REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 8 OF 2015

REPUBLIC……...…….……..PROSECUTOR

Versus

GEOFREY WAMBUA MUSAU alias MUTUA…….....ACCUSED

JUDGEMENT

The accused GEOFREY WAMBUA MUSAU alias MUTUA was charged of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The brief particulars of the case are that the accused on the 7th day of November 2010 at Kajiado township, within Kajiado County murdered REBECCA WANJERU hereinafter referred as the deceased. The accused denied the charge and any information implicating him with the death of the deceased.

At the trial the accused was presented initially by Mr. Kamanda advocate when the proceedings commenced at Machakos High Court in the year 2015. The Chief Justice established Kajiado High Court and this became one of the file originally from Kajiado was duly transferred to this court for hearing and disposal. The learned counsel Mr. Kamanda seized of the matter withdrew instructions and this prompted the probono committee to appoint another advocate Ms. Mageto to represent the accused. The state was represented by Mr. Alex Akula, the senior prosecution counsel.

The Constitution 2010 Article 50 (2) (a) sets the narrative of our criminal law jurisprudence under the principle that an accused person is presumed innocent unless the contrary is proved. The state therefore through the Director of Public Prosecutions called nine (9) witnesses to prove the guilty of the accused as charged under section 203 of the Penal Code. This duty upon the prosecution is an answer to the provisions under section 107 (1) of the Evidence Act (Cap 80 of the Laws of Kenya) which provides:

> **"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist."**

THE FACTUAL MATRIX AND THE EVIDENCE BY THE PROSECUTION:

At the trial PW1 Lorna Kagwira Mutwiri stated that prior to the 7/11/2010 the deceased used to be her employee working as a bar maid in their pub at Kajiado owned together with her husband. In the early morning of the 7/11/2010 PW1 stated that they received a telephone call that the deceased and her child had been taken ill and admitted in the hospital. As a way of getting more details PW1 then proceeded to the deceased house where she found the door to her house locked with a padlock and therefore unable to access any information. After leaving the house PW1 went on with her assignments including travelling to Meru. PW1 further stated that on or about 8.30 pm she received a confirmation message that the search for the deceased body was discovered in her house. She was therefore required to record a statement with the police as an employer to the deceased. In the testimony of PW1 she recalled that the deceased and

accused person used to stay together where complaints of domestic violence against accused had been raised with her by the deceased. PW1 further confirmed that the previous night the 6/11/2010 at 11.30 pm when the deceased left the bar she was in company of the accused person.

PW2 DEBORAH WAMBUI MBAE testified as a daughter to the landlady who leased the house to the deceased and accused person. According to PW2 testimony the deceased and accused had rented the house for about ten months. As an immediate neighbour she confirmed that the two lived together as boyfriend/girlfriend. PW2 testified that on the 6/11/2010 at about 2.30 am she heard a knock at the deceased house and in a little while she was drawn to some people quarrelling but in her evaluation there was a fight going on between them. In the morning of 7/11/2010 at 6.00 am PW2 further stated that she saw the accused person leave the house carrying a bag having locked the house. During the evening PW2 told this court the lady by the name Eunice Kanyi (PW3) who used to take care of the child of the deceased visited her inquiring the whereabouts of the deceased. This was because the previous night the deceased had left her young child under the care of PW3 Eunice Kanyi. According to PW2 and PW3 the deceased had an arrangement to always pick the child from PW3 when she was done with her work. In the testimony of PW2 she informed PW3 that she had not seen the deceased. That is when PW3 decided to involve the police who came later in the day and broke into the house of the deceased. It was in that house PW2 told the court that the body of the deceased was recovered.

PW3 EUNICE KANYI the care giver gave deposed on how on the 6/11/2010 the deceased took her baby as it was the routine practice to her in the morning. PW3 further stated that the arrangement was for the deceased to come for the child in the evening after work. PW3 explained that when the time reached for the deceased to call in and pick up the child she was nowhere to be seen. This caused PW3 anxiety and made her to travel to the deceased house the following day to confirm what must have happened. It was also PW3 testimony that during the period she took care of the deceased child she kept seeing the accused in the same house. According to PW3 on arrival at the home of the deceased on 7/11/2010 there was no sign of her presence and the house was locked from outside. In consultation with other people including PW2, PW3 told this court that she decided to report the matter of a missing person to the police herein being the deceased. That report by PW3 prompted police action to search and find the deceased.

