REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 17 OF 2012

Lesiit, J.

REPUBLIC.....PROSECUTOR

VERSUS

PAUL NGANGA WANJIRU.....1ST ACCUSED

JAMES MUTUNGA MUIA….....….…2ND ACCUSED

JUDGMENT.

1. The accused persons **PAUL NGANGA WANJIRU,** herein after the 1st accused and **JAMES MUTUNGA MUIA,** the 2nd accused are jointly charged with one count of Murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that:

   "On 9th March, 2012 along Ngong Road near Lenana School, Nairobi within Nairobi County jointly with others not before court, murdered CAROLYNE CHAJIRAH."

2. The prosecution called a total of 12 witnesses.
3. The brief facts of the prosecution case are that at around 8.15 pm on the 9th March, 2012 personnel from KK Security that is PW1, PW2 and two others were travelling in a vehicle from Karen direction to Kenol Petrol Station near Racecourse along Ngong Road to collect their colleague who was unwell for purposes of taking him to the hospital. As they approached the turn off to Lenana School along Ngong road the four men were flagged down by a young lady who appeared to be crying and in need of assistance. Upon stopping they noticed that the girl was bleeding profusely from the head and the blood was flowing into her clothes. The girl told them that some people who were trying to kill her were in the vehicle the crew had just passed.
4. PW1 was left guarding the young woman, the deceased in this case while PW2 and the other two men made a U-turn and about 100 meters down the road a saw a vehicle parked off the road. They stopped their vehicle with the headlights on in front of the stationary car. The 1st accused is the one who approached them and said that he required assistance from them because he had just been carjacked. PW2 noted that both accused persons had blood stains on the front part of their clothing. He invited the two accused to enter their vehicle so that he could take them to the police station for help. That is when the 1st accused person excused himself saying he wanted to lock the doors of his vehicle but in the process of locking he fled into the nearby forest and disappeared.
5. When PW2 returned to where PW1 and the deceased were in the company of the 2nd accused. He

and his colleagues found PW2 and the accused with two police officers at the scene. The deceased person then identified the 2nd accused as one of the men who was in the Pastor's vehicle with the pastor in which she was attacked.

