REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 16 OF 2015

REPUBLIC…..……..……...……PROSECUTOR

Versus

GEORGE NDUNGU MWANGI…….....ACCUSED

JUDGEMENT

GEORGE NDUNGU MWANGI hereinafter referred as the accused is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the offence alleged that on the night of 6th November 2014 at Nkoroni Location Isiait Sub-Location in Kajiado, within Kajiado County with another not before court the accused jointly murdered Nkuruna Kasatwa. The accused pleaded not guilty to the charge. This called upon the prosecution to proof the guilt of the accused person beyond reasonable doubt by way of calling evidence. See the provisions of section 107 (1) of the Evidence Act Cap 80 of the Laws of Kenya. Mr. Sekento advocate represented the accused at the trial while Mr. Akula, senior prosecution counsel appeared for the state.

The evidence for the state was presented by eight witnesses namely:

PW1 – JULIUS LESHAN testified to the effect that on 6/11/2014 he was approached by the accused at 11.30 pm to assist take the deceased who had suffered some burns to the hospital using his motorcycle. According to PW1 after serious pestering he reluctantly agreed to accompany the accused to travel to the scene where the alleged victim was staying and help escort him to the medical facility. However on arrival at the time PW1 seeing the victim, who became the deceased herein had suffered serious burns and was therefore not capable of being carried in the motorcycle. PW1 stated that he decided to go and inform the family of the deceased on what he has been able to observe and the condition of the deceased arising from the burn injuries. PW1 in his testimony being the first person to arrive at the scene was able to observe that the deceased lay on the floor with some clothes partially burnt. The body of the deceased as he could see it had substantial burns on the neck, hands and lower limbs.

PW2 KESEWE NKURUNA testified that in the midst of the night of 6/11/2014 he received information from PW1 that his brother the deceased had suffered serious burns. In PW2 evidence acting on that report he accompanied PW1 to the house where the deceased stayed with the accused to see whether they could look for transport to take him to the hospital. PW2 further stated that he was able to see the deceased with severe burns and together with PW1 were able to move him from the scene to Bissil Heath Centre. At the same time PW2 decided to report the incident to police. On cross examination by Mr. Sekento for the accused PW1 and PW2 told this court that the deceased had suffered severe burns but they could not see any fire within the scene. PW1 and PW2 further confirmed in cross-examination that the deceased and accused person stayed together in the same house where the incident is alleged to have happened. According to PW1 and PW2 the matter was now a police case under investigations to establish the case of death.

PW3: TIMPIYON KASATWA the wife to the deceased narrated before this court that on 6/11/2014 the accused accompanied of deceased passed through their home. According to PW3 the two stayed for a while and left to their place of work where they used to burn charcoal for sale. From the moment the deceased and accused left it was the evidence of PW3 that she never saw them again except when she was woken up at 2.00 am regarding the incident involving the deceased. PW3 further testified that she visited the scene where the alleged offence took place, only to find the deceased on the floor of the house with serious burns all over the body. In her evidence PW3 also confirmed that she never saw the source of any fire around where the deceased was lying which could have inflicted the injuries. In cross-examination by Mr. Sekento PW3 stated that the deceased was like a supervisor to the accused who had been employed by the owner of the farm to burn the charcoal.

PW4 KINTET NKURUNA SAMORE brother to the deceased testified that he also received information regarding the burn injuries by the deceased in early hours of 6/11/2014. PW4 further stated that when he travelled to the scene where the alleged incident occurred he was able to see the deceased body with server burns. PW4 confirmed that they made arrangements to have the deceased taken to Kenyatta National Hospital for better treatment. In his testimony the deceased succumbed to death in the course of treatment. This referral to Kenyatta National Hospital PW4 stated was a result of a advice from both Bissil and Kajiado District Hospital to enable further medical treatment. PW4 was cross examined by Mr. Sekento learned counsel for the accused. In his answer to the issues PW4 confirmed that a visit to the house where the deceased burnt at could not see any fire or residual of the fire. PW4 further stated that he was not able to confirm how the deceased might have sustained the injuries.

PW5 PC JAMES LUGAI testified to the effect on how he received a report involving the deceased and the accused person at Bissil police station. While acting on the report PW5 stated that in company of other police officers they proceeded to Bissil Health Centre where the victim had been taken for treatment. In the evidence of PW5 he decided to record some statements and did arrest the accused as a suspect who must have caused grievious harm to the deceased. As at this time PW5 was preferring a charge of grievious harm since the deceased was alive admitted in hospital undergoing treatment.

