



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KAJIANDO**

**CRIMINAL CASE NO.3 OF 2016**

**REPUBLIC ..... PROSECUTION**

**VERSUS**

**REDEMPTA NTHENYA MWANZIA ..... ACCUSED**

**JUDGEMENT**

On the 11/2/2016 **Redempta Nthenya** hereinafter referred as the accused person was indicted with the offence of murder contrary to Section 203 as read with the Section 204 of the Penal Code. The accused was arrested and arraigned in Court upon investigations that on the 23/11/2015 at Ongata Rongai area in Kajiado North Sub- County jointly with others not before Court murdered Teresia Wacuka Maina hereinafter referred as the deceased.

The accused pleaded not guilty and was represented at the trial by Mr. Chege Advocate while the prosecution was conducted by Mr. Alex Akula, the Senior Prosecution Counsel.

**PROSECUTION CASE:**

In order to prove the guilty of the accused person, prosecution called twenty one witnesses. Their evidence can be summarized as follows:-

According to PW2 Monica Wanjiku the mother to the Deceased, PW3 Gabriel Gatheca a relative and PW4 Sammy Mwangi a boyfriend to the deceased all testified to have known her and subsequent reports of her missing from the house and place of work. The three witnesses commenced a frantic search of the whereabouts of the deceased including reporting the matter to Ongata Rongai Police Station. This was confirmed by PW11 Sgt Richard Ekuwon of Ongata Rongai Police Station who booked the report of a missing person. In the evidence of PW11 upon booking the report, investigations to trace the deceased commenced involving various agencies like Safaricom data call center, the Criminal Intelligence and the CID Office. According to the testimony of PW11 the evidence gathering led them to effect arrest of the accused and her mother in connection with the disappearance of the deceased.

**PW5 JOHN NJOROGE**, a cousin to the deceased also stated to have received the report in connection with the disappearance of the deceased on 23.11.2015. As a relative it was PW5 testimony that he joined hands with PW2, PW3, PW4 and PW5 to have a report made to the police and contact with her friend whom he identified as the accused person in the case. The testimony by PW2, PW3, PW4 and PW5 further confirmed that the body of the deceased was later traced inside a septic tank at Ongata Rongai on 14/1/2016. They all participated in the process of the recovery and recording of statements with the police on the sequence of events since the deceased went missing on discovery and retrieval of her body.

**PW6 JOSEPH RUHIU** who owns the property where the septic tank the body recovered from also

recorded a statement. The testimony by PW6 was to the effect that he owned the land and houses upon which the septic tank was constructed and subject matter of this trial, but did not know how the body of the deceased ended up at the property.

**PW7 MARGRET MAINA** a Government analyst conducted a DNA profile involving samples from PW2 the mother of the deceased with a view to coming up with the positive identity of the deceased. In her report PW7 confirmed that PW2 was the mother to the deceased. The analyst report was admitted in evidence as exhibit 5. According to PW7 the DNA diagnostic accomplished by extracting the biological materials from PW2 compared with that of the deceased rendered credence in positive identification of human remains from the septic tank. As explained by the analyst this kind of comparison is achieved because one component of each of the 23 pairs of chromosomes characteristics of the human being is inherited from the biological father and the other from the biological mother. In the instant case the deceased identification was accomplished by the DNA comparison of her biological mother.

**PW8** a certified Cisco and forensic analyst from the directorate of cyber crime unit testified as to the analysis undertaken on the following exhibits:

Exhibit marked A Samsang, IMSI No. 357055055666864 paired with Safaricom SIM card ICCID 89254029371001346591. It was further the testimony of PW8 that he was required to extract and print text messages from the exhibit under reference being mobile number +254 70375\*\*\*\* for the 23/11/2015. According to PW8 in undertaking the forensic analysis he extracted the message which reads thus: *“let mi stop kidin u hakuna doo nilikoniwa I just wanted 2 know kama unanipeda bt u dont let mi nijipe shuguli na mtu mwingine.”*

Having complied with the request from the investigating officer, PW8 prepared the certificate and the detailed report which he produced in court as exhibit 6(a) and 6(b). The gist of the report as stated by PW8 was that a message was received and read on 23/11/2015 at 17.48 hrs from the identified cellular number +254 70375\*\*\*\*.

**PW9 PC JOHN NGENO** a gazetted scene of crime Officer was called in to take photos at the scene where the body of the deceased was recovered. PW9 upon documenting the scene did process and develop the photographs under his supervision and direction. He produced the 15 photos as exhibit 2 (a) and the certificate as exhibit 2(b). The photographs revealed a decomposed body of a human being wrapped in a sack.

**PW10 SENIOR SUPERITENDENT BENSON KASYOKI** testified as to the role he played in recording a charge and cautionary statement by the accused person. The charge and cautionary statement was admitted in evidence as exhibit 7(a) and 6 being the handwritten and transcript as stated by the accused. The accused gave a description of the chain of events on the cause of death and how the body ended up at the septic tank where it was recovered. She further contended in the statement that it all began at PW14's clinic where she had escorted the deceased to go and procure an abortion. It was at this stage that the process which was being conducted by PW14 turned fatal. According to the accused in the charge and cautionary statement this being the situation PW14 came with a plan on how to conceal the death by disposing it in the septic tank. In all these circumstances the accused painted a picture of the primary perpetrator to be PW14 Frank Njue.

**PW12 DANIEL MWANGI** testified on the efforts made together with other family members to trace the whereabouts of the deceased. In his testimony they moved into various places including the residence, the place of work and other Venues just to see whether she could be spotted anywhere. PW12 further confirmed that one person they contacted was the accused who was a friend to the deceased. On 14/1/2016 PW12 was to receive a message that the deceased body has been recovered in a septic tank within a plot in Ongata Rongai. PW12 further was shown a recovered mobile phone Samsung mobile which he positively identified before Court.

**PW13 CAROLYNE WAMBUI** a secretary who keeps medical records at Afya Frank Medical Clinic testified and denied that the deceased visited their clinic on 23/11/2015 to seek any medical treatment.