One Solomon Mbogo was PW4 who testified as a brother to deceased. PW4 testimony was to the effect of having received a telephone message that her sister the deceased who lived in Kajiado has been murdered. According to PW4 on arrival at the CID office at Kajiado he was taken to the Kajiado District Mortuary where he identified the body to the pathologist during the postmortem. PW4 further stated that prior to the death of the deceased she was married to the accused person.

The other prosecution witness Margerine Mbura PW5 a sister to the deceased also testified as having accompanied PW4 to Kajiado CID office pursuant to the death report. PW5 told this court that on arrival they were taken to the mortuary where they were able to identify the body of the deceased to the pathologist who conducted the postmortem. The last piece of evidence by PW5 was that of existence of a marriage relationship between the accused and the deceased. That during the subsistence of the marriage the accused visited their home including when their father passed away.

PW6 the medical doctor Musita David PW6 testified on behalf of Dr. Omar whom they worked with at Kajiado District Hospital. According to PW6 he had worked with Dr. Omar and was conversant with his handwriting and signature. PW6 confirmed that Dr. Omar who conducted the postmortem on the body of the deceased left the hospital to pursue post graduate studies at Moi University Eldoret. Under section 77 (1) of the Evidence Act PW6 was allowed to produce the postmortem report on behalf of his colleague Dr. Omar. Dr. Musita David testified that the deceased had the following external features; hyperaemic eyes, blood oozing from the nostrils, blood oozing from the mouth tongue bitten cyanosed, rope marks around the neck. On internal Dr. Musita David confirmed that the deceased suffered fracture cervical spine II compressed spinal cord at CI – CII level. Dr. Musita David concluded the cause of death to be cardiopulmonary arrest secondary to asphyxiation. The postmortem report was admitted in evidence as exhibit 2.

PW7 Cpl Maurice Musoi testimony was on the role he played in arresting the accused as a suspect of

murder on 9/12/2011. He was able to identify the accused as the one he effected arrest to be investigated for causing the death of the deceased.

PW8 No. 47352 Cpl James Kimuku attached to Kajiado investigations directorate testified on his role of investigating this incident of murder involving the deceased. According to PW8 testimony he visited the scene before even the body could be removed from the house where she was killed. As an investigator PW8 told this court on how he interrogated various witnesses who gave leads on how the deceased could have met her death. It was further PW8 evidence that upon gathering the necessary evidence and arranging for a postmortem he recommended for a charge of murder against the accused person. In support of the investigations and the materials collected from the scene PW8 placed before court a rope as a murder weapon allegedly used to strangle the deceased exhibit 4. The statement of Samuel Kagia Mwangi a witness for the state who died before his testimony could be taken exhibit 3 (a) (b).

The prosecution further relied on the evidence of PW9 C.IP Gillon Mwangi a gazetted scenes of crime officer. The testimony of PW9 was to the effect that he took over the processing and development of a film containing documentation of the scene carried out by his colleague the late C.IP Ochieng. According to PW9 the film was processed into various photos under his supervision and on completion he prepared a certificate with notes to support the photographic prints of the scene of murder. The bundle of 24 photographs were admitted in evidence as exhibit 1 (a) and the certificate under his signature as exhibit 1 (b).

At the close of the prosecution case the accused was placed on his defence under section 306 (2) of the Criminal Procedure Code. In his defence the accused denied being at the scene or killing the deceased as alleged by the prosecution witnesses. The accused in testimony admitted that he had a relationship with the deceased in the year 2008. He further explained that the relationship did not last long as they parted ways in 2009. During the termination of their relationship the accused testified that he even migrated from Kajiado County to Makueni where he carried on his butchery business. According to the accused he was arrested at Machakos junction on suspicion that he killed somebody an offence he was not aware of or even committed.

