was the mother of the deceased. She had been at her mother's home in Londiani with her sister Magdalene

(PW4), her daughter L (the deceased) and her sister's daughter, Sandra. The accused was also at the home. PW5 had gone with her sister and her daughter to the Kenya Assemblies of God Church, while PW5's daughter, the deceased, had gone to the Catholic Church as she wanted to be a Catholic sister (nun). The deceased had left home first as the Catholic Church, which was not far from their home, starts early.

27. PW5, PW4 and Sandra had left church at around 2 – 3.00 p.m. They had seen the accused at Kamuingi on their way from church. They had left him at home in the morning, washing his clothes, when they left for church. When they got home, they had found the house locked. The compound comprised a main house, kitchen and another house. When they opened the kitchen, they found that clothes had been taken off the line, and the food, which they had cooked for lunch before leaving for church, had not been eaten.

28. According to PW5, PW4 had called the accused and asked him where the deceased was, and he had said that he did not know. They thought she had passed somewhere to pay money to one Wanjiku, but when they called Wanjiku, she said that she had not seen the deceased.

29. PW5 testified, as had her sister, PW4, about going to the kitchen and finding the drops of blood on the floor, and their assumption that it was the cat which had killed a rat and brought it into the house. However, they kept on calling to find out where the deceased was. They called their aunt Elizabeth who also went to the Catholic Church, but she said she had not seen the deceased but suggested that the deceased may have remained in church for a youth meeting. They asked and were informed that the youth meeting had ended, so they began to ask their neighbours if they had seen the deceased, to no avail. They thought she had gone somewhere and decided to wait for her, but she did not return.

30. They continued with household chores and PW4 went to look for the cows while PW5 went to sell vegetables to a woman who had come to buy vegetables from PW4. It was when PW5, while in the shamba with the customer, decided to check on the sheep as it was threatening to rain that she found the body of the deceased. When she got to the sheep's pen, she found it was locked. She could not open it initially, but eventually succeeded.

31. Upon opening the sheep's pen, she found the sheep and goats together in the pen, which had two portions, an upper and lower part. Ordinarily the sheep would be in the lower portion and the goats in the upper/second portion. She looked down and saw her daughter lying sideways on the ground. She turned her and found that she was full of mud. It had been raining, and she was wet all over. There was a lot of blood oozing from her head. The deceased did not have her underpants on. Her daughter was 14 years in 2015, and had just done her exams in class 8.

32. The accused did not return home that day, and he never returned. He was arrested some 2 or 3 days later.

33. In cross-examination, PW5 stated that she had met the accused in March 2015. They had left him alone at home that Sunday. He had gone to a well (borehole), fetched water and they had left him washing clothes. They had seen the accused at Kamuingi Centre but could not speak to him as he was not near. PW5 confirmed that the accused had a house in the compound, and that he lived in that house alone. While their cousin, Paul, sometimes used to visit, he was not there on that day, and he did not leave his clothes in the house the accused lived in as he had his home.

34. PW6 was Henry Kiptoo Sang, a government analyst based at the Government Chemist Laboratories in Nairobi. He had prepared a report regarding some items that had been received at the Government Chemist on 18th December 2015. His report was dated 23rd April 2017. PW6 indicated that they had received for analysis various items set out in the report. These were a knife, blood samples of the accused and the deceased, as well as a vaginal swab from the deceased. They had also received the blue/white coloured socks, a pair of black long trousers, a pair of beige sandals and a pair of black gumboots all marked as belonging to the accused.

35. Further, they had received for analysis pink underpants and a black petticoat belonging to the deceased. The items had been taken to the Government Chemist, together with an exhibit memo form dated 17th December 2015 by a police officer, No. 99445 P.C. Henry Mwitii of CID Londiani.

36. From his DNA analysis of the items, he was able to conclude that the DNA profiles generated from the knife and the pair of long trousers matched those generated from the blood sample of the deceased. The Government Analysts report dated 25th April 2017 was produced as P. Exhibit – 8. They were not able to generate DNA profiles from some items.

37. In cross-examination by Mr. Langat, PW6 stated that in the items where they had not been able to generate DNA profiles, the reason may have been due to decomposition of the samples. Further, that they were not able to generate DNA profiles from the vaginal swab. This, however, did not mean that there was no sexual activity, but that the sample may have decomposed. He confirmed that the knife and the black trouser had blood belonging to the deceased.