PW6 JOHN LEKAKIMON who also was attached to Bissil police station confirmed to have accompanied PW5 to Bissil Health Centre where the deceased was being treated. PW6 further deposed that seeing the severe burns on the deceased body he commenced investigations on the matter. It was PW6 testimony that on visit to the scene they recovered blanket partially burnt, Maasai leso, jacket, two bottles one containing half alcohol while the second one was empty. That is when the investigations were commenced on the basis of a grievious harm charge but upon the demise of the deceased the accused was charged with the offence of murder.

PW7 JOSEPH KIILU the co-investigating officer with PW6 confirmed and corroborated the sequence of events as stated by PW6. The significant highlights being that in the house where the deceased suffered the injuries there was no fire. The deceased whom the saw at Bissil Health Centre had suffered extensive severe burns. The deceased and the accused stayed in that same house alone. PW7 produced the rough and fair sketch plan of the scene exhibit 3 (a) (b). The blanket exhibit 1. The jacket exhibit 2(a). The Maasai leso exhibit 2(b) with half alcoholic drink exhibit 4 (b) while the empty bottle exhibit 4 (a).

PW8 DR. WALONG performed the postmortem at Kenyatta National Hospital on the body of the deceased. On examination PW8 observed the following burn injuries;

Chest injuries 17%, face and neck 5%, right hand 8%, left hand 5%, right leg 1%, general 1%, left leg 3% escarotory scar on the anterior chest wall measuring 32cm. 36cm and 35 cm in diameter, escarotory scar right forearm measuring 185 cm, escarotory scar measuring 18 cm long. Upon conducting an evaluation PW8 opined that the deceased died due to brain asphyxia due to circumferential chest bandages due to 3 degree 44% burnt. The postmortem was admitted in evidence as exhibit 5.

In answer to the charge the accused gave evidence on oath without calling any witness. He denied the charge only alluding to the fact that the deceased was his supervisor at his place of work. In cross examination by the learned counsel for the state the accused stated that in the material day he went about

his duties. When he returned back to the house of the deceased he found him to have suffered severe burns. In his defence the accused noting the condition of the deceased he decided to inform the family on what had transpired besides seeking means to have him taken to the hospital.

At the close of the trial both counsel filed written submissions on the issues arising out of the entire charge. Mr. Sekento learned counsel submitted that the prosecution has failed to proof the charge of murder beyond reasonable doubt. It was learned counsel contention that the prosecution evidence did not place the accused as the one who killed the deceased. Learned counsel further argued that the accused person though stated to have been staying with the deceased no evidence connects him with the murder. The learned counsel urged this court to acquit the accused in absence of cogent evidence to establish the ingredients of the offence.

Mr. Akula learned counsel for the state briefly relying on the evidence adduced to prove the guilty of the accused submitted that there is no dispute that accused has been placed at the scene. According to learned counsel for the state the prosecution witnesses PW1, PW2, PW4, PW6 and PW7 who visited the scene confirmed that the deceased suffered serious burns. Learned counsel further contended that the house had no evidence of a fire and yet the body of the deceased was found lying on the floor substantially burnt. In a nutshell the learned counsel submitted that from the circumstantial evidence the prosecution has established its case beyond reasonable doubt against the accused person.

ANALYSIS AND RESOLUTION:

The accused person was indicted before this court under section 203 of the Penal Code Cap 63 of the Laws of Kenya. In order to prove the guilt of the accused person beyond reasonable doubt the prosecution has a burden to establish the following ingredients:

1. **The death of the deceased.**

2. **That the deceased death was unlawful.**

3. **That the deceased death besides being unlawful was actuated by malice aforethought.**

4. **That the accused person has been positively identified as the perpetrator of the crime.**

This court has therefore to weigh the evidence alongside each singular ingredient to come up with a finding on how the prosecution faired in discharging the burden of prove beyond reasonable doubt.

a. Death of the deceased:

In this case PW3 the wife of the deceased confirmed that in the early hours of the day on 6/11/2014 she was with the deceased at home and alive. In the night of the 6/11/2014-7/11/2014 at about 2.00 am she received information that the deceased had suffered burns unto his body. PW2 and PW4 who testified as brothers to the deceased stated on how they saw the deceased at Nkoroni area where he stayed having sustained severe injuries. Both PW2 and PW4 and other family members made arrangements for the deceased to be treated at Bissil, Kajiado and later on referral at Kenyatta National Hospital. PW2 and PW4 confirmed that the deceased died on 10/11/2014 while undergoing treatment at Kenyatta National Hospital. PW6 and PW7 police officers who were involved in the investigations also testified that they made arrangements to have a postmortem be conducted at the Kenya National Hospital. PW8 Dr. Walong testified that on 13/11/2014 he carried out a postmortem examination on the body of the deceased and afterwards prepared his findings in the report signed and produced as exhibit 5. According to PW8 following the confirmation of death a death certificate number 794903 was duly issued.