**PW14 FRANK NJUE** the operator of Afya Frank Clinic explained the circumstances of his arrest as a suspect to the death of the deceased. In his testimony PW14 denied that he ever housed or treated the deceased as a patient nor did he see the accused in the clinic as alleged. He further informed the Court that he did not know how his motor vehicle reg. No. KAS 252J was implicated with transporting the body of the deceased to the septic tank located in a private property where it was finally discovered and retrieved by police officers. This to him remained a mystery even as he was enlisted as a witness in the death he did not have a clue how it occurred.

**PW15 PC LAZARUS NJUGUNA** participated in the investigations. In his testimony he identified a Samsung handset with dual SIM cards being Airtel- IME 8925403152104493524 and a Safaricom SIM card with S/No. 892540210040442608. PW15 further testified that armed with positive information on the two SIM cards he proceeded to Machakos township where he arrested Jane Mwanzia PW 18 the mother to the accused. According to the testimony by PW15, the mother of the accused had mobile phone in her custody. They sought the whereabouts of the accused. PW15 further stated that the mother telephoned the accused whom she made arrangements to be picked from around City Cabanas in Nairobi. That is how they effected the arrest of the accused to assist in taking investigations to another level. PW15 confirmed that on interrogation of the accused she confessed to the murder and the location where body of the deceased was dumped in a septic tank in a private property.

**PW16 MWANZIA MATHEKA** a caretaker at the property where the body was recovered denied any knowledge of the incident. He denied ever seeing one Frank Njue or the accused in this case. He also confirmed that the property had no watchman to guard the premises nor did any tenant notice anything prior to the recovery of the deceased body.

**PW17 PC PETER KIGIA** a police Officer attached to Ongata Rongai stated that he did participate in the recovery of the body of the deceased from a septic tank at Ongata Rongai in company of other witnesses and police officers.

**PW18 JANE MWANZIA** the mother to the accused testified that there was a time around November 2015 when she was left with some mobile phones by the accused. She further confirmed that she took over the mobile phones and inserted an Airtel and Safaricom SIM cards. According to PW18 she continued using the mobile phones until the police visited her at Machakos and arrested her in connection with the phones. PW 18 further stated that it became clear while in police custody that the mobile phones had something to do with the accused and the death of the deceased. PW18 further stated that she was later to be released by the police and asked to record the statement in respect to the possession of mobile phones subject matter of this trial. PW18 Jane Mwanzia further deposed that the mobile phone make Samsang with IME 356301043597700 was confirmed by PW18 as one of those in her possession when she was arrested by the police. PW18 further stated that a Safaricom SIM Card S/No. 8925401004044260820 with a subscriber No. 0706 68\*\*\*\* was also retrieved from her at the time of her arrest. These two exhibits became the central focus of investigations in this murder trial.

**PW19 MICHAEL MUSYOKI MWANZIA** testified as the brother to the accused in his role of being present when she recorded the confession statement. It was his evidence that the recording of the statement he witnessed was at the end of it counter signed by him as proof that he attended as a relative to the accused.

**PW20 MARTIN WEKESA** corrected data analyses which he produced as exhibit 14(a) (b) which revealed that mobile number 0703 75\*\*\*\* was using IME 868 744-020128210 as at 23/11/2015 and on 4/12/2015 at 12.18.54hrs. PW20 further confirmed that the call data analysis established that as from the 23/11/2015 the same IME was using mobile number 0706 68\*\*\*\* whose physical location was at Machakos County. The witness armed with this information did prepare a report detailing the request which he placed before court as exhibit 11(a) and 11(b).

In support of the Mpesa transactions with an entry of 22/11/2015 between the deceased phone 0703 75\*\*\*\* and that of the accused 0716 70\*\*\*\* a statement of account exhibit 12(a) and (b) was tendered in evidence by PW20. The transactions confirms payment of Ksh.25,000 by the deceased to the accused

person. PW20 further told this court that call data extract on SMS and voice data involving the deceased mobile phone 0703 75\*\*\*\*, with that of the accused mobile number 0716 70\*\*\*\* and that of PW4 Sammy Mwangi 0711 54\*\*\*\* was retrieved as supported by exhibit 13 (a) (b) (c) and (d) respectively. In the testimony of PW20 the analyses confirmed that there was active communication between the identified mobile numbers which terminated later in the day of 23/11/2015. The location was centered around Karen and Ongata Rongai area.

**PW21 PC DOUGLAS CHEGE** conducted the investigations of the case. The witness laid the sequence of events culminating in the arrest and recommending a charge of murder against the accused. In his role as an investigator he collected a number of exhibits which included mobile phones. The two mobile phones a Samsung and GT were produced in evidence as exhibit 3(b). Secondly he tendered before Court Airtel and Safaricom SIM cards as exhibit 4(a) (b) (c) (d). The missing person report was made in the occurrence book which he produced as exhibit No. 15. According to the witness statements recorded in the course of investigating the alleged offence PW21 deposed that PW14 was exonerated of being involved with the murder of the deceased. PW21 further stated that the substance and narrative created by the accused on the abortion theory was impugned by the findings from the postmortem report. PW21 testified that PW1 confirmed that on examination of the body of the deceased there was no evidence of an abortion as alleged by the accused.

In absence of any other cogent evidence implicating PW14 a decision was reached to treat him as a state witness.

**PW1 DR. WALONG** who conducted the postmortem with Dr. Ndegwa on the autopsy report dated 31/3/2016. According to PW1 the medical examination revealed that the deceased had a fracture dislocation right wrist joint loose and phalangeal bones ligature impressions along the neck. In the postmortem report PW1 confirmed that the cause of death was asphyxiation due to ligature strangulation and suffocation.

#### **DEFENCE TESTIMONY:**

After the close prosecution case the accused was placed on her defence. She elected to give unsworn testimony where she denied any involvement with the offence of killing the deceased. The accused described the deceased as her close friend whom they enjoyed a cardinal relationship. On the days in question between the 22 and 23/11/2015 the accused told this court that they spent part of the substantial day together before they parted ways. The accused went further to state that the deceased had purchased a problematic phone which necessitated her to go to a shop to purchase new ones. It was out of their friendship that the deceased even exchanged a white Techno phone with a black one before they parted ways. According to the accused since 23/11/2015 she never came to see the deceased again only to learn she was no more.

