



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL CASE NO. 21 OF 2010**

**LESIT J.**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAMUEL NDICHU MACHARIA.....ACCUSED**

**JUDGEMENT**

1. The accused **SAMUEL NDICHU MACHARIA** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that:

**“On the 4<sup>th</sup> day of June, 2006 at Kerwa Village in Kiambu District within central province murdered Samuel Kamau Kariuki.”**

2. The prosecution called a total of 10 witnesses. The entire prosecution case was heard by Ombija, J as he then was. After I took over the case under **section 201(1)** and **200** of **Criminal Procedure Code** the prosecution recalled PW7 Dr. Rogena for cross-examination by the defence. Thereafter the court heard the accused in his sworn defence and one defence witness.

3. In brief the prosecution case is that the deceased had been left in the care of the accused in Kerwa village Kiambu District (as then was). The deceased was a known mentally unstable person apparently due to abuse of cannabis sativa and alcohol. His mother left for USA leaving the accused and his wife in her main family stone house to care for the deceased. It is not clear whether the deceased lived in the main house with the accused and his wife or in a corrugated iron sheet flat roofed single room next to the main house.

4. The prosecution case is that the accused ran to the neighbours PW1 and his father PW2, calling out for the mother of PW1 to go and help because the deceased ‘*was committing suicide*’. PW1 ran behind the accused to the corrugated iron sheet room next to the deceased mother’s home where PW1 testified he saw the deceased lying on the ground.

5. PW1’s father PW2 testified that at around 8.00am on the material morning, while in bed in his house he heard the accused state “**come help Kamau (deceased) is committing suicide**”. PW2 stated that he went to the scene five minutes behind PW1 and the accused. He said that he found the accused and PW1 alone. PW2 further stated that he found the deceased lying down in his corrugated iron sheet house and that he noticed there was a rope on the neck of the deceased. He stated that he helped lift the deceased from the floor and placed him on a bed in the room. PW2 stated that the accused insisted the deceased

was still alive because he was still warm and that he therefore sent him to ask PW3 to help take the deceased to hospital. PW2 said that PW3 came half an hour later but the deceased was dead and was therefore not moved until the police visited the scene.

6. Two post-mortems examinations were carried out on the body of the deceased. In the first post-mortem which was conducted by Dr. Wasike (PW8) on 7<sup>th</sup> June 2007, she formed the opinion that the cause of death was manual strangulation. One day later, Dr. Wasike (PW8) conducted a second post-mortem in conjunction with Dr. Rogena (PW7) who had been hired by the family of the deceased. After their examination both doctors came to the same conclusion that the cause of death of the deceased was manual strangulation.

7. It is on record that an inquest into the death of the deceased was first opened before the Kikuyu Law Courts. After hearing the Inquest, the learned trial magistrate Hon. Mrs Wachira ordered that the accused be charged with the murder of the deceased. The accused was then arraigned with a charge of murder contrary to section 203 of the Penal Code before Nairobi High Court on the 4<sup>th</sup> May 2010.

8. The accused gave a sworn defence. His case was that he, his wife and the deceased had eaten supper together the night before. The accused stated that he woke up early that morning, milked the cows, swept their shed then proceeded to cut grass for them. It was as he cut grass that his wife reported to him that she had tried to call the deceased to go for tea but he was not responding.

9. The accused said that he proceeded to the corrugated iron sheet house, peeped through the window and saw the deceased hanging suspended from the roof with his head bent backwards and a rope around his head. The accused said that he ran to PW2's house while calling them. He said that he met the wife of PW2 in their kitchen and upon telling her that the deceased had hanged himself, she told him to go back and cut the rope.

10. The accused stated he went back and broke into the house with PW1 right behind him. He then cut the rope as PW1 held the deceased. PW2 came in just then. The accused said that PW2 sent him to the home of PW3 to ask for a vehicle to take the deceased to hospital as he was still warm. The accused said that he sent for PW3 and his vehicle and that he responded immediately. He said that he and three others carried the deceased to the vehicle. However PW2 said that there was no need of taking the deceased to hospital as he was already dead. He said that they then returned the deceased to the house where he used to live. The accused stated that the deceased was of unsound mind, that he attended psychiatrist clinics and was on medication.