38. John Muchiri Njogu (PW7) was the Chief of Sorget Location. He had received a call on 13th December 2015 at around 7.00 p.m. from Paul Ndurema informing him that there was a killing at the home of Magdalene Chepkorir (PW4). After the said Paul had confirmed that there indeed was a killing, he had informed PW7, who had then reported the incident to the OCS of Londiani, Julius Mwamrizi. PW7 had been given 4 officers and a vehicle and they had gone to the scene. They had interviewed the aunt and mother of the deceased. They had been informed that there used to be a herdsman known as Zachariah Langat alias Charlie, but he was not there when they arrived.

39. They had gone to the sheep's pen where they had found the body of the deceased below the sheep's pen. Her body had a deep injury at the centre of the head, and her underpants had been removed and were hanging from one foot. PW7 confirmed that they had asked PW4 to open the house where the accused used to stay, and they found some items inside the house.

40. These were the kitchen knife, bent and with blood stains; a pair of gumboots; a pair of plastic sandals stained with blood; a pair of blue socks with white stripes also stained with blood; a maroon t-shirt which had blood, as well as a pair of black trousers with sheep dung. They had also found a roll of bhanga wrapped in a khaki paper. The items had been found in the house which was occupied by the accused. They

had learnt from Magdalene (PW4) that the knife belonged to her family, while the other items belonged to the accused.

41. PW7 testified that after the incident, the accused used to call him on the phone. He had called him to ask him what was happening on the ground, and he also told PW7 that he wanted to go and tell him who had killed the girl. He had called PW7 the Monday after the incident. PW7 had tried to persuade him to come forward but he did not. He was arrested on the Wednesday following the incident.

42. PW7 stated that he had, earlier that year, in May, visited the home of PW4 to record the names of newcomers to the neighbourhood as part of the *Nyumba Kumi* initiative. That was the first time he had met the accused. He had asked the accused for his identity card but he had said he had left it at his original home. PW7 had advised the accused to bring his identity card next time. He stated in cross-examination that the accused had given his name initially as Charlie, but he learnt later that his name is Zacharia Langat.

43. PW7 confirmed that they had asked PW4 to open the house in which the accused was living, and she did so in the presence of police officers. He further confirmed that the accused person had called him on two occasions

44. PW8 was No. 99445 P.C Henry Mwiti stationed at Londiani, CID. PC Mwiti had escorted the exhibits which were found at the scene of murder from Londiani to the Government Chemist on 18th December 2015. He identified the items which he had taken to the Government Chemist together with the exhibit memo prepared by Corporal Mugambi dated 17th December 2015. His role was confined to taking the exhibits to the Government Chemist.

45. PW9, No. 64319 Corporal Linus Mugambi was working at the Londiani Police Station. On 13th December 2015, at around 6.00 p.m., he received a call from Mr. John Muchiri (PW7), the Chief of Sorget Location, informing him that there was a murder incident at Eastleigh, a small village in Sorget. He had gone to the scene with his colleagues, the Assistant Chief and the Chief of the area. They were shown the body of the deceased, which was under a sheep's pen. The sheep's pen was raised with timber, and the body was underneath. The deceased had a serious injury on the head, and her pants and petticoat were at her ankles.

46. PW9 and his colleagues were led to the kitchen where it was suspected that the offence had taken place as there were blood stains on the floor. The kitchen was a short distance, about 12 metres, from where the body of the deceased was found.

47. PW9 and his colleagues were also led to the house which the accused had been occupying in the compound. He found assorted clothing which were all identified as belonging to the accused. They included one pair of black trousers, a maroon t-shirt, a pair of socks stained in blood, blue with white stripes, a pair of men's plastic open shoes and a pair of black gumboots, He also recovered pink underpants from the deceased and a black petticoat. PW9 also found a bent kitchen knife in the house occupied by the accused.

48. PW4 had called the accused on PW9's phone, and the accused had alleged that he was at a video house at Kamuingi Trading Centre. The police had tried to locate the accused but he was nowhere to be found. PW9 had taken his phone number and sent it to DCIO Londiani for tracking. He had later collected the body of the deceased and taken it to Molo District Hospital to await a post mortem.