#### **SUBMISSIONS BY THE DEFENCE COUNSEL:**

Mr. Chege, the learned Counsel submitted and argued that the prosecution did not discharge the burden of proof beyond reasonable doubt against the accused person. The learned Counsel further argued and submitted that there was no eye-witness to the murder and the circumstantial evidence failed to meet the legal threshold. The learned Counsel contended that the evidence from the witness was not worthy for this Court to draw an inference that the accused participated in committing the crime as alleged in the information. The learned Counsel also took issue with the testimony of the pathologist Dr. Walong (PW1) for failure on the part of the prosecution to summon the co-pathologist Dr. Ndegwa. The argument advanced by Learned Counsel was that the failure to call Dr. Ndegwa impugned the postmortem presented by Dr. Walong, hence the Court should not place much reliance on it. Learned Counsel relied on the legal proposition on circumstantial evidence as illustrated in the case of ***Republic v Kipkering Arap Koske & Ano. (1945) EACA*** to urge the Court to exonerate the accused of the charge leveled against her.

#### **SUBMISSIONS BY THE PROSECUTION COUNSEL:**

On his part Learned Senior prosecution Counsel Mr. Akula appearing for the state submitted and supported the evidence adduced by the 21 witnesses. The Learned Counsel contended that prior to the deceased death the accused was her close friend whom they interacted and shared issues of a commonality. In his further submissions Learned Counsel stated that the circumstantial evidence points to the accused as the last person who was with the deceased. According to the arguments by Learned Counsel evidence was led to show that the deceased had in her M-pesa account a total of Kshs.25, 000. The said amount was later confirmed to have been withdrawn by the accused. It was further the submissions by Learned Counsel that the prosecution established a link between the mobile phones found with mother of the accused PW18. Learned counsel submitted that one of the mobile phones found with PW18 belonged to the deceased. The said mobile phone according to learned counsel contention was conveyed by the accused to her mother PW18 who resides at Machakos town. This nexus learned counsel argues has not been controverted by the accused. The court should also evaluate the evidence on the Safaricom call data which places the accused at the scene. In support of his contentions Learned Counsel refers to the following cases; in the case of **Republic v Godfrey Ngotho Mutiso (2008) eKLR, MORRIS Aluoch v Republic Cr. Appeal No. 47 of 1990 UR, Republic v Tubere S/O Ochen (1945) 12 EACA 63, James Masomo Mbatha v Republic (2015) eKLR.** All these cases according to learned counsel were to buttress the legal proposition on the ingredient and proof of the offence of murder contrary to section 203 of the Penal Code.

In the case of **Issac Ng'ang'a Kahiga v Republic Cr. Appeal No.272 of 2005 UR** Learned Counsel invited the Court to test the evidence on the recent possession and its relevance in this case. The piece of evidence the Learned Counsel submitted on this ground was the recovery of the mobile phones belonging to the deceased. Learned Counsel further submitted and made an argument of existence of circumstantial evidence which in essence places the accused at the scene of the murder. On this ground Learned Counsel relied on the case of **Mohamed & 3 Others v Republic eKLR, Mwangi & Ano. v Republic (2004) 2KLR 32, Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990 UR.**

In a nutshell learned prosecution counsel supported the case for the prosecution that all the elements of murder contrary to Section 203 of the Penal Code have been proved beyond reasonable doubt.

#### **ANALYSIS AND DETERMINATION:**

In this case I have gone through the evidence on record and duly considered the submissions by both Counsels. It is now my duty to weigh and evaluate the evidence as placed before me by the prosecution to establish whether the offense against the accused is proven beyond reasonable doubt. The burden of proof to tender evidence to disprove the innocence of an accused person is always cast upon the prosecution. This is well illustrated under Section 107 (1) of the Evidence Act Cap 80 of the Laws of Kenya which provides:

***“(1) Whoever desires any Court to give judgment as to any legal right or liability on the existence of facts which he asserts must prove those facts exist.”***

***“(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”***

Lord Denning dealt with the onus of proof in criminal cases in the case of **Miller v Minister of Pensions (1947) 2ALL ER 372** where he stated:

***“It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The Law would fail to protect community if it admitted fanciful possibilities to deplete the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor 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.”***

The accused person is presumed innocent until the contrary is proved as clearly provided for under Article 50 (2) (a) of our constitution. Therefore the prosecution bears the burden to prove that the offence

was committed and the culprit is the accused person in the dock. That evidence by the prosecution must meet the threshold of beyond reasonable doubt and nothing less like fanciful and suspicious possibilities. This would be the standard of proof I will subject this case against the accused. It is not in dispute that the accused has been charged with the offence of murder contrary to section 203 of the Penal Code.

As regards the charge of murder contrary to Section 203 of the Penal Code it provides as follows:

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

That definition is well captured in the case of *Republic v Andrew Omwenga (2009) eKLR* where the Court stated:

***“It is clear from this definition that for an accused person convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:***

- a) The death of the deceased and the cause of that death.***
- b) That the accused committed the unlawful act which caused the death of the deceased; and***
- c) That the accused had the malice aforethought.”***

I shall now turn to consider each ingredient of the offence by appraising the evidence by the prosecution vis viz the defence answer to the charge.

**a) The death of the deceased:**

It is not in dispute that Teresia Wacuka Maina is dead. The general principle of Law on homicide cases is that it is important that the prosecution proves death and also the cause of death. As held in the case of *Republic v Kimbugwe S/O Nyagoli & Others (1936) 3 EACA 129* it is cause of the death which often links the accused to the death. As regards proof of death it is usually through medical evidence as stated in the case of *Republic v Cheya & Another (1973) EA 500*.