It is not disputed that Nkuruna Kasatwa is dead. There is no other evidence to challenge that findings made by way of medical evidence by the prosecution. The prosecution has therefore discharged the burden of proof beyond reasonable doubt.

b. The deceased death was unlawful by acts of omission or commission:

In the classic cases of ***Guzambizi Wesonga v Republic [1948] 15 EACA 63 and Republic v Sharmpal Singh [1962] EA*** 13 the Court of Appeal Eastern Africa held that every homicide is unlawful unless it is authorized by law. According to PW1, PW2 and PW4 who were the first ones to arrive at the scene presented evidence which disclosed that the deceased had sustained severe burns when they visited the scene. PW1, PW2 and PW4 collected the deceased at the house located at Nkoroni and took him to Bissil Hospital. After initial examination PW1, PW2 and PW4 testified that the deceased was referred to Kenyatta National Hospital where he was admitted until the 10/11/2014. The deceased died while undergoing treatment for the burns. The postmortem by Dr. Walong PW8 of Kenyatta National Hospital was categoric on the nature of extensive burns confirmed the deceased to have suffered. According to Dr. Walong the deceased 3rd degree burns assessed at 44% caused his death. The prosecution case did not seem to have explored the motive of the death of the deceased. However what is clear is the fact that the nature of injuries are such that they were not self inflicted nor accidental or falls under the category of those authorized by law for advancement of criminal justice. This is also confirmed by the testimonies of PW1 – PW7 who had the opportunity to visit the scene. There was no evidence of a fire, so the question of suicide is not even a consideration in this case. In the case at hand the circumstantial evidence is so strong that the deceased must have been burnt elsewhere only to be brought in the house as a cover-up of the scene.

The provisions of section 213 of the Penal Code are applicable in the instant case. Under section 213 the code defines death to include acts which are not the immediate or sole cause of death to include the following:

> **a. If an offender inflicts bodily injury on another person and as a consequence of that or injury the injured person undergoes a surgery or treatment which causes his death.**
>
> **b. If he inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precautions as to his mode of living.**
>
> **c. .....**
>
> **d. .....**
>
> **e. If his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.**

In the instant case as alluded herein the pathologist postmortem report and the testimony of PW8 is very clear as to the cause of death as brain asphyxia due to 3rd degree 44% burns. I am therefore satisfied that the prosecution evidence has established the ingredient of the death of the deceased being as a result of unlawful acts of omission or commission.

c. The ingredient of malice aforethought:

In order to establish malice aforethought, section 206 of the Penal Code provides as follows interalia that:

> **a. An intention to cause the death of or to do grievious 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 death or grievious harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievious injury occurs or not or by a wish that it may not be caused.**
>
> **c. An intention to commit a felony.**

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

The circumstances upon which malice aforethought can be inferred has been discussed in a series of cases, in a persuasive authority form Zambia the case of ***People v Njobvu [1968] ZR 132*** the court stated:

> **"To establish malice aforethought, the prosecution must prove either that the accused had the accrual intention to kill or to cause grievious harm to the deceased or that the accused know that his actions would be likely to cause death or grievious harm to someone."**

I reiterate that the Zambian Code section 204 has similar provisions with our section 206 of the Penal Code. The principle of law is therefore relevant in application to this case. This ingredient which is at the center of the charge under section 203 of the Penal Code sometimes has paused some challenges of interpretation. The difficulty has to do with the test to prove a person's mental disposition at the time of committing the offence and yet that is the ***mens rea*** required to bring the charge within the provisions of section 203. That burden however has been easiened by the interpretation given the authorities in the various court decisions. This position was well illustrated in the case of ***Tubere S/O Ochen v Republic [1945] 12 EACA 63*** where the court held, ***"that the existence of the following circumstances can constitute malice aforethought; the nature of the weapon used in the murder, the manner in which it is used and the part of the body injured, the conduct of the accused before, during and after the incident."***