In the final submissions Ms. Mageto learned counsel sought enlargement of time to put in final submissions but that was never to be actualized. However Mr. Alex Akula for the state filed written submissions on the issues advancing further the prosecution case on the facts and the law. According to the submissions by Mr. Akula for the state the case against the accused rested on both direct and circumstantial evidence. Mr. Akula highlighted the prosecution case as one where the accused lived with the deceased as husband and wife at Kajiado township. To substantiate the case Mr. Akula made reference to the prosecution witness testimonies which established the ingredients for the offence of murder contrary to section 203 of the Penal Code. Mr. Akula further submitted that the accused was married to the deceased and their relationship was still subsisting during the time the deceased was killed. Mr. Akula attributed the death of the deceased to unlawful acts by the accused. In this regard he made reference to the evidence of PW6, Dr. Musita PW9 – the scenes of crime officer, PW8 the investigating officer and PW2 a neighbour to the accused and the deceased person. It is the prosecution case according to Mr. Akula that in the accused committing the offence he had malice aforethought. Mr. Akula, attributed this element to the recovery of the rope used to strangle the deceased, the nature of severe injuries to the neck and cervical spine. Learned counsel for the state submitted that the offence of murder pursuant to section 203 of the Penal Code has been proved beyond reasonable doubt. Learned counsel opined that the prosecution established that the deceased Rebecca Wanjeru is dead, that her death was unlawful and the accused was positively identified as the perpetrator of the crime. The learned counsel further contended that malice aforethought an essential ingredient for the offence of murder was found to exist and established from the prevailing circumstances of this case. He cited the following cases to buttress his arguments and submissions; ***Republic v Godfrey Ngotho Mutiso [2008] eKLR, Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 UR, Republic v Tubere S/O Ochen [1945] 12 EACA 63, James Masomo Mbatha v Republic [2015] eKLR, Republic v Daniel Anyango Omoyo [2015] eKLR, Libambula v Republic [2003] KLR 683, Mohammed & 3 Others v Republic eKLR, Mwangi & Another v Republic 2 KLR 32, Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990.***

The learned counsel for the state armed with the legal principles elucidated in the cited authorities urged this court to find in favour of the prosecution as having discharged the burden of proof on the guilt of the accused beyond reasonable doubt.

From the charge, the prosecution and defence, together with submissions by the prosecution counsel i proceed to discuss the issues in the following structure:

The starting point is to outline the ingredients of murder contrary to section 203 of the Penal Code which the prosecution must prove beyond reasonable doubt as:

(1) The death of the deceased.

(2) That the death of the deceased named in the charge died as a result of unlawful act or omission.

(3) That the person who killed the deceased did so with malice aforethought.

(4) That the person accused before court either directly or indirectly participated in murdering the deceased.

It is trite law that the accused person is presumed innocent unless the contrary is proved. See (Article 50 (2) (a)) of the Constitution.

Section 107 (1) of the Evidence Act provides that:

> **"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist."**

The standard of proof of those facts as stipulated under section 107 (1) for any criminal case is that of beyond reasonable doubt. This was clearly stated in the case of ***Miller v Minister of Pensions [1945] 2 ALLER 372 at 373*** where Lord Denning stated thus:

> **"That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

In all these circumstances the burden of proof is therefore upon the prosecution and the accused bears no responsibility to disapprove his innocence. With this background in mind, it is now my singular duty to consider the ingredients of the offence under section 203 of the Penal Code. This is to enable me to come up with the finding as to whether each one of the element has been proved beyond reasonable doubt against the accused by the prosecution.

(1) The death of the deceased Rebecca Wanjeru

In our jurisdiction cause of death is usually proved by medical evidence, though the law recognizes that in absence of a postmortem report the prosecution is allowed to present cogent and credible evidence as to the cause of death. This was illustrated in the case of ***Ambari Gundani Kinde v Republic Cr, Appeal No. 103 of 1999*** at Mombasa where the Court of Appeal held interalia that whilst it is prudent to call evidence of an expert as to the cause of death, when death is so obviously apparent, lack of evidence of an expert does not vitiate a conviction for murder or manslaughter. See also scholarly works by William Musyoka J in his book on Criminal Law at pg 303.

In so far as the death of the deceased is concerned the prosecution tendered evidence through the testimony of PW4 Solomon Mbogo Ndwiga and PW5 Margerine Ndwiga who testified as brother and sister to the deceased respectively. Their testimony touched on the death report made to them from Kajiado where the deceased lived. According to PW4 and PW5 they travelled to Kajiado District Mortuary where on the 11/11/2010 they positively identified the deceased body to the pathologist. The postmortem was conducted by Dr. Omar but his report produced on his behalf by Dr. Musita who was conversant with his work and handwriting. The postmortem report by PW6 is clear on whose body the medical examination was conducted on and the respective findings as to the cause of death. That body as referenced by PW6 was that of the deceased Rebecca Wanjeru female adult aged 33 years. There is no dispute as to the death of the deceased.