In our case the death of the deceased is supported by the testimony of PW3 Gabriel Gathecha and PW5 John Njoroge who testified as a brother and cousin at the trial. The two witnesses PW3 and PW5 identified the body of the deceased on 20/1/2016 at the City Mortuary to the pathologists Dr. Ndegwa and Dr. Walong during the postmortem. In his testimony PW1 Dr. Walong testified that in conjunction with Dr. Ndegwa. They conducted a postmortem on the remains of a human being duly identified by her relatives. PW5 pegged part of has to identification to the sweater the deceased was warm-up wearing during her last days. In the testimony of PW5 when the body was recovered part of that sweater had not fully decomposed. According to PW3 he was able to identify the body by way of her braids though in the process of decomposition. The postmortem report admitted in evidence confirmed that the deceased died as a result of asphyxia due to strangulation and suffocation. The autopsy and postmortem reports were produced by PW1 as exhibit 1(a) and 1(b) in support of the prosecution case to proof this ingredient.

There is further evidence by the Government analyst PW7 Marget Wahu in her evidence she alluded to the chemical buccal swab samples extracted from the mother of the deceased PW2 Monica Wanjiku. The samples were for carrying out a DNA analysis with the sole purpose of positively confirming the identity of the deceased. The analyst report by PW2 further corroborated the testimony of PW3 and PW5 as to the death of the deceased. The prosecution therefore has discharged the burden of proof beyond reasonable doubt on this ingredient. This is in line with the legal proposition in the case of *Benson Ngunyi Nandu v Republic CACRA No. 171 of 1984*.

**b) The second ingredients is that of unlawful death of the deceased:**

The issue of the causation in the death of another human being is well provided for under Section 213 of the Penal Code. The acts and circumstances surrounding the death of the deceased person involve acts of causing or inflicting bodily harm. Through the said acts the deceased either undergoes treatment which causes the death, or deceased fails to get proper medical attention or the acts of the accused hastens the death of the deceased or an act of accused accompanied by that of the deceased or of other persons.

The second principle under this element is illustrated in the case of ***Republic v Guzambizi S/O Wesonga (1948) 15 EACA 65***. It was held inter alia that, ***“all homicides are presumed unlawful unless excusable by law, or in reasonable defence of property or person.”***

In ***Andrew v DPP [1937] AC 576*** the court propounded what constitutes unlawful act as follows:

***“The words unlawful act includes:***

***(i) Acts punishable as crimes (or involving penalties).***

***(ii) Acts constituting actionable wrongs.***

***(iii) Acts contrary to public policy or morality or injurious to the public.”***

In an article on causation in ***English Law by Hart, HLA & Another*** the author had this to say:

***“For causation to amount to murder by a defendant at the time of death, the defendant’s acts or omissions must be the operating and most substantial cause of death with no novus actus interveniens (latin for new act breaking in) to break the chain of causation.”***

Unlawful act gets its name in this case from the requirement that the deceased must have died as a result of an unlawful act and liability of the accused.

On this ingredient the prosecution adduced the evidence of PW4 Sammy Mwangi a fiancé to the deceased. According to PW4 on 22/12/2015 he had been telephoned by the deceased regarding unlawful withdrawal of Kshs. 25, 000 from her M-pesa account. Using the same conversation PW4 advised her to seek assistance with Safaricom Liason Office. That was the last contact PW4 had with the deceased. What followed thereafter was her mobile phone not reachable. PW4 testified that becoming anxious he decided to consult PW12 Daniel Mwangi brother to the deceased in effort to trace her whereabouts. According to PW4 and PW12 a search conducted at the deceased work place revealed no evidence that she has reported duty on 23/12/2015. The frantic search culminated in the recovery of the deceased in a septic tank within a plot owned by PW6-Njeru. The evidence by the pathologist is relevant as to the nature of the injuries. The postmortem revealed that the deceased had suffered fracture dislocation right wrist joint with loose metacarpals phalangeal bones ligature impressions along the neck. The scene of the crime officer document the scene of the body positively identified and recovered from the inside a septic tank. The circumstances of recovery and the positive findings by the pathologist demonstrated that the deceased was assaulted prior to her death. The assailants did not rest there but concealed evidence by throwing the body into a septic tank. There is no evidence to rebut the prosecution case that the accused did accidentally or through misadventure or in the course of a fight with another person. The injuries confirmed on the body of the deceased further corroborates the facts that her death was not through natural causes.

The narrative introduced to the case that the deceased had died out of abortion complications was not supported by any medical evidence or postmortem findings. That was the reason why a suspect by the name Frank Kirimi PW14 was absolved of any blame. According to PW14 it was a mystery that his motor vehicle registration KAS 253J was involved in carrying the deceased from clinic. According to PW14 he testified ever knowing the deceased or the accused physically. PW14 further stated that neither the accused nor the deceased ever visited his clinic during the period in contention or any other time. PW14 further told this Court that as a result of malicious information the investigation officer had to involve him to trace the whereabouts of the deceased. That search finally led them to a plot where he

witnessed the retrieval of the deceased body from inside a septic tank. All these circumstances being traced to 22/11/2015 when PW4 had a telephone conversation with the deceased and subsequently recovery of her body days later point to one conclusion of unlawful death.

In line with our constitution Article 26, **“every person has a right to life and no one shall be deprived intentionally of his life save in circumstances authorized, justified or permitted by law.”** This court accepts that whenever a life is unlawfully taken the essence of the crime of murder or manslaughter applies depending on the peculiar circumstances of each case. In the instant case evidence by the pathologist alluded to acts of assault and strangulation of the deceased. If that be so the unlawful acts resulted in the death of the deceased entails the unlawful ending of her life.

I therefore find that the prosecution has proved the unlawful death of the deceased beyond reasonable doubt.

**c) The third element of malice aforethought:**

Malice aforethought has been defined under section 206 of the Penal code to constitute the following:

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**

**(a) An intention to cause death or to do grievous harm to any person whether such 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 such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused 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 or omission to facilitate the flight or escape from custody of any person who attempts to commit a felony”**

The *mens rea* of malice under section 206 is satisfied by showing of either reckless or intentional conduct on the part of the accused. The prosecution in a charge of murder contrary to section 203 must therefore prove that the accused committed an act that caused the death of the deceased. That when the accused acted she had a state of mind called malice aforethought. That in killing the deceased the accused did so without lawful excuse or justification.