The courts have also held that the manner of killing can also constitute malice aforethought. In the case of ***Karani v Republic [1991] KLR 622*** the court held that, ***"malice aforethought can be deemed from the nature of the injuries caused on the deceased and the weapons used."***

See ***Criminal Law by Musyoka J reprint [2016] Law Africa pg 312 – 316.***

Malice aforethought is a predetermination to commit an act without legal justification or excuse a malicious design to injure an intent at the time of a killing, willfully to take the life of a human being or an intent willfully to act in a callous and wanton disregard of the consequences to human life; but malice aforethought does not necessarily imply ill will spite or hatred towards the individual killed. See (West Encyclopedia of American Law Edition 2.

Closer home in the cases of ***Dickson Mwangi Munene & Another v Republic [2014] eKLR*** the definition of malice aforethought in section 206 of the Penal Code comprises of not only the intentional but also recklessness acts causing grievious harm committed with indifference of their consequences. In addition in the case of ***Paul Muigai Ndungi v Republic [2011] eKLR*** malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievious harm.

In a persuasive English case which we share a long history of common heritage on criminal law in the case of **DPP v Hyam [1975] AC S5** the court made the following observations on how intent to murder can be inferred as follows:

> ***"Evidence of the fact that a reasonable man would have foreseen that the natural and probable consequences of the acts of an accused was to cause death and evidence of the fact that the accused was reckless as to whether his acts would cause death or not is evidence from which an inference of intent to cause death may or should be drawn, but the court must consider whether either or both of these facts do establish beyond reasonable doubt an actual intention to cause death. The court further observed no distination is to be drawn in English Law between the state of mind of one who does an act because he desires it to produce a particular evil consequence and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act."***

When applying the above principles to this case, I am satisfied that whoever did the burning of the deceased acted with implied malice. This inference is arrived at because the prosecution evidence

demonstrates that by burning the decease with such severity to a level of 3rd degree burns the natural and consequence of the act was dangerous to life of the deceased. At the time a person takes a step to lit the fire douse another human being in that fire and may ensures there is no escape route from one cannot avoid to impute this as a deliberate act done consciously in disregard for the survival of a human being. The deceased in this case suffered serious bodily harm generally defined in the Penal Code under section 234 as unlawful wounds, disfigures, disables, or does grievious harm to any person by any means is guilty of a felony. The accused actions were a proximate cause of the victim's death.

As a result of these multiple injuries the deceased eventually succumbed to death on 10/11/2013. The evidence was sufficient to show that the accused was present, knew about, participated in and rendered aid to the joint venture which must have occasioned serious harm to the deceased.

I find no evidence that the accused was an innocent by stander at the scene where the deceased suffered the serious bodily harm. The reporting of the incident to PW1 to me cannot be said to be an intervening conduct to relieve the accused of criminal responsibility. The fire which must have consumed the deceased cannot be equated with the fiery furnace from a mysterious source. The involvement of a human element in lighting the fire and exposing the deceased to it is imminent and plausible. The reporting of the incident by the accused is not a ground for this court to accord him diminished responsibility to the death of the deceased.

Can this fiery furnace which burnt the deceased be described as mysterious beyond the human eye and control? Will the fire be equated with the one God will avenge his wrath on the wrong doers? How come the accused seemed not have seen or heard this great fire which consumed the organs of the deceased? Where was the deceased burnt before being brought to the house where his body was in excruciating pain? At what point and time did the deceased sustain the injuries? Was it at 11.30 pm when the accused went to report to PW1 or was it earlier than 11.30 pm. The answers to this questions has been directed to the accused by virtue of the sufficiently of evidence placed before court pointing at the accused person as an alleged planner and perpetrator of the murder.

I have anxiously appraised the evidence by the prosecution in light of the defence by the accused person. It is not in dispute from the testimony of PW1 that the accused was the first person to report of the injuries suffered by the deceased. This was later confirmed by PW1, PW2 and PW4 upon visiting the scene. PW5, PW6 and PW7 later followed and corroborated the evidence of PW1, PW2 and PW4. PW1, PW2 and PW4 made arrangements to transport the deceased to the hospital. It was the evidence by PW1 that the deceased reported that the deceased had been burnt by fire but did not disclose then, where, and when that injury had taken place. The accused also did not disclose the nature of the fire that burnt the deceased as he was the very first person with the knowledge. The deceased was admitted at Kenyatta National Hospital from the 6/11/2014 until 10/11/2014 when he passed away while undergoing treatment. The postmortem report by Dr. Walong PW8 display a man who had undergone excruciating pain as a result of the save injuries particularly to the chest, neck, face, genital, right hand, right leg, left leg. According to Dr. Walong the degree of burns were classified as 3rd degree with a circumference of 44%. All these areas fall within vulnerable and sensitive parts of the body. As said earlier this kind of injuries cannot be self-inflicting but through a third party. In view of the evidence placed before me I am satisfied that whoever caused the death of the deceased had malice aforethought.