49. According to PW9, the body had a serious injury on the head, and there was a pool of blood where the body was lying. PW9 had handed over the items he had collected from the scene to the DCIO Londiani who took over the investigations.

50. PW9 stated in cross-examination that he had received a call from the Chief of Sorget as he was the in-charge at Londiani on that day. After visiting the scene, he had concluded that the murder was committed in the kitchen as there were blood stains, and the sheep's pen is where the body was dumped after the offence. He further confirmed that he had collected various items from the house occupied by the accused. All the items apart from the deceased's underpants and the petticoat were in the accused's house. The pants and petticoat were around the deceased's ankle.

51. PW9 had been shown the house occupied by the accused. He did not know whether anyone else occupied it, but he was informed that a cousin of the deceased used to stay in the same house.

52. PW10 was No. 61077 Stanley Musembi who had at the time of the incident been based at the Londiani DCI office. While he was in the office on 14th December 2015, he had been called by the officer in charge, Inspector Musyimi Kelo, to liaise with Corporal Mugambi (PW9) over a case of murder which had been reported at the Londiani Police Station the previous day, 13th December 2015. He had taken over the exhibits that Corporal Mugambi had collected at the scene, as well as witness statements. He had also recorded statements from witnesses and had noted that the suspect was a herds boy who had been employed by the mother of the deceased. He had further noted that the accused was still at large.

53. PW10 had obtained the phone number of the accused from the witness statements and in conjunction with the officer in charge, they had traced the accused's number in Sigowet. The number they had traced was Safaricom number 0728 980103 and also Airtel number 0739 425177, both of which belonged to the accused. They had traced the Safaricom line which showed that the subscriber was in Sigowet, which they had learnt was the accused's home area.

54. PW10 had also prepared a post mortem form on 15th December 2015 and had accompanied the relatives of the deceased to Elburgon sub-county hospital. He had witnessed the post mortem on the deceased and had had samples taken from the victim for DNA analysis.

55. On 16th December 2015, he had received information that one Charles Langat, *alias* Zacharia, had been arrested by officers within his home area of Sigowet. The accused had been collected from Kericho Police Station by PW9 and Inspector Kelo. He had been sent for mental assessment and collection of a blood sample and saliva, and subsequently, charged with the offence he now faces.

56. PW10 confirmed in cross-examination that Corporal Mugambi (PW9) had handed over the exhibits and statements to him. He further confirmed that the telephone number 0728980103 belonged to the accused, and he had been given the number by the relatives of the deceased. They had been able to trace the number in Sigowet.

57. PW11, No. 236631 Inspector Musyimi Kelo had received a phone call on 13th December 2015 from Corporal Mugambi, then the officer in charge at Londiani Police Station. Corporal Mugambi had informed him of a case of murder within Sorget area and that he had already arrived at the scene. He had found the body of a girl, and PW11 instructed him to process the scene. PW9 had collected several exhibits and organized for the body to be taken to Kericho District Hospital Mortuary. The following day, Corporal Mugambi had handed over the case as well as the exhibits he had collected from the scene to Corporal Musembi and Inspector Kelo.

58. On 16th December 2015, Inspector Kelo received information that the accused was in Komala in the house of Esther, within Soin/Sigowet. He had arranged with the DCIO Kericho and the accused was arrested. The accused had been taken to Kericho District Hospital and examined and found fit to stand trial. He had also been informed by Inspector Kelo of the intention to carry out a DNA sampling procedure in accordance with Section 122 of the Penal Code, and the accused had complied. Inspector Kelo had also recorded a statement from the accused.

59. PW11 had gathered that the accused was an employee of the aunt of the deceased. He had been left at home with the deceased while the others proceeded to church. The accused had then tried to defile the deceased while she was in the kitchen, and in order to overcome her resistance, he had stabbed the deceased and dragged her to the sheep's pen where the body was found.

60. The Government Analyst's report, according to PW11, had confirmed that the blood found on the accused's clothes matched that of the deceased. The post mortem report had also noted that the deceased had a torn hymen and semen.