My reading of section 206 of the Penal Code and the decisions from the superior court accords an interpretation that malice aforethought to cause death or grievous harm may be conceived and executed at the spur of the moment. Malice aforethought to support the offence of murder to me need not be articulated only as a premeditated design to cause the death of the deceased or any other human being.

The standard of proof that the prosecution must establish is that of beyond reasonable doubt. The prosecution must prove that the accused had the intention and did execute it by causing the death of the deceased or caused grievous harm; or had the knowledge that his/her unlawful acts or omission would result in death of the deceased. The definition of malice aforethought therefore imports the elements of intention and knowledge to the commission of the offence.

The manifestation of it depends on specific facts of each case to be supported by prosecution evidence. This element has been demonstrated in the plethora of cases as discussed herein below:

**Case law commentaries on malice aforethought:**

In the case of *Nzuki v. Republic [1973] KLR 171* the Court of appeal stated that in the commission of the offence of murder it must be committed with the following intentions:-

**“(i) The intention to cause death;**

**(ii) The intention to cause grievous bodily harm**

**(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those circumstances to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.”**

The honourable Court in the case of *Republic v. Godfrey Ngotho Mutiso [2000] eKLR* on the intention to caused the death of another or an intention to cause grievous harm to another contrary to section 206(a) and (b) observed as follows on the inference of malice that, **“the injury on the head was grievous. The deceased head was hit against the wall and as a result the deceased bled through the mouth”**.

Can it be said that malice aforethought can be inferred from these injuries? In the case of *Republic v. Tubere S/O Ochen [1945] 12 EACA 63* in this case the assault was of a serious nature causing severe injuries which the victim died shortly afterwards. The court held 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, and the conduct of the accused before, during and after the incident. In *Ernest Asami Bwire Abanga alias Onyango v. Republic CA Cr. Appeal No. 32 of 1990*, the Court of Appeal held inter alia that the fact that the brutal killing was well calculated and planned by the appellant to conclude that he had an intention to kill the deceased.

The Court of Appeal of Eastern Africa in the case of *Republic v. Yakobo Ojambo S/O Wambio [1994] 11 EACA 97* in this case the accused beat up the deceased so severely that on being tied, he fell down and seemed to be dead. The accused believed him to be dead and move his body and threw it into a swamp but he died upon immersion in water. As a result he died of asphyxia. The accused was held responsible for the offence of murder. See learned Author **William Musyoka J** at pg 317. In *Republic v. Daniel Anyango Omoyo [2015] eKLR* the Court observed on malice aforethought under section 206 of the Penal Code that:

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

The element of intention in committing the offence was examined in the English case of *Hyam v DPP [1974] 2 ALL ER 41* where Lord Diplock observed as follows:

**“No distinction 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 consequent, 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.”**

In *Republic v Nedrick [1986] 3 ALL ER 1* Lord Lane CJ on malice aforethought held:

**“What then do a jury have to decide so far as the mental element in murder is concerned? They simply have to decide whether the defendant intended to kill or do serious bodily harm. In order to reach that decision the jury must pay regard to all the relevant circumstances, including what the defendant himself or herself said and did.**

***In the great majority of cases a direction to that effect will be enough, particularly where the defendants actions amounted to a direct attack on his victim, because in such cases the evidence relating to the defendants desire, or motive will be clear and his intent will have been the same as his desire or motive. But in some cases, which this is one, the defendant does an act which is manifestly dangerous and as a result someone dies. The primary desire or motive of the defendant may not have been to harm that person or indeed any one. In that situation what further directions should a jury be given as to the mental state which they must find to exist in the defendant if murder is to be proved?"***

The above principles laid down by various courts would be squarely applied to the facts of this case.

Malice aforethought therefore in our jurisprudence connotes an intention at the time of killing willfully to take the life of another human being or to cause grievous harm from which the victim succumbs to death. It does not however imply that the accused was motivated by any ill will, spite or hatred towards the victim. It is not essential in the offence of murder to identify which unlawful acts or series of acts by the accused which caused the deceased the final breathe. However the prosecution must satisfy the court by way of evidence that some acts or the conduct of the accused taken cumulatively caused the death of the deceased accompanied with malice aforethought.

In reference to the legal principles and the facts of this case I make the following findings: In the present case the evidence of PW1 Dr. Walong who did examine the deceased together with Dr. Ndegwa indicated that the deceased had suffered fractures and dislocation of the right wrist, ligature around the neck. The cause of death is opined to be asphyxiation due to ligature strangulation and suffocation. The deceased went missing on 23.11.2015. Her body was eventually recovered on 14.1.2016 in a septic tank in unknown place where none of the relatives nor the deceased stayed. During the recovery PW15 Daniel, PW17 PC Peter Kaggia, PW21 PC Douglas Chege participated in the retrieval of the body of the deceased.

The inference I draw from the nature and cause of injuries is that the perpetrator had the intention to cause death. In an article by professor Bhullar on death due to constriction of the neck (*Punjab Academic Medical Toxicology 2013*) the pathologist illustrates the death as follows;

***“Strangulation should not be used as a synonym for hanging. Strangulation is defined as asphyxia by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck”.***

The learned author went on to explain that, ***“ligature involves a constricting band tightened by a force other than the body weight.”***

Autopsy examination by Dr. Walong who testified before this court observed that pressure obstruction of the larynx cuts off air flow to the lungs and the brain producing asphyxia. The deceased in this case had earlier been reported as missing. Every effort was made to trace her whereabouts in vain. It was after a long search from 23.11.2015 to 14.1.2016 when the accused confessed to the murder. She consented to take the family and the investigating team where she had dumped the body inside a septic tank. The septic tank was opened and the body buried there was retrieved when it had already undergone decomposition. The accused was present and did witness the recovery of the body from inside the septic tank a plot owned by PW6. Interestingly the accused was not known to PW6 the landlord nor has she been a tenant in the said plot.

The conclusion I make from the evidence under this ingredient is that the person who killed the deceased had the intention to cause death. There is no doubt that the accused was a close friend to the deceased. There is no dispute that prior to the deceased disappearance from both her place of work and residence. The accused has spent considerable of time with her. There is no dispute that the recovery of the body was only achieved through the direction and admission to the investigating officer by the accused who showed the location of the body. There is no dispute that the only person who was in the know as to the place and location of the body of the deceased is the accused. According to the evidence by the

prosecution witnesses the only inference why the body was thrown into a septic tank is to facilitate decomposition and conceal the murder. The decomposition could have aided in complete destruction of traceable evidence as to the deceased being physically traced. All these matters were in the knowledge of the accused.