The one million dollar question to be asked by this court, ***who killed the deceased person?*** The case for the prosecution is purely circumstantial. In a case based on circumstantial evidence the law is trite that the circumstances from which the conviction of guilt is to be drawn should be proved beyond reasonable doubt as such circumstances must be of such nature conclusive. The courts have further held that the proved circumstantial evidence must be consistent only with the hypothesis of the guilt of the accused in consistent with his evidence adduced at the trial.

The leading authorities that lay down the principles to guide the courts when the evidence relied upon by the prosecution is circumstantial in nature include; ***Republic v Kipkering Arap Koske & Ano. 16 EACA 135*** where the court held:

"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 guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusive of any reasonable hypothesis of innocent is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

Simon Musoke v Republic [1958] EA 715:

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

Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1996:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests in circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established:

i. Those circumstances should be of a definite tendency in erringly pointing towards guilt of the accused.

ii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

In the instant case the prosecution did not adduce direct evidence to the murder of the deceased. The case therefore rests entirely on circumstantial evidence as who was the killer during this fateful night of 6/11/2014. This court must therefore applying the above legal principles come up with existence of circumstances of a nature which are cogent and firmly do point to the accused person.

In perusal and appraisal of the evidence by the witnesses the following circumstances do emerge; the testimony of PW3 Timpiyon Kasatwa wife of the deceased was categorical that during the day on 6/11/2014 the accused was in her house with the deceased. While within the homestead the accused made attempts to beat PW3 when she was exchanging money with her husband the deceased. PW3 also confirmed that the accused and the deceased have been staying together where they are involved in the business of charcoal burning. According to PW3 the deceased had been employed as a caretaker and supervisor to the accused by the owner of the farm where the fire woods are to be cut for purposes of charcoal burning. PW3 stated that after a short while the accused and the deceased left together but never did they come back nor the deceased. PW3 who had no knowledge of the deceased but thought he was at the firm where he oversees the charcoal burning. In the meantime PW3 retired for the day without the deceased at home. It was only at 2.00 am between the 6&7/11/2014 when she learnt from PW4, PW1 and PW2 that the husband had sustained burn injuries. That is when she travelled to the home of the incident and saw the deceased body with extensive physical burn injuries. By perusal of the evidence of PW3 Timpiyon it is clear that the accused was the last person to be seen with the deceased alive. It is also not in disputed that when the deceased is not at his matrimonial home with PW3 he used to spent time with the accused at the farm. The testimony of PW1 confirmed the evidence of PW3 regarding the last seen theory of the accused with the deceased. The evidence of PW1 confirms that the first report on the condition of the deceased was made by the accused at about 11.30 pm on 6/11/2014.

What the prosecution evidence reveals is the fact that the deceased was seen alive in company of the accused on 6/11/2014 during the day. The accused at about 11.30 pm same day reports to PW1 that he required assistance to take the deceased to the hospital to be treated for the burn injuries. Prior to the death of the deceased he was found in the house they share with the accused having sustained severe burns. The testimonies of PW1, PW2, PW3, PW4, PW5, PW6, PW7 all who visited the scene saw no fire or any residual of existence of a fire capable to have burnt the deceased. The only person therefore who

has the answer as to how the deceased met his death is the accused person.