11. DW2, said that he was a father-in-law to the accused. His evidence was that the deceased was a bhang smoker and that he used to smoke it openly. He said that the deceased was unkempt and that he never used to comb his hair. DW2 said that the deceased was always laughing and had no quarrel with anyone.

12. Regarding the accused DW2 said that he was a good man who took care of the home of Mama Kinuthia and also of the deceased. He said that he never heard that the accused strangled the deceased to death. He said that he knew accused as a non-violent man.

13. DW2 said that the accused had married his daughter but that for reasons he did not know the two separated after the accused was held in custody for some months in regard to this case.

14. Learned defence counsel was Mr. Kariu. Counsel submitted on behalf of the accused and urged that the prosecution had not discharged their burden of proof in the case. Counsel urged that there was no eye witness for the attack on the deceased and that the circumstantial evidence relied upon by the prosecution did not warrant a conviction. Counsel urged that PW1 and 2 who had visited the scene of crime at the time the deceased died failed the credibility test as they both recanted their evidence. Counsel urged that PW1 and 2 recanted their statements that they helped the accused cut the rope and that the deceased was breathing while hanging.

15. Counsel urged that PW7's conclusion that the cause of death was manual strangulation and not

hanging was an opinion as to the circumstances under which the deceased met his death and not incriminating evidence against the accused. In regard to the evidence of PW7, counsel urged it was not reliable and credible as it did not disclose certain aspects which he gave as namely a) a ligature mark can be as a result of 3 types of compressions and not just ligature strangulation as PW7 had opined; b) that the pathologist had requested for a toxicology report which was not availed and as such it rendered PW7's report inconclusive on certain aspects. Counsel urged that the unanswered question was why the accused was charged and not his wife yet they were the two of them in the compound.

16. Mr. Kariu urged that there were no defensive injuries on the deceased, neither were any such injuries found on the accused. Counsel urged the court to find that absence of defensive injuries on both the accused and deceased persons ruled out a forced or violent death. Counsel urged further that failure by the prosecution to avail the deceased aunt as a witness yet she was a crucial witness with regards to the schizophrenic condition of the deceased, should be construed to mean that her evidence was adverse to the prosecution. Counsel finally urged that the accused had no malice or motive to kill the deceased as the deceased was the reason he was earning a living.

17. Learned prosecution counsel Ms. Onunga in her submissions urged that the prosecution witnesses had unfolded the events leading to the deceased death. Counsel urged that the cause of death of the deceased was traceable to the injuries inflicted on the body of the deceased. Counsel submitted that the conduct of the accused person after the offence depicted conduct of a person with a guilty mind as he ran to call his neighbours yet the wife was in the compound where they lived together. Counsel urged that the accused conduct was meant to conceal evidence.

18. Counsel further urged that the height of the house where the deceased was found dead was established to be 6ft and that with the deceased being established to be 5ft 7inch, he could not have hanged himself in that room as it was too short to suspend his body. Counsel urged that the deceased death was caused by an act of the accused person because there was no evidence to show that anybody else came into their compound and as such it was the duty of the accused person to explain what happened to the deceased.

19. The accused is facing a charge of murder contrary to **section 203** of the **Penal Code**. That section provides that:

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

20. Malice aforethought has been defined under **section 206** of the **Penal Code** as follows:

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

**a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**c. ...**

**d. ...”**

21. The burden of proof lies on the prosecution to adduce evidence to prove that it was the accused unlawful act that caused the death of the deceased in this case by manually strangling deceased to death. The prosecution must equally adduce evidence to prove that at the time the accused strangled the deceased, he had formed the necessary intention to either cause death or grievous harm to the deceased.

22. Having considered the evidence adduced and the submissions by the prosecution and the defence, I find that there are issues which are not in dispute. It is not in dispute that the accused was employed by the deceased mother to take charge of her home, her domestic animals as well as take care of her son, the deceased in this case. It is not in dispute that the deceased was suffering from a mental illness. It is also not in dispute that the accused alerted PW2 and his wife that the deceased was committing suicide.