61. The accused had disappeared the same day after commission of the offence and did not inform his employer when he was leaving. PW11 had tried to trace the accused's number, which he had been given by the accused's employer, in Londiani, but he had switched it off.

62. When placed on his defence, the accused elected to give an unsworn statement. He stated that he was a resident of Tumoiyot, Sigowet/Soin sub-county. On 13th December 2015, a Sunday, he was at a village called Eastleigh, Sorget in Londiani. He had taken breakfast with Josephine, Magdalene, L, Sandra, Paulo and Kamau in the morning, then Kamau and Paulo had gone to a nearby sawmill. Josephine, Magdalene and the children were preparing to go to church, and he was going to Kamuingi centre as he was off duty. He had been asked by Josephine to pass by Mama Mwaura and ask her to remove clothes for Josephine from the line should the rain come before she returned. He had passed by Mama Nyambura and showed her where the keys to the house were placed, then he went to Kamuingi centre.

63. The accused had then been called and informed by a driver plying the Sigowet route that Kamau had told him he was selling potatoes, and that he had gone to Njoroge's house and seen the potatoes, then called the driver and told him that he had seen the potatoes. He had gone to Kamuingi centre and he had seen PW2, Magdalene, at around 1.00 p.m. as she was coming from church. He had then gone to a video shop where he stayed until 3.00 p.m. He had received a phone call from PW2 who had told him to hurry up to take the cows home from the grazing field but he had said he would not go home as he was going to Londiani. He had then gone to Londiani with the driver who had asked him earlier about potatoes. The driver, who was his neighbour in Sigowet, had then asked him to go to Sigowet, and he had agreed to go home as he was off duty.

64. The accused denied that he had ran away from his work place. He stated that he used to leave his employment place and stay at his home for even a week, and his employer had no problem with this. He had arrived at his home in Sigowet at 7.00 p.m. He had been at his home on the 14th and 15th of December 2015 with his phone on, but no one had called him. He had been arrested on 16th December 2015 by the area Chief and Administration Police He was taken to the AP camp where he was informed that he had committed murder. They had used excessive force on him and told him to admit he had committed murder. He had agreed to what they were saying, and then CID officer from Kericho had arrested him. He had written a statement and been forced to thumb print it, then he was charged with the offence.

65. The accused denied that he committed the offence he is charged with. He had been living with one Kamau and Macharia, and that he and Kamau had similar clothing. He produced in evidence a pair of black trousers which he alleged were his trousers. His evidence was that he and the said Kamau had similar trousers which they had bought on the same day in Londiani in September. He and Kamau were wearing the same pair of trousers on the day of the murder, and he had been wearing his pair of trousers on the day of his arrest. He alleged that the trousers produced in court by the prosecution belonged to the said Kamau. Kamau had also borrowed his gumboots when he went to the sawmill. The accused also alleged that he had informed one Paul and Macharia when they went to the saw mill that he would place the keys at the top of the door.

66. I have considered the prosecution evidence and the defence of the accused. The prosecution evidence presents a tragic case of the defilement and murder of a young girl, 14 years of age. She had gone to church on the material day, and returned home earlier than the others. It would appear that she had taken clothes down from the line. Her murderer would appear to have attacked her in the kitchen. He had defiled her, stabbed her brutally with her aunt's kitchen knife, then carried her body into the sheep's pen, where he had dumped it. This was a clear case of murder.

67. Section 203 of the Penal Code sets out the offence of murder as follows:

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

68. Section 206 of the Penal Code provides as follows with respect to what amounts to ‘malice aforethought’:

‘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) an intent to commit a felony;

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

69. The deceased, an innocent young girl, was defiled and murdered. It may be that the person who defiled her was known to her. The murder may have been an attempt to conceal the act of defilement. The prosecution's case is that it was the accused who committed this heinous crime. That he defiled the deceased, then stabbed her, several times, till she was dead. It appears also that she may have been strangled, as her cricoid cartilage was injured. The accused was known to her as he worked for her aunt, and he had been employed through the efforts of the deceased's mother to find a workman for her sister. He had had breakfast with the family that morning before they left for church, and had been left at home washing his clothes.