I am therefore satisfied that prima facie evidence exist beyond reasonable doubt which has not been rebutted as to the death of the deceased.

(2) The second ingredient is whether the death of the deceased was unlawful:

Section 213 of the Penal Code defines causing death to include acts which are not the sole or immediate cause of the death. See ***Criminal Law (ibid) pg 304 at paragraph 4.***

The circumstances to be inferred include whether the accused would be held responsible as to where;

> **(a) He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death.**
>
> **(b) 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) He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is caused.**
>
> **(d) .....**
>
> **(e) His act or omission would not have caused the death unless it had been accompanied by an act or omission of the person killed or of other person.**

It is trite law that the killing of another human being is not excusable unless committed by accident, in execution or advancement of justice, on reasonable defence of self or property. This legal proposition has been clearly illustrated in the case of ***Republic v Gusambizi S/O Wesonga [1948] 15 EACA 65***.

The prosecution case on this ingredient tendered evidence by PW1 Lorna Mutwiri the employer to the deceased at Kindaruma Bar. PW1 confirmed that on 6/11/2010 they closed the bar and restaurant at about 11.30 pm and the deceased was one of the workers on duty. The deceased never reported on duty the following day on 7/11/2010 as she had no permission to be off duty. PW3 Eunice Kanyi confirmed to this court that she normally used to take care of the young child of the deceased during the day while she was away at work. That routine of the deceased leaving the child with PW3 was complied with on 6/11/2010 by the deceased. As per the evidence of PW3 at the close of business on 6/11/2010 the deceased never passed by her house to pick the child as expected normally. This caused her concern that the following day on the 7/11/2010 she went to the deceased to check and find out what must have happened on her failure to perform the obligation of collecting the child. That is when PW3 found the door to the house locked and there was nobody like the deceased within the compound. The prosecution evidence was to the effect that the house of the deceased was subsequently broken into and the body of the deceased discovered lying inside the room. According to PW8 Cpl Kimulu the investigating officer he made arrangements to have the later C.IP Ochieng document the scene. The photographs taken were developed by PW9 C.IP Gillon Mwangi of scenes of crime department and certificate to support the

information on the photos. The photographs showed the deceased and nature of injuries suffered. In the testimony of PW8 while at the scene he observed that the deceased bleeding and also did notice a blue manila rope tied around her neck. The manila rope was admitted as exhibit 3 in support of the prosecution case as one of the instrument/weapon used to occasion harm to the deceased. PW6 Dr. Musita was emphatic from the medical examination that the deceased had sustained injuries to the cervical spine consisting of a fracture and compressed at CI – CII.

What this evidence demonstrates is that in the night of 6/11/2010 at 11.30 pm the deceased was alive. She left her place of work without any of such injuries discovered in the evening of 7/11/2010. The body of the deceased was found in her house lying in bed. The cause of death is traceable to the injuries inflicted on her body. PW6 opined the cause of death as cardio pulmonary arrest secondary to asphyxiation. There is no evidence that the deceased died accidentally, through natural causes or in the cause of actions permitted by law.

I therefore find sufficient evidence on the part of the prosecution that the death of the deceased was through unlawful acts of omission and or commission.

(3) Whether whoever caused the death did so with malice aforethought:

Malice aforethought as defined under section 206 of the Penal Code can be proved by evidence if any of the circumstances do exist:

> **(a) An intention to cause the death of another.**
>
> **(b) An intention to cause grievious harm to another.**
>
> **(c) Knowledge that the act of omission causing death will probably cause death or grievious harm to some person, whether that person is the one killed or not, accompanied by indifference whether death or grievious harm occurs or not or by a wish that it may not be caused.**
>
> **(d) An intent to commit a felony;**
>
> **(e) Intention to facilitate the escape from custody of a person who has committed a felony."**

In Kenyan criminal law it is murder where a person kills another unlawfully with an intention to kill or cause grievious harm. It does not matter that the person killed is the one intended or some other person in such circumstances transferred malice aforethought is inferred and the offender would be held responsible for the offence of murder. The provisions of section 206 of the Penal Code are therefore to be interpreted in a liberal way that an accused person under section 203 shall be presumed to have intended the natural and probable consequences of his conduct. This concept has occupied the minds of the superior courts in as to the salient features of both direct or indirect malice aforethought.