The prosecution has gone further to introduce the element of motive as another angle in this case. According to the prosecution case the deceased had in her Mpesa account Kshs.25,000 as at 22.11.2015. The deceased made a first report to her fiancé PW4 on the loss of the money. PW4 testified that he made a few telephone calls on the material day but as the day progressed the deceased was not reachable on phone. As regards motive the prosecution went further to demonstrate that the accused on 22.11.2015 sent ksh.25,000 to her mother PW18 Jane Mwanzia. The Safaricom call data exhibit 8 confirms that the accused received Ksh. 25,000 from the deceased's phone. It is from that moment the deceased went missing for a period of about two months till the 14.1.2016. The accused in her defence failed to explain on how she came to receive Ksh.25,000 and immediately thereafter disappeared from the area at Ongata Rongai. There is a presumption of fact under section 119 of the Evidence Act that alone or in conjunction with other people unknown to this Court killed the deceased. In the absence of any explanation to rebut that presumption on motive, there was therefore existence of the motive traceable to the theft of the deceased money and the opportunity to kill the deceased.

The manifestation and inference to be drawn from the set of circumstances in this case reveals the following elements. That, the killing of the deceased was willful and deliberate without iota of evidence of provocation. The accused conduct before, during and after the death of the deceased the prosecution circumstantial evidence that the accused was with the deceased on the last day she went missing. The accused deliberately left friends, the police and family continuously anxious with no clue as what must have happened to the deceased for period of over two months. The deliberation and the intent to kill the deceased is also manifested in the manner the accused disposed off the body of the deceased in a septic tank where in all human imagination nobody could have thought the deceased body to be hidden. There is no link or clue to have occasioned the people involved in the search that she will be somewhere in unknown place inside a septic tank. The postmortem report shows that the deceased was strangled which killing felled the deceased in a brutal manner. This particular cruelty of killing the deceased who was unarmed shows the cruelty of the killing and intent to cause death.

The preparation and design by the accused to kill the deceased is eminent in this case as deduced from the following circumstances:

In view of the evidence in this case the accused was one of the last persons who communicated with the deceased within proximity where her body was found in a septic tank. The accused apparently was a close friend to the deceased a fact known to the relatives and the fiancée PW4. Prior to her death the accused transferred Ksh.25,000 from the Mpesa account of the deceased on 22/11/2015 at 11.57.47 hrs mobile number 0703 75\*\*\*\* to her mobile number 0716-70\*\*\*\*. The same amount totaling Ksh.26,000 was transferred on 22/11/2015 at 16.32hrs by the accused to her mother PW18. Besides the transfer of money the accused conveyed the deceased mobile phones identified by the brother, PW4 Sammy Mwangi, PW8 and PW20 as to her mother PW18 a resident of Machakos town. The mobile phones must have come into possession of the accused immediately after the death of the deceased. The medical evidence by PW1 was categorical as to the cause of death being due to asphyxiation due to ligature strangulation and suffocation. The deceased also sustained fractures to the upper limbs. This sustained and excessive force to the neck cartilage caused loss of oxygen to the blood and eventual death as per the pathologist testimony. The explanations given by the accused in her statement to the police and in the witness box amounted to a lie and fabrication as to how the deceased met her death. The theory on abortion was dislodged by the postmortem report by PW1. The accused in this matter knew all along that the deceased was dead and her body was hidden in a septic tank but chose not to report to the police or inform any of the family members. This cannot be said to be a conduct of an innocent person or a victim of circumstances as the accused wants this court to believe.

In view of the foregoing factual and legal reasons there is sufficient evidence to show a manifestation and presence of malice aforethought on the part of the accused. I therefore infer that the evidence taken in

totality does not suggest further information the active involvement of another person in the death of the deceased besides the accused. The manner in which the crime was committed inclusive of the behaviour of the accused places her squarely at the scene. However there has been overwhelming circumstantial evidence to establish how the victim died. Dr. Walong's opinion as to the cause of death is telling where the evidence of a ligature mark along the neck does suggest the upper airway system and the neurovascular structures in the neck region were compressed leading to blockage of air and blood to vital organs of the body (herein described as asphyxia) as a result of a compressive ligature.

For all these reasons the prosecution has proved beyond reasonable doubt the ingredient of malice aforethought on the part of the accused for this heinous crime of murder. The accused in committing the acts of strangulation, assault, throwing the body into a septic tank knew that it was so imminently dangerous that in all purposes and intents it will cause death or such bodily injury as is likely to cause death of the deceased.

Turning now to the last element of identification and placing the accused at the scene of the crime. The case of the prosecution is entirely based on circumstantial evidence. It is settled law and has been reiterated in a plethora of cases as to what principles apply on circumstantial evidence. In **Abanga alias Onyango v. Republic Cr Appeal No. 32 of 1990** the Court of Appeal held,

***“It is settle law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-***

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

***(2) Those circumstances should be of definite tendency unerringly pointing towards the guilty 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”***

The Court further held in the case of **Mwangi & Another v. Republic 2004 2 KLR 32** as follows:-

***“In a case depending on circumstantial evidence, each link in the action must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that he accuse is guilty of the charge”.***

So, what is the circumstantial evidence presumed by the prosecution? Based on the evidence of PW5 John Njoroge Njuguna who in his testimony told this Court that on learning that the deceased was missing from her place of work and her house, they contacted the accused who was her close friend. In PW5 testimony the accused indicated that she was with the deceased on 22.11.2015. That information made PW5 to report the matter to the police where PW11 booked the report and did commence investigations.