70. No-one had seen the accused attack and kill the deceased. The evidence against him is purely circumstantial. Our courts have settled the question of whether a conviction can be founded on the basis of circumstantial evidence. The law is that a court may convict an accused person on the basis of circumstantial evidence where such evidence points irresistibly to the accused as the perpetrator of the offence charged. This has been the position in law since the decision in **R vs Kipkering arap Koske & Another 16 EACA 135** in which the court stated:

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

71. In its decision in **Sawe vs Republic [2003] KLR 364** at page 375, the Court of Appeal stated as follows:

“There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

72. The accused in this case was left at home by the deceased and PW4 and PW5, the aunt and mother of the deceased respectively. The deceased came home from church earlier than the others as she had gone to a Catholic Church and the mass ended earlier than the service at the Kenya Assemblies of God Church where her mother and aunt and the deceased's cousin had gone. The deceased's body was found in the sheep's pen, although there was blood in the kitchen which suggested that the attack had taken place there. She had been defiled, her panties were found hanging around her feet, and her black slip was found in the house occupied by the accused.

73. The accused had been seen by PW4 and PW5 at Kamuingi Centre, from a distance. He had later been called on the phone and asked to return home to bring in the cows for milking, but he had not done so.

74. After the discovery of the deceased's body, the house which the accused occupied in the home of PW4 was opened. Inside the house was found a kitchen knife which was bent and had blood on it, a pair of gumboots which had sheep droppings, as well as blood stained socks which belonged to the accused. There was also a pair of black trousers, which was identified as belonging to the accused, which had dirt from the sheep's pen; a maroon t-shirt and open plastic shoes with blood on them, which were also identified as belonging to the accused. A black petticoat (slip) belonging to the deceased was also found in the house which was occupied by the accused. The bent, bloodstained kitchen knife was surmised to be the murder weapon.

75. In his report, PW6, the Government Analyst, H. K. Sang, indicated that the DNA profiles generated from the knife and the pair of black long trousers matched those generated from the blood sample of the deceased.

76. What the circumstantial evidence shows is that the deceased was murdered with the bent kitchen knife that was found in the house that was occupied by the accused. The black trousers found in his house had blood stains whose DNA profile matched that of the deceased. The socks also had blood stains, as did the plastic slippers. Though the Government Analyst had not been able to generate DNA profiles from some of the items found in the accused's house, which he explained was due to the manner of their storage which had led to decomposition, there was sufficient evidence to show that the person who murdered the deceased used the knife, was wearing the black trousers and socks, and at some point was wearing the plastic slippers. He appears to have worn the gumboots to move the body of the deceased from the kitchen to the sheep's pen, as they were found to have sheep's droppings. The deceased's petticoat was found in the house he occupied.

77. Could anyone else, other than the accused, have committed the defilement and murder of the deceased? The accused's defence is that he was not there at the time of the murder. He also suggests that someone else, a Kamau who had a similar pair of trousers as his, and who had borrowed his gumboots, may have committed the murder. He also mentioned a Paulo and Macharia whom he alleged he had told where the keys of the house were.

78. My view of the accused's defence is that it was a weak and belated attempt to try and cast suspicion on other persons who had not been mentioned at any point in the proceedings. With the exception of one Paul, whose name had been mentioned in the cross-examination of PW5, the mother of the deceased, there was no indication emerging from the cross-examination of the prosecution witnesses that there had

been any person other than the accused in the home of PW4. There was no evidence that anyone other than the accused lived in the house where the bent and blood stained kitchen knife, the deceased's petticoat, the accused's trousers, socks and plastic slippers, were found.

79. In my view, the circumstantial evidence in this case irresistibly points to the accused as the person who defiled and murdered the deceased. No-one saw him attack the deceased, but from the facts, it can be inferred that he had murdered her probably in order to conceal the sexual attack as he was known to the deceased. He had then moved her body from the kitchen to the sheep's pen. The inculpatory facts in this case are incompatible with the innocence of the accused. They are incapable of explanation upon any other reasonable hypothesis than that of his guilt.

80. It is my finding therefore that the accused did, with malice aforethought, murder the deceased. I therefore find him guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and convict him in accordance with section 215 of the Penal Code.

Dated Delivered and Signed at Kericho this 18th day of December 2018.

MUMBI NGUGI

JUDGE