23. Having carefully considered all the evidence adduced before court and the submissions by the counsels for the defence and the prosecution, I find that the issues for determination in this case are:

**I. Whether the circumstantial evidence adduced by the prosecution is sufficient to prove the charge against the accused.**

**II. Whether the prosecution has proved malice aforethought as against the accused.**

**III. Whether the prosecution has proved the motive for this offence.**

**IV. Whether the prosecution had proved the cause of death.**

**V. Whether the accused defence was reasonable and plausible.**

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

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

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

**c. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused.”**

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

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

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

26. The circumstantial evidence against the accused was the fact that he had been left to care for the deceased and the fact that the deceased was found dead in the premises they resided with the accused. It is the evidence of PW1 and 2 that the accused lived in the home of the deceased mother, more particularly in the main stone house. It was however not clear whether the deceased slept in the same house, or whether he slept in an adjacent corrugated iron sheet flat roofed house where he met his death. The prosecution case was that the accused shared the premises with his wife as well. The wife was not a compellable witness and the prosecution did not avail her.

27. The accused who had the power to call her as his witness stated in defence that since his arrest and detention in relation to this case, his wife left and he did not know where she was. He was however able to avail the father of that wife as his sole defence witness.

28. The first fact to consider is whether the prosecution has adduced clear evidence that the deceased was found hanging from the roof of the house where he was found. PW1 was the first witness to enter the house in question apart from the accused. There was inconsistency in the evidence of PW1. In his evidence in court, PW1 said that he saw the deceased lying on the floor of the house and that he and his father, PW2 lifted him from there to the bed.

29. In cross examination by the defence, PW1 admitted that in his statement to the police he recorded that he saw the accused cutting the string from the deceased neck while the deceased was in a hanging position but with the feet touching the floor.

30. PW2 in his evidence stated that he saw a sisal rope hanging on the roof of the deceased house. He described the roof as flat. PW2 testified that the deceased was lying on the floor when he entered the house. He further admitted that in his statement to the police he recorded that the deceased body was still warm and his heart was still beating when he arrived at the scene.

31. PW3 came to the scene much later but he described vividly what he saw. PW3 testified that he noted that the deceased had many wounds on the head and that he had a string on the neck. The deceased was already dead. On seeing all this, PW3 stated that he told the people present that there was no need to take the deceased to the hospital as he was already dead.

32. PW6 PC Nicholas Kakula Mulinge stated that on 11<sup>th</sup> June 2006 at around 11.00am while at Kikuyu police station, he received a report from the accused amongst others about the death of the deceased. He proceeded to Kerwa the scene of the incident with one PC Ngugi and PC (Dr.) Simon Karanja where he found the deceased lying on his bed. PW6 stated that there were no signs of struggle in the house whose height was about 6ft and that he saw a sisal string around the neck of the deceased.

33. I noted from the proceedings in this case that the rope or string was not an exhibit in this case. It was produced at the Inquest into deceased death before the Magistrates court Kikuyu. It was described by the witnesses as a string and rope interchangeably. PW1 and 2 described it as a sisal rope whereas PW3 and 6 described it as a string. PW9 the Investigating Officer of this case described the sisal rope he found at the scene, as a small single twin rope. PW7, Dr. Rogena pathologist for the family of the deceased was categorical that she was not shown the string. Noteworthy was that the witnesses, especially PW2 and the police officers PW6 and PW9 described the rope on the ceiling and also on the deceased neck as a smaller single twin rope as opposed to the twin sisal rope used to tie domestic animals like goats and cows.

34. Considering the findings of the two pathologists at post mortem, there was ligature marking around the neck of the deceased. Further the doctors also found trauma injury on the deceased hand and several other injuries on the deceased head which were not consistent with defence injuries. With these two findings, it is more probable that the deceased was hanging on a rope when PW1 first saw him inside the house in line with his initial statement to the police. It is also probable that it was when the rope was cut that his body fell causing among others the injury on the back of the hand. For purposes of this case I find that there was indeed a rope or string involved in this case and that it was tied on the deceased.

35. Did PW1 change his story? Was he lying about the position in which he found the deceased and for

what reason? It is difficult to resolve that point except to note that due to the final conclusions of the pathologists on the cause of the deceased death, it is not significant how the deceased was found and it does not go to the root of the prosecution case. I will get to this later on in this judgment.