According to PW11 Sgt. Richard Ekuwon he made contacts with Safaricom provider and the crime intelligence unit to track and locate the Samsung MBO phone IMEI 868744020128251. PW11 added that the signals were traced in Karen area. It was also the evidence of PW11 that through Safaricom and Crime intelligence that the signals of mobile phone Exhibit 4(b) was located at Machakos town. In company of PW5, PW12 and PW11 they proceeded to Machakos where they recovered the said mobile in Jane Mwanzia's home the mother to the accused. The Samsung MBO IMEI 868744020128251 exhibit 4 pared with Pw18's number 070668\*\*\*\*.

PW11 further testified that after tracing the Samsung phone with IMEI 30143597700 therein produced as exhibit 3 it also pared with the mobile number 073620\*\*\*\* belonging to PW18. The witnesses PW4, PW5, PW11 and PW15 recovered the said phones and arrested PW18. The Samsung mobile phone with

IMEI 868744020128254 and a Safaricom SIM number 070668\*\*\*\* was positively identified by PW4 Sammy Mwangi and PW12 Daniel Mwangi as belonging to the deceased. The prosecution further adduced evidence of PW20 Martin Wekesa from Safaricom Ltd who extracted the call data history of the deceased mobile number 07037\*\*\*\* which utilized the two phones. It was also established by PW20 that the accused mother PW18 started using the phones on 4.12.2015. PW20 further confirmed that the deceased last call was on 23.11.2015 as supported by exhibit 10(b).

PW20 further stated that PW18 call data confirmed that the mobile number 0706-68\*\*\*\* paired with Samsung 868744020128210 belonging to the deceased. The prosecution further tendered evidence exhibit 12(c) which was the accused statement call data confirmed that the deceased was the registered owner of mobile number 070375\*\*\*\* as at 22.11.2015. It was further PW20 testimony that the Safaricom call data exhibit 13 (c) indicated that the deceased was at Ongata Rongai on 23.11.2015 when she spoke with PW4 Samuel Mwangi, the Fiancee and later at 17.48 hrs he received the last SMS from the deceased phone. PW20 further added in his testimony that from the Safaricom call data of the accused admitted as exhibit 13(d) the accused mobile number 071670\*\*\*\* revealed that on 22.11.2015 at 15.20 hrs to 18.33 hrs the deceased Khs.25,000 was withdrawn from her Mpesa account. The mother of the accused was found with two phones. It is not disputed that PW18 confirmed on oath that her daughter the accused was the one who gave her the two phones. There is cogent evidence that between 22.11.2015 and 23.11.2015 the deceased and accused communicated six times on voice calls. See exhibit 13(d).

The prosecution called in the testimony of PW8 James Kyalo the Computer Forensic Examiner expert in respect to the extraction of data on IMEI 35705505566864 and SIM card 89254029371001346591. The certificate and extract were admitted as exhibit 6(a), (b). This was in compliance with Section 106 B (4), it provides that,

***“In any proceedings where it is desired to give a statement in evidence by virtue of this section a certificate during any of the following;***

***(a) Identify the electronic record concerning the statement and describing the manner in which it was provided.***

***(b) Giving such particulars of any device in the production of the electronic record as may be appropriate for the purpose of showing that the electronic record was produced by computer.***

***(c) Dealing with any matters to which conditions mentioned in sub-section 2 relates; and***

***(d) Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities whichever is appropriate “shall be evidence of any matter stated in the certificate for the purpose of this sub-section. It shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it”***

In applying the above provisions I am satisfied that the electronic evidence as relates to exhibit 6(a) and 6(b) is admissible as per the requirement of the law. Further PW20 Martin Wekesa produced exhibit 10(a) (b), 11(b) the Safaricom data reports exhibit 13 b –E with a certificate marked exhibit 14(b) on extraction of electronic evidence. I am satisfied that the electronic evidence by PW8 and PW20 was accompanied by respective certificates as provided for under Section 106 B (4) of the Evidence Act (Cap 80 of the Laws of Kenya).

The evidence by PW8 and PW20 positively links the accused with the offence of murder in the following manner. On 22.11.2015 the deceased mobile phone transferred Khs.25,000 to the accused mobile number. According to PW4 the deceased complained that on 22.4.2015 that her money Kshs.25000 has been stolen from the Mpesa account. The deceased mobile phone was found with the accused mother PW18. The last communication the deceased has was on 23.11.2015. The mother of the accused PW18 testified that the mobile phones in dispute were taken to her by the accused on or about 28.11.2015. This recovery of the mobile phone which is traceable to the accused is in line with the doctrine of recent

possession.

In the case of *Isaac Nganga Kalunga alias Peter Nganga Kalunga v Republic Cr Appeal No. 272 of 2005 UR*, the Court addressed itself as follows on what constitutes the doctrine,

***“It is trite that before a Court of law can rely on the doctrine of recent possession as a bases for conviction in a criminal case the possession must be positively proved, in other words, there must be positive proof:-***

***(i) That the property was found with the suspect.***

***(ii) That the property is positively the property of the complainant.***

***(iii) That the property was stolen from the complainant.***

***(iv) That the property was recently stolen from the complainant. The proof as to time as has been stated over and over again will depend on the easiness with which the stolen property can move from one person to the other”.***

In my view from the electronic evidence of PW8 and PW20, the testimony of PW4 and PW10 positively pointed to the mobile phone used by the deceased. PW18 gave a plausible explanation how she came to be in the possession of the phones. The phones therefore came into possession of the accused immediately after the deceased was killed.

The other aspect of this case touches on the confession statement. I will start by stating the law. Section 25 of the Evidence Act defines a confession as follows:

***“A confession comprises words or conduct or a combination of words and conduct, from which, whether taken alone, or in conjunction with other facts pointed on an inference which may reasonably be drawn that the person making it has committed the offence. Under Section 25 A (1);-***

***(a) A confession or any admission of a fact tending to prove the guilt of an accused person is generally not admissible.***

***(b) Only confessions and admissions made in Court before a Judge, a Magistrate or made before a Police Officer (not investigating Officer, of the rank higher than Chief Inspector and a third party of the accused persons are admissible”.***

The evidence Act provides for the Out of Court Confession Rules 2009. I have considered the testimony of PW10 before me regarding the Confession statement. I have further considered with utmost care the law and the practice the Courts are to bear in mind when confronted by Confession statement of an accused person.