6. Eventually the deceased and the 2nd accused were taken away by the police in a vehicle belonging to Ultimate Security. The deceased pointed out the home of her grandmother PW3 to the police. By the time PW3 went to the vehicle the deceased was already unconscious and was not able to say anything to her. PW3 hired a vehicle and took the deceased to Kenyatta National Hospital where she was admitted to the ICU. In the morning, PW3 left the deceased under the care of her uncle, PW4. PW4 testified that he kept the deceased company but that between 10 and 11 a.m. of that morning the deceased passed away.
7. The post-mortem examination on the body of the deceased carried out by Doctor Johansen revealed that the cause of death was head injury due to blunt force trauma. The doctor also noted that there were features of attempted strangulation using a ligature. The deceased had other injuries including stabs on the face. In cross-examination the doctor said that stab wounds on the face and the head would have caused splashing of the blood.
8. DNA profiling that was conducted by PW9 the Government Chemist on the blood stains on the brown coat and brown shirt belonging to the 1st accused P. exhibit 1 and 2 together with blood stains on the red T-shirt and white sports shoes P. exhibits 4 and 5 belonging to the 2nd accused and the six swabs that were lifted from the 1st accused vehicle received at the Government Chemist marked F(i) to F(vi) together with blood stains on a cable wire that was tied to metal bars on each end that is P.Exh.14 proved positive as having been from the deceased.
9. It was the prosecution case that after the 1st accused fled from the scene near Lenana School about one hour later and precisely 21.50 hours he reported at Muthangari Police Station to PW6 in the company of one John kamau Karari that he had been driving along Ngong road near Nakumatt Junction when two men who were armed in the company of woman they were struggling with carjacked him and others and commandeered him towards Racecourse along Ngong Road. PW6 stated that the 1st accused reported that he had been robbed of 4000/-.
10. PW6 referred the 1st accused to Mid Hill Hospital. That is where PW7 arrested the 1st accused. PW7 was later joined by the OCS Muthangari PW5 and they took the accused to Muthangari Police Station. PW5 ordered that the accused person should surrender his shirt, coat and tie P.Exhibit 1 to 3 which were soaked in blood.
11. The OCS of Karen Police Station PW12 received the 2nd accused from PC Toya and PC Mulatya. Upon interrogating the 2nd accused he learned from him that he had stopped Pastor Nganga the 1st accused at Dagoretti Corner and asked for a lift to Kawangware and upon entering the vehicle he found the 1staccused and a lady passenger in the co-driver's seat and the male passenger seated behind the driver. PW12 took the red T-shirt and the sport shoes that the 2nd accused was wearing as exhibits since they were blood stained.
12. The following day after the incident, PW12 visited the scene where the vehicle of the 1st accused had been parked as pointed out to him by PC Mulatya, and he recovered P. exhibit 14 the cable tied to two bars on either end which were blood stained.
13. PW11 was the investigating officer. It was his evidence that he caused statements under inquiry to be recorded from each accused person by the OCS Muthangari Police Station who was PW5. The 1st accused produced his statement under inquiry as D.exh.I. After that he also caused the vehicle of the 1st accused to be photographed by PW8 in his presence.
14. PW8 took 8 photographs. Photograph no.1 was a view of the motor vehicle which was registration number KAD 313N. Photograph no. 3 shows blood stains on the window. Photograph no. 4 shows blood stains on the front door of the vehicle. Photograph no. 5 shows blood stains on the front seat of the vehicle and the steering wheel. Photograph no.7 shows blood stains on the front left inside the vehicle. Photograph no.8 was blood splatter on the rear roof of the vehicle. PW8 also took six blood swabs from different parts inside the same vehicle for the Government Analyst.
15. PW11 took both accused persons to the Police Doctor for an examination as to injuries and their mental status. The P3 Form in respect of the 1st accused P. exhibit 19 shows that the 1st accused had a bruise on the forehead and complained of chest pains. The P3 Form in respect of the 2nd

accused, P. exhibit 20 shows that the 2nd accused had bruises on the lower back of the right arm and a swelling.

16. The accused persons were placed on their defence. The 1st accused gave an unsworn statement and said that he was a preacher by profession. He said that on the material night he was driving along Ngong Road going home from Kibera where he had gone to preach. He said that he was driving his motor vehicle KAD 313 N when he was stopped by the 2nd accused near Nakumatt Junction. He said that the 2nd accused was a pianist who played the keyboard in his church at Katina in Kawangware. The 1st accused stated that the 2nd accused asked him for a lift which he gave him.

17. On reaching Nakumatt Junction along Ngong Road roundabout the 1st accused stated that they were ambushed by three people one of who had a pistol. He said that he stopped his vehicle and the woman and one of the two men sat on the co-driver's seat while the third person with the gun sat behind him. He says that the women who sat on the co-driver's seat fell on him and that he felt wetness. He was commandeered towards Ngong direction and that as he drove he heard the 2nd accused crying at the back as he was being assaulted. The two on the co-driver's seat were quarrelling. He said that on reaching near Lenana School his vehicle suddenly went off. The man with the gun then took 4000/- from his blazer. The 1st accused said that all the three came out of the vehicle leaving him with the 2nd accused.

18. The 1st accused said that him and the 2nd accused flagged down a KK security vehicle for assistance however the security men were aggressive and they started beating him and that is when the moment he got a chance he ran away into the bush. He said that he then called his father in law and a friend who took him to Muthangari Police Station where he reported that he had been carjacked and that he was a victim. Eventually he was charged with the offence. The 1st accused stated that he did not know the deceased before the incident.

19. The 2nd accused gave a sworn statement. He said that he was a keyboard player and a