36. There was also another issue about the door to the house where the deceased was found, whether it was locked from inside and how PW1 and the accused gained access into it. PW1 in his evidence in chief said that the accused entered the house ahead of him without stating how he gained access. In cross examination by the prosecution PW1 admitted that in his statement to the police he said that the accused hit the door to the deceased house and forced the door open.

37. Issue is what weight to place on the fact of the manner in which access into the room was gained by the accused and PW1.

38. PW9 CIP Gerald Wambugu Kanu (Rtd) stated that he attended the scene of suicide as officer in charge CID Kikuyu on the 4<sup>th</sup> June 2016 accompanied by OCS CIP Gitahi. He stated that the accused identified the scene as the flat roofed iron sheet house. PW9 said that he noted that there was an L-Cutting on the wall of the said house through which one could open the door from inside or outside. Further to that, there was a broken piece of wood from the door.

39. The I. O. in this case, PW9 was stood down by the preceding judge before being cross examined and was not re-called. This matter was not raised by the defence. I have considered it nevertheless and find that the accused did not suffer any prejudice by failure to re-call PW9.

40. PW10 CPL Virginia Wanjiku stated that she was a crime scene support service officer for 15 years. She stated that though she was not the scene of crime officer who handled the scene, she had worked with her two predecessors who had handled the photographs but had passed on before testifying. She explained that she had worked with IP Cosmas Muema Kioo who was the first officer to handle the scene for 5 years before his demise. CPL Gerald Wasike prepared the photos on the 18<sup>th</sup> November 2011 but passed on thereafter. She produced the 1<sup>st</sup> set of photographs taken at the scene as P. Exhibit 5 (a – t) and a second set of photographs taken after the 1<sup>st</sup> post mortem as P. Exhibit 6 (a-t). She produced the film as P. Exhibit 7 and the report as P. Exhibit 8.

41. The L cutting on the wall and the space on the wall near the door referred to by PW6 and 9 were captured in the photographs taken of the same house produced as P. Exh. 5. It is clear that there was interference with the door and the only people who could explain this were the accused and the deceased. It is the evidence of PW1, PW2 PW3 and DW2 that the deceased was almost always high on narcotics or other substances such as cannabis sativa and alcohol. He may therefore not have been in a position to appreciate what was going on around him.

42. The accused on the other hand stated in his defence that he kicked the door open so as to gain entry into the corrugated house. The accused offered no explanation as to why he chose to kick the door open yet there was an L cutting through which one could open the door. I will get back to this point at a later stage.

43. The other issue to determine is whether the deceased committed suicide? Or whether the deceased was murdered? Connected with this issue is whether the prosecution has proved what the cause of the death of the deceased was. We have the evidence of those who first went to the scene and also the evidence of the two pathologists who carried out the autopsy on the body of the deceased.

44. PW1, 2 and 3 who were amongst the first people to arrive at the scene, testified that the accused alerted them that the deceased was committing suicide. They testified that on arrival, they found the deceased lying on the ground of the house having a rope/string tied around the neck and another piece of the same rope/string on the roof.

45. PW8 Dr. Jane Wasike Simiyu was a government pathologist based at City Mortuary. She testified that

on the 7<sup>th</sup> June, 2006 she conducted a post mortem on the body of the deceased. She stated that she observed there was conjunctival haemorrhages of the eyes. PW8 stated that she saw a sisal ligature on the neck with a single bruise mark with no fractures on the cricoid cartilage. She further noted bruises on the skull in the occipital and left temporal region. PW8 stated that the lungs were hyper ventilated (full of air) and that there was sub-scapular haemorrhage of the right kidney which PW8 opined could have been caused by trauma. PW8 stated that other internal organs were normal.

46. PW8 formed the opinion that the cause of death was neck compression following manual strangulation. She further took some specimens for toxicology. PW8 produced her post mortem report as P. Exhibit 4.

47. PW8 stated that during the second post mortem there was one more significant finding not included in her earlier report. This she said was the finding of a dislocation of the left wing of the hyoid bone. She opined that the dislocation could only have been caused by manual interference of the hyoid bone through manual strangulation.