I hereby discuss a few of the judicial precedents. In the case of ***Republic v Nedrick [1986] 3 ALL ER1***:

> **"Where the charge is murder and in the rare cases where the sample directions is not enough, the jury should be directed that they are not entitled to infer the necessary intention unless they fell sure that death or serious bodily harm was a virtual certainly barring some unforeseen intervention as a result of the defendants actions and that the defendant appreciated that such was the case."**

In addition in the case of the ***People v Douglas [1985] 1L-R.M 25*** Irish Court of Criminal Appeal observed as follows on ***mens rea*** on murder:

> **"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 a reasonable doubt an actual intention to cause death."

In ***Stanton v the Queen [2003] 77 ALJR 1151*** the Australian Court discussed how intention may be inferred from the actions of the accused:

"In the circumstances of the present case, bearing in mind the nature of the weapon involved, and the range from which it was discharged, if the appellant intended to shoot the victim, then his intent was obviously to kill, rather than merely to cause grievious bodily harm. Furthermore although defence counsel at trial put an argument to the effect that the shooting was accidental, in the sense that it was not a willed act, the argument had nothing to command it. The appellant's best hope was that the jury might regard the case as one of manslaughter based upon the view that he was menacing his wife with a loaded shot fun but did not actually intend to shoot her."

In a scholarly works ***Fosters Crown Law [1762] at 255*** Sir Michael Foster opined:

"In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or infirmity are to be satisfactory proved by the prisoner, unless they arise out of the evidence produced against him. For the law presumeth the fact to have been founded in malice until the contrary appeareth."

Closer home the superior courts have grappled with the issue of *mens rea* in the offence of murder. A discussion on some of the cases would shed light on the issue in ***Ogeto v Republic [2004] 2 KLR.*** In this case the appellant chased the deceased and another person caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wound. The court found that by dint of section 206 (9) malice aforethought is seemed to be established by evidence showing an intention to cause death or grievious harm.

In ***Republic v Mazabia hin Mkumi [1941] 8 EACA 85;*** in this case the appellant killed his friend by shooting him with an arrow at close range. There was no evidence of motive, provocation or insanity. The court upheld the charge of murder.

In ***Republic v Tubere S/O Ochen [1945] 12 EACA 63*** the Court of Appeal of Eastern Africa stated as follows:

"That it is the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it was used and the part of the body injured."

In a recent case by the Court of Appeal in ***James Masano Mbatha v Republic 2015 eKLR*** the court had interalia that the slier force of wounds on the deceased are indicative of malice aforethought.

In ***Republic v Daniel Anyango Omoyo [2015] eKLR*** the court dealing with the circumstances where malice aforethought can be inferred under section 206 of the Penal Code held interalia that:

"It is to be noted that once the prosecution proves one or a combination of the above circumstances, malice aforethought, will be deemed to have been established and in such a situation, there would be no escape route for the accused person."

See also scholarly works by **William Musyoka J** in his book on Criminal Law pg 313 – 318 (Published Law Africa Reprint 2016)

In the present case PW2, a daughter to the landlady and a neighbour to the deceased stated that on

6/11/2010 she was able to hear quarrels and a fight in her house. PW2 further confirmed that in the morning of 7/11/2010 at about 6.00 am the accused passed by her carrying a bag. According to PW2 she did not suspect anything was amiss until later in the day where PW3 came knocking wanting to know the whereabouts of the deceased. In the evidence of PW2, the young child to the deceased was under the care of PW3 since the 6/11/2010 and she had not gone to pick her in the evening as per the arrangements. The police station at Kajiado was informed of the incident. PW8 Cpl James Kimulu and other police officers visited the scene. When PW8 broke into the house they found the deceased body under the bed with a manila rope tied around her neck. The police made arrangements to have the body taken to the mortuary at Kajiado. That is where Dr. Omar conducted a postmortem. The report revealed that the deceased had a fractured spine, tongue bitten cyanosed, rope marks around the neck as per the evidence tendered by PW6 Dr. Musita on behalf of Dr. Omar, who was not available at the trial of the case.

The circumstantial evidence by PW1, PW2, PW3, PW4, PW5 and PW8 is indicative that the deceased was killed and the door to the house locked from outside. There were only two houses in this compound where the murder incident took place. One of the houses belonged to the landlady whilst the second one was occupied by the deceased and the accused. The circumstances that the deceased was killed involved strangulation using a rope and further injuries to fracture of the spine. The degree of violence in this case was excessive in the sense that the deceased died of cardio pulmonary arrest. The inference to be inferred are that the deceased by use of a rope was denied oxygen and brunt force used to occasion the spinal cord fracture at CI – CII. The target and focus of the neck by use of a rope and the spine column was meant not to be harm in the ordinary sense but occasion grievious harm. The second aspect of the action by the offender is to strangle the victim to death by restricting oxygen flow to the blood system. Whoever caused the death must have continued with the aggressive conduct of strangulation until he confirmed the deceased was no more or in survival condition.

This court in order to draw and inference whether the action by accused was accompanied with malice aforethought or not looked at the medical research by Dr. Dean Hanley on Death by Strangulation. In his Article Dr. Dean relying a Gonzales TA scholarly text – strangulation in ***Arch Pathol 15 – 55 – 165 [1933] Kelly M. Trauma to the neck and larynx (Review CRA 8 (1) 22 – 30 – 1997*** observed as follows:

> **"The process of strangulation whether by hand or by ligature, results in blunt force injury of the tissues of the neck. The pattern of these injuries allows us to recognise strangulation as a mechanism, and to distinguish strangulation from other blunt injuries including hanging, traumatic blows to the neck, and artifacts of decomposition.....**
>
> **At autopsy we can exam all of the issues of the neck, superficial and deep, and track the force vector that produced the injuries.....**
>
> **In addition to the blunt force injuries of the neck strangulation produces evidence of asphyxiation, recognized as pin point haemorrhages in the skin, conjunctiva of the eyes, and deep internal organs. Immediate death from hanging or strangulation can progress from one of four mechanisms:**
>
> > **(1) Cardiac arrhythmia may be provoked by pressure on the carotid artery nerve ganglion causing cardiac arrest.**
> >
> > **(2) Pressure of obstruction of the carotid arteries prevents blood flow to the brain.**
> >
> > **(3) Pressure on the jugular veins prevents venous blood return from the brain, gradually backing up blood in the brain resulting in unconsciousness, depressed respiration, and asphyxia.**
> >
> > **(4) Pressure obstruction of the Larynx cuts off air flow to the lungs, providing asphyxia"**

This article precisely in different medical terms makes it clear that the acts of strangulation as seen here is

meant to kill or cause serious injury to the victim. In the instant case PW8 still found the rope around the neck of the deceased and her body placed under the bed. The view i take in this matter flows through this thread created a nexus between the act and the crime in the following manner:

(1) The perpetrator is presumed to have procured and armed himself with a rope as a murder weapon.

(2) The rope was tied around the neck of the victim in this case the deceased.

(3) The rope was repeatedly applied to the neck and cervical spine to occasion grievious harm.

(4) The nature of injuries from the postmortem report recognized abrasions, fracture to the cervical spine, comprised spinal code at CI-II as ligatures, evidence of asphyxiation as a typical case of strangulation.

(5) This part of the body when targeted as deduced from the postmortem report generates pressure to the internal organs denying the victim opportunity to breathe normally or receive oxygen.

(6) The prosecution evidence placed before this court showed that whoever committed the acts of strangulation and grievious harm never assisted the deceased. The body was retrieved under the bed in a padlocked house.

The set of circumstances gives rise to the conclusion that in the ordinary presumption prevails that a man intends the natural consequences of his acts. In the instant case the natural inference is that the offender intended to kill the deceased or inflict grievious harm to the deceased. There is no evidence involving intoxication or plea of insanity on the part of the perpetrator that could have impaired his judgement.

Can one say that the death of the deceased was accidental or it occurred as a result of an unintended and unforeseen acts on the part of the offender? My considered view on analysing the evidence is that the offender intended all these acts leading to the grievious harm and subsequent death from the injuries. There was no doubt that by electing to strangle the deceased the offender picked kill me quick method because of its lethal nature to the entire nervous system which depends on the flow of oxygen. That process has no other inference save the intention to cause death of the deceased or serious grievious harm. I am satisfied that the same under section 206 (a) and (b) of the Penal Code has been established beyond reasonable doubt. A manifestation of an intention to cause death or serious grievious harm can correctly be inferred in this case involving the accused.

I therefore agree with the prosecution that malice aforethought is present in this case.

(5) The next issue raised in this trial relates with the aspect of recognition of the accused.

The culpability on the part of the accused as advanced by the prosecution is a case that is partially dependent on circumstantial evidence and direct evidence. The leading authorities that lay the principles to guide the courts when the evidence relied upon by the prosecution is circumstantial in nature include:

Republic v Kipkering Arap Koske & Another 16 EACA 135, Simon Musoke v Republic [1958] EA 715, Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990 UR.

In reference to the above authorities the rule about circumstantial evidence is that it must satisfy the following tests:

(1) The circumstances from which an inference of guilt is sought to be drawn, must cogently and firmly established.

(2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

(3) 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 present case the prosecution adduced evidence from PW2 Deborah Wambui was both direct and circumstantial in nature. In the first piece of evidence the accused was a tenant to the mother of PW2. PW2 and the mother managed the house where the deceased and accused stayed together as husband and wife. According to PW2 they also lived in the same compound with the deceased family. Regarding the accused PW2 told this court in the night of 6th – 7th/11/2010 she heard the voice from the deceased house which she could equate to be that of the accused. In her testimony although it was about 2.30 am she was woken up by the knock at the adjacent door and violent quarrels which emanated through the porous walls of the iron sheet house. PW2 further testified that she managed to fall asleep leaving the quarrels and some kind of fighting going on in the accused and deceased house. The second time PW2 saw the accused was on or about 6.00 am on the 7/11/2010 having locked the house and leaving the premises carrying a bag. She however confirmed not having seen the deceased until later when PW3 Eunice Kanyi came knocking looking for the deceased. PW2 further confirmed that in the afternoon when she came back from church the door to the accused and deceased house was still locked with a padlock. There was concern and anxiety from PW2 and PW3 who decided to have the matter reported to the police. PW8 Cpl James Kimulu visited the scene confirmed breaking into the house and discovering the deceased body on the top of the bed with a rope around her neck.

The conditions of identifying the accused voice by PW2 in the night of 6/11/2010 were favourable. The witness had known the accused for about six months. They lived in adjacent houses. As a daughter to the landlady she was able to interact with the accused as their tenant. The testimony by PW2 recognizing the voice of the accused positively was corroborated by her own evidence of identifying him leave the house on 7/11/2010 at 6.00 am. This house where the incident occurred was occupied by two adults the accused and the deceased. There was no other person seen or heard within the compound between the night of 6th and early morning of the 7/11/2010 save for the accused.

The evidence by PW2 falls within the legal proposition in the case of ***Wamunga v Republic Cr. Appeal No. 20 of 1989*** where the Court of Appeal held interalia:

> **"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it a basis of a conviction."**

The account given by PW2 on positive identification and recognition concerning the accused was not impeached by the defence. The accused person was heard in the night by PW2 quarrelling and fighting the deceased. The following morning the accused was seen by PW2 locking the house walking away carrying a bag. That is the last time PW12 saw the accused person.

I find the testimony by PW2 consistent, unwavering and candid as to the whereabouts of the accused between the 6th – 7th/11/2010. I find the PW2 honest and had no reason to implicate the accused and placing him at the scene of the crime. I find therefore PW3 evidence on visual and voice recognition cogent and credible.

The other evidence that is material to this case involves the testimony of PW1 Lorna Mercy Kagwira the employer to the deceased. According to PW1 the deceased reported on duty on the 6/11/2010 at her bar and restaurant. PW1 further explained to this court that the deceased and accused left together at about 11.30 pm when they closed the bar. This was in line with the practice that sometimes the accused could come to the bar and leave together with the deceased. In the testimony by PW1 that was the last time she saw the deceased alive. PW1 further testified that the deceased was expected on duty in the morning of the 7/11/2010 but she never showed up. What followed next was a report that her body has been discovered in her house.

These facts prove sufficiently that the accused was the last person to be seen with the deceased. This legal proposition on the last seen theory was clearly elucidated in the case of ***Ndunguri v Republic [2001] 1EA 179*** where in this case the appellant was convicted of murder upon circumstantial evidence that he was the last person to be seen with the deceased and the deceased's body was later retrieved from the appellant's latrine. He was unable to give a plausible explanation of how he and the deceased parted. See also ***Joseph Cheboi Kabon v Republic Cr. Appeal No. 86 of 1999 at Nakuru, Mbuthia v Republic [2010] 2 EA 311 and also William Musyoka J in his book on Criminal Law (Law Africa Reprint 2016) at pg 309.***

The crucial inculpatory of which the accused has no explanation was that he left with the deceased from Kandaruma bar at 11.30 pm on 6/11/2010. Secondly the accused was heard entering the house at 2.30 am quarrelling with the deceased. Thirdly in the morning of 7/11/2010 the accused locked the house and left the homestead until his subsequent arrest implicating him with the murder of the deceased. In my conceded view the inculpatory facts are incompatible with the innocence of the accused. All the circumstances taken cumulatively together are only capable of positively identifying the accused, and placing him at the scene of the murder as the perpetrator. The accused in response was categoric that he was not at the scene of the murder.

I am satisfied that there is no error or mistake on recognition evidence received and admitted by this court linking the accused with the offence. In my judgement the prosecution has proved element on positive recognition and placing the accused at the scene beyond reasonable doubt.

The issue according to the defence was that on the material particulars of the charge he was elsewhere and not at Kajiado where the deceased was murdered. Mr. Akula, learned counsel for the state invited the court to rely on the evidence of identification adduced by PW2 and the last seen theory by PW1 as credible evidence to place the accused at the scene.

It is trite that the accused has absolute right to defend himself in any way he likes as provided for in the constitution under Article 50 including the right to keep silent. The accused was therefore within that realm of the law to put forward an alibi defence. The court has pronounced itself on the alibi defence in the following cases; in ***Kiarie v Republic [1984] KLR 739*** it was held:

> **"An alibi defence raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that it is not unreasonable."**

In addition the Court of Appeal in the case of ***Lenyesio Lekupe & Another v Republic Cr. Appeal No. 145 of 2011 at Nakuru*** – the court observed thus:

> **"An alibi defence is a plea by an accused person that he was not there (was not present) at the place where the crime was committed, at the time of the alleged commission of the offence for which he was charged."**

In ***Victor Mwendwa Mulinge v Republic [2014] eKLR*** the Court of Appeal declared itself on the proposition on alibi defence:

> **"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution. See Karanja v Republic [1983] KLR 501. This court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence wan an afterthought."**

Applying these principles to the present case the alibi defence was put forward at a later stage of this trial.

However that does not diminish the responsibility by the court to weigh it alongside the burden of proof cast upon the prosecution to establish the guilty fo an accused person beyond reasonable doubt. In the defence of alibi i hold that he accused never gave sufficient particulars as to where he spent the night of 6th – 7th/11/2010. These could have presented to the prosecution to seek leave of the court to check and investigate the alibi defence with a view to disapprove it. As a general it is not all alibi defence further evidence must be adduced by the prosecution to disapprove the alibi. If the prosecution adduces sufficient evidence to diminish the alibi defence then there is no more burden to prove an established fact. I wish to point out that this case falls under the category where the prosecution never sought leave to investigate the alibi by the accused.

The question is can this court find evidence from the case for the prosecution to destroy the alibi put forth that the accused was elsewhere away from the murder scene. In evaluating the prosecution evidence this court has the testimony of PW1 who saw the accused in company of the deceased in the night of 6/11/2011 at 11.30 pm leaving Kandaruma bar. Secondly there is the piece of evidence by PW2 a neighbour who heard and recognized the voice of the accused in their house at about 2.30 am. Thirdly in the morning of 7/11/2010 PW2 positively identified the accused locking the house which became the scene of the murder and walking away with a bag. It is clear that both the testimony of PW1 and PW2 is credible and candid sufficient enough to logically and physically demolish the accused alibi defence. The alibi defence did not therefore raise any reasonable doubt that the witnesses could have been mistaken as to the positive identification of the accused in both situations.

In the circumstances of this case and guided by the principles laid down in ***Woolmington v DPP [1935] AC 485 and Miller v Minister of Pensions [1947] 3ALLER 373*** i am satisfied the prosecution has proved the elements of the offence of murder contrary to section 203 beyond reasonable doubt against the accused person.

The result is that i enter a verdict of guilty, convict the accused with the offence of murder contrary to section 203 of the Penal Code. The sentencing hearings and verdict to proceed accordingly for an order under section 204 of the Penal Code.

It is so ordered.

Dated, delivered and signed in open court at Kajiado on 17th day of April, 2017

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R. NYAKUNDI

JUDGE

In the presence of:

Ms Mageto for the accused present

Mr. Akula for Director of Public Prosecutions

Accused present

Mr. Mateli Court Assistant