The last seen theory and other circumstantial evidence therefore becomes an important link in the chain of circumstances to prove the guilt of the accused person with some cogent and tangible evidence. The principle of the last seen alive theory was considered extensively in a persuasive authority by the Supreme Court of India in the case of ***State of Rajasthan v Kashi Ram [2006] 12 SCC 254*** where the court held:

> **"It is not necessary to multiply with authorities. The principle is well settled. The provisions of section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. This, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he falls to discharge the burden case upon him by section 106 of the Evidence Act.**
>
> **In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Nana Moh'd v Republic [AIR 1960] Mad 218*.**

I note that section 106 of the Indian Evidence Act is similar with our own section 111 and 119 of the Evidence Act Cap 80 of the Laws of Kenya which provides as follows:

Section 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 tom the operations 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 she burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances of 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."**

Section 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."**

The rule under section 111 of the Evidence Act was applied in the case of ***Ndungiri v Republic [2001] 1 EA 179*** where the appellant was convicted of murder upon circumstantial evidence that he was the last person to be seen with the deceased and the deceased body was later retrieved from the appellant's latrine. In addition the case of ***Ernest Asami Bwire Abanga alias Onyango v Republic Cr. Appeal No.***

32 of 1990 the Court of Appeal held interalia that the appellant was the last person to be with the deceased and the deceased was found dead in a room that the appellant had booked and occupied. However I must note that from the evidence adduced, there was no eye-witness to this offence. The prosecution is relying on circumstantial evidence.

What then constitutes circumstantial evidence? Based on various judicial precedents the courts have pronounced the legal proposition as follows:

In the case of ***Mohammed & 3 Others v Republic [2005] 1KLR 722*** the court held:

> **"Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such to exclude every hypothesis but the one proposed to be proved."**

In ***Mwangi & Another v Republic [2004] 12 KLR 32*** the Court of Appeal held thus:

> **"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 evidences as proved is incapable on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge."**

Under section 111 (1) and 119 of the Evidence Act a statutory rebuttable presumption exists. However it does not mean the burden of proof shifts from the prosecution to the accused person. In this case the law stipulates that the accused person had a rebuttable burden to explain either how he parted ways with the deceased or how he came to learn of the injuries sustained by the deceased.

From these principles the testimony of PW3 Timpiyon the wife of the deceased told this court accused was at her home in company of the deceased on 6/11/2014. According to PW4 the deceased was alive with no known ailment or injuries. In the course of that material day the accused and the deceased life together and the next time PW3 saw the deceased he had suffered severe burns all over his body. It is clear that the accused was the last person to be seen with the deceased alive. In the testimony of PW1 accused was the first person to report about the occurrence of the injuries and sought assistance from PW1 to have him taken to the hospital. The accused person under section 111 (1) of the Evidence Act was by law bound to offer a plausible explanation on how and when they parted ways with the deceased. Secondly, since he was the first person to come into contact and they occupied the same house with the deceased the circumstances upon which the deceased suffered the serious burns which finally caused his death are presumed to be within his knowledge.

Where the deceased body was found there was no fire or any residual evidence that a fire had been lit which could have caused the burns of that magnitude as espoused by the medical doctor PW8 in the postmortem report. The prosecution has laid before court watertight circumstantial evidence to establish the charge against the accused person. It is undoubtedly clear from the sworn testimony of the accused he has not alluded to any of that pieces of evidence on the last seen theory and that he occupied the same house which the deceased was found with burnt injuries. The accused in this case did not attempt to explain facts which were reasonably expected from him to be able and interested to explain as stipulated under section 111 (1) of the Evidence Act. What therefore circumstantial evidence did in proving the guilty of the accused was cumulatively and unerringly form a complete chain showing that it was the accused who killed the deceased. This court will therefore be right in invoking the provisions of section 119 of the Evidence Act as to the cause of death and circumstantial evidence adduced as to how the deceased met his death. The prosecution evidence of PW1 and PW3 properly and sufficiently places the accused person at the scene of the crime. There is no alibi defence raised by the accused that when the deceased suffered grievious harm he was not at the scene and only came to discover the victim when he assisted him as a co-worker.

In view of the prosecution evidence it was incumbent on the accused to remove himself out of the ring of

the perpetrators of the crime. Unfortunately that never happened in this trial. There is nothing in the evidence to weaken the chain of events and the nexus of implicating the accused as advanced by the prosecution. In absence of any other evidence for this court to go by the accused can therefore be legally and logically identified as the principal offender of the murder.

From the above reasons I am satisfied that the prosecution has discharged the burden of proof against the accused for the charge of murder contrary to section 203 of the Penal Code. I find the accused guilt of the charge and convict him according to the provisions of law established. Sentencing hearing under section 204 be held for the verdict on sentence.

Dated, delivered and signed in open court at Kajiado on 30th day of March, 2017.

……..

R. NYAKUNDI

JUDGE

Representation:

Mr. Sekento for accused present

Mr. Akula for Director of Public Prosecutions present

Mr. Mateli Court Assistant

Accused present