48. PW7 Dr. Emily Rogena a pathologist by profession was far more qualified than PW8 because other than the Forensic Pathology Post Graduate Diploma PW8 had, she had Masters in Medicine in Human Pathology, and a PhD in Forensic Medicine. PW7 was engaged by the deceased family to be present during the post mortem. She came into the picture one day after PW8 had conducted post mortem on the deceased. The two pathologists repeated the autopsy on the deceased together.

49. PW7 testified that the history she received was that the deceased was found hanging from the roof of his house and that he had a history of schizophrenia. She described the deceased as a tall man with short hair. PW7 stated that she observed that there was bleeding in the conjunctive (eyes). There was also bruising of the muscle of the neck which formed the horizontal ligature mark. She stated the horizontal ligature around that neck was a post mortem ligature rather than ante mortem and was not as a result of hanging.

50. PW7 ruled out the ligature mark as having been caused as a result of hanging for two reasons. The pathologist testified that had it been caused by ante mortem hanging, the ligature mark would have been oblique in shape and secondly there could have been bleeding below the skin. PW7 further testified that the ligature mark on the deceased was horizontal in shape which was an indication that it was caused as the deceased lay horizontally and that it was caused after the death.

51. PW7 described other injuries on the deceased as consisting of kidney injuries on the capsule, the membrane of kidney, and sub-capsular haemorrhage of left kidney and contusion parenchyma of right kidney. PW7 further noted subcutaneous of the top layer of the skin behind the shoulder blade. She noted there were multiple bruises on the external skin of the head though the skull was not ruptured a finding PW7 attributed to a fall.

52. PW7 testified that the scalp had large haemorrhages into the subcutaneous and dorsal tissue. PW7 stated that the injury on the head was caused by a blow by a blunt object. PW7 stated that there was also a bruise on the back of the left hand measuring 10mm which she said was caused by a bruise against an object as there was no bleeding.

53. PW7 testified that the hyoid bone was dislocated on the left wing which she explained as being on the small left bone from the "U" shape part of the bone. PW7 explained that the dislocation was indicative of pressure being applied to that bone. She stated that the same was done while the body was still alive and this caused the bruising (bleeding into the muscle and soft tissues). PW7 further explained that had the deceased been dead when the pressure was applied, there would have been no bleeding.

54. PW7 opined that the cause of death was pressure to the neck due to manual strangulation. PW7 identified P. Exhibit 5(a-t) as the photographs and film that she took during the post mortem. She testified that the pressure of ligature captured in the photographs was not due to suspension of the body but as a result of the deceased having been throttled while on horizontal position. She concluded her testimony by

explaining that an oblique ligature occurs where someone is completely suspended whereas in incomplete hanging, there may exist horizontal ligature where the feet are still pending on the ground. She buttressed her opinion that the cause of death was manual strangulation and not hanging.

55. After I had taken over the case, PW7 was recalled for purposes of cross examination by the defence. She produced her preliminary post mortem report as P.Exhibit 3A and explained that she termed it preliminary because she wanted a toxicology report which was never supplied to her. She further denied that her report was inadequate and explained that the physical injuries described in her report were sufficient to show the cause of death which she buttressed was manual strangulation.

56. PW7 further explained that manual strangulation could be by pressure occasioned by a hand or an elbow or an object on the neck. She further explained that ligature strangulation was different from manual strangulation. She went into detail and stated that complete hanging was where a body hangs off the ground and due to that the ligature gave an oblique shape. She stated that incomplete hanging on the other hand was where the body is resting on something/ the legs could be touching the ground but the height is enough to hang.

57. On being cross examined about the abrasion on the back left hand, PW7 explained that since there was no bleeding, the injury was caused after death hence she ruled out it being a defensive injury. She further explained that the toxicology report that she had requested would only have helped her understand the reaction of and the mental status of the deceased. PW7 stated that the toxicology findings would have changed some findings but not the cause of death. She gave an example that if one is drunk or drugged they may not respond during strangulation as one is expected to fight back/ resist and scratch the hands or the neck of the person strangling them. She concluded by stating that manual strangulation could not be self-inflicted despite a person suffering from mental illness having suicidal tendencies.

58. Both pathologies testified that after conducting the post mortem on the body of the deceased, they were in agreement that the deceased died as a result of manual strangulation. The two doctors ruled out any possibility that the deceased died as a result of incomplete hanging or ligature strangulation.

59. The accused on the other hand denied the offence and stated that the deceased had taken dinner with him and his wife the night before. On the material morning, the accused said that he was busy performing his chores when his wife informed him that the deceased was not responding to her calls. He said he went to find the deceased hanging on a rope on the roof of the corrugated iron sheet house. He then rushed to the home of PW2 to get help.

60. I have considered accused defence. It is clear he was taking care of deceased at the time of the incident. He lived with him in the same compound, which from evidence of PW6 was well secured. The only other person in that compound was the wife of the accused. The accused said he did not know where to get her as they had parted ways. She therefore did not testify in this case since the accused, the only one who could have called her opted not to call her as a witness yet he was able to avail the father in law. **Section 127(2) of the Evidence Act** is clear on that point.

**61. Section 127 (2) of the Evidence Act stipulates:**

**“In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person Provided that:**

**i. the person charged shall not be called as a witness except upon his own application;**

**ii. save as provided in subsection (3) of this section, the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;**

**iii. the failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.**

62. Given the doctors finding that the cause of death was manual strangulation, it means that the deceased was strangled just before the accused ran to PW2's home to call them. The evidence of the prosecution witnesses places the accused at the scene at the time of the incident and also as the person tasked with taking care of the deceased and the premises where they resided. That evidence places upon the accused a statutory burden to discharge a rebuttable presumption as spelt out under **Sections 111(1) and 119** of the **Evidence Act**. These sections stipulate as follows:

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

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

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

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

63. Having been placed at the scene of the incident as the person tasked with taking care of the deceased before he died, the accused had a duty to give an explanation of how the deceased met his death. The accused in his statement in defence alluded to the fact that the deceased committed suicide and that he (the accused) had no knowledge of the same. That explanation does not meet the statutory requirement of **sections 111(1) and 119** of the **Evidence Act**. The doctors' evidence as I have found earlier in this judgment ruled out the possibility of ligature strangulation and suicide. Therefore the rebuttable presumption created by the circumstances prevailing at the scene at the time of incident and the fact that the accused was the sole person tasked with taking care of the deceased before he died, the accused knew how deceased died. It was therefore in his interest to give an explanation.

64. In the Court of Appeal case of **ERNEST ABANGA ALIAS ONYANGO VS REPUBLIC (supra)**, the court of appeal observed:

**"In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:**

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect".

**This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available".**

65. Since the accused was present at home at the time of the incident, he had special knowledge of facts into the case and should have explained how the deceased met his death. This fact is buttressed further by the fact that at the time PW2 came to the scene, he found the deceased body still warm, a clear indication that what caused his death had just happened.

66. All these facts considered together can only lead to one conclusion, that the accused manually strangled the deceased. That action in itself was actuated by malice with the sole intention of causing death or grievous harm to the deceased.

67. The accused defence is therefore not plausible or reasonable in the circumstances. His suicide theory was not supported by the forensic findings on the body of the deceased. I find that he set up the scene after he manually strangled the deceased. First he tied a rope or string on the deceased neck creating the ligature mark to give impression the deceased had hanged himself. He also tied a string/rope onto the roof of the house to give an impression the deceased was hanging from the roof of the house. He then locked the door and rushed to call PW2 and his family. On coming back, he kicked the door to the room where the deceased was to give an impression that it was locked from inside. He then stood there insisting that the deceased was still alive to show concern. In the circumstances, I find that the only explanation is that his conduct was purely a put up act to cover up for the murder of the deceased. Accordingly I reject the accused defence in total.

68. Having considered the entire evidence I find that the prosecution has proved beyond any reasonable doubt that the accused murdered the deceased through manual strangulation of the neck. I find that the deceased did not commit suicide. I find that the prosecution has proved unequivocally that the cause of the deceased death was manual strangulation, meaning that the deceased was murdered.

69. I find that the prosecution has proved the charge of murder contrary to **section 203** of the **Penal Code**. I find the accused guilty of murder as charged and convict him for that offence under **section 322** of the **Criminal Procedure Code**.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER, 2017.**

**LESIIT, J.**

**JUDGE**