After reviewing the evidence I am of the conceded view that PW10 complied with out of Court Confession Rules 2009. In recording the statement the accused was informed of her rights as provided for in the Constitution and Statutory law.

As noted from the testimony of PW10 the accused opted for her brother PW 19 Michael Mwanzia to participate during the recording of the confession statement. There is no dispute as to the admission of the confession statement. I am satisfied that the Confession statement was voluntarily recorded and the Confession property admitted as exhibit 7(a) and (b) respectively. The gist of the confession statement by the accused was that the deceased had died in Frank Kimuli Njue’s clinic who testified as PW14. According to the Confession statement she had taken the deceased to PW14 Clinic in order for her to be assisted to carry out an abortion. It was in the course of that the deceased died while undergoing an operation at the Clinic. Following the death PW14 arranged to dispose off the body where it was later

recovered.

Having considered the Confession statement and the evidence as a whole, I am also alive to the submissions made by both learned Counsels Mr. Chege and Mr. Akula for the state on the matter arising in this trial. It is crystal clear that the circumstantial evidence poked holes to the accused defence explanation on how the deceased met her death.

In the first instance the postmortem and autopsy report by PW1 Dr. Walong prepared jointly with Dr. Ndegwa indicated that the deceased had no signs of pregnancy injuries to her reproductive organs to warrant inference of abortion. According to the examination by PW1 the genitor urinary system was intact.

I am satisfied with the prosecution evidence in respect of electronic evidence, the loss of Kshs.25,000 from Mpesa account traced with the accused, the recovering of the deceased mobile phones with PW18 the mother of the accused, the confirmation of PW18 that the accused gave her the two mobile phones, in addition the accused had sent Ksh.26,000 to her mother PW18 on 22.11.2015, the accused gave no explanation of the source of the amount. However Ksh.25,000 is positively traceable to as an amount withdrawn from the deceased Mpesa number 0703 75\*\*\*\*.

According to PW20 on 22.11.2015 at 15.57.43 the accused received Kshs.25,000 from the deceased on the same day 22.11.2015 at 16.32. Secondly, the accused conduct after participating in seeing where the deceased body has been concealed in a septic tank is prima facie evidence that she either acted alone or jointly with others not before Court to commit the crime. The accused was a close friend to the deceased. She narrates in graphic outline to PW10 on how the deceased died but when making a report fails to take the police to the scene where the body was dumped. It was obligatory for the accused to show the police and the family early enough as a sign that she was not accomplice to the murder. The skeleton report made to the police on the missing person of the accused continued with the conveyance of the mobile phones to PW18 injures her credibility and the defence put forward.

In appraising the prosecution case through the testimonies of PW1 – PW21, their evidence was candid, cogent and truthful as to how the deceased was murdered and the culpability of the accused person. The inculcating circumstantial evidence test as stated in the authorities cited of **Abanga Alias Onyango & Mwangi v Republic (Sypra)** applied to the facts of this case unerringly lead to the inference that within all human imagination, or possibility the deceased was murdered at the behest of the accused.

In summary therefore I hold as follows:

The deceased was last seen alive in the company of the accused shortly before the time she was presumed missing or death near the place of occurrence at Ongata Rongai. The accused failed to furnish evidence or explanation of the whereabouts of the deceased. The last seen evidence on record being the Mpesa transaction between the deceased and the accused person of Ksh.25,000 on 22/11/2015 at 15.57 hrs. The same amount was transferred to the mother of the accused PW18 Jenifer Mwanzia on 22/11/2015 at 16.32.33 of telephone number 254 072516\*\*\*\*. The prosecution further corroborated the last seen theory and Mpesa transactions with the recovery of the deceased mobile phone Samsung from the accused mother residence at Machakos town. The mother PW18 confirmed that the accused delivered the phones to her as a gift for her own personal use. The phones were positively identified by PW3 and PW5 as owned, and in possession of the deceased at the time of her death. The electronic evidence tendered in court by PW8 a forensic analyst and PW20 a technical analyst from Safaricom call data centre showed clear communication between the accused and the deceased on or about 22/11/2015 and 23/11/2015.

I further find more incriminating evidence in the charge and caution of the accused recorded by PW10. In charge and caution the accused painted an hypothesis of the deceased attending Afya clinic of PW14 to procure an abortion. She went further and described the chronology of events from the death to the disposal of the body in a septic tank. However as a close friend, she never deemed it fit to report the incident to the police or family of the deceased. There was no impediment or physical restriction to her life which made her not to report this heinous crime to the law enforcement agencies. The hypothesis was

investigated by PW21 and found to be at variance with the autopsy report conducted on the body of the deceased. PW1 confirmed that the deceased was neither pregnant nor any abortion procured as evidenced from her genitalia. That therefore disapproved the narrative of the deceased having died in the hands of a medical procedure being conducted by PW14.

From the prosecution evidence I also confirm availability of incriminating material on recoveries of mobile phones, motive/proximity of time and location where the murder took place when both accused and deceased are confirmed to have been together at and around Ongata Rongai. The doctrine of recent possession involving recovery of mobile phone of the deceased is also applicable in this case. The recovery of the deceased body was at the instance of the accused. The conduct of the accused after committing the offence comes into question. It took her more than one month to confess to the death and the location of the body in a septic tank where she, nor the deceased lived. The choice of the scene where the body lay buried was only known to the accused person. The narrative of an abortion by the accused hit a dead end as rebutted by PW1 and PW21.

These circumstances to me are incompatible with the innocence of the accused. There is no break in the chain of circumstantial evidence from the last day the deceased is said to be seen alive with the accused to the time her body was discovered at the revelation and confession of the accused. I am therefore of the conceded view that the prosecution has discharged the burden of proof beyond reasonable doubt on each of the ingredients of the offence contrary to Section 203 as read with Section 204 of the Penal Code.

Accordingly, I enter verdict of guilty and a conviction against the accused for the offence of murder contrary to section 203 of the Penal Code.

**Dated, delivered and signed in open Court at Kajiado on 4.8.2017.**

.....

R. NYAKUNDI

JUDGE

**In the presence of:**

Accused

Mr. Chege for the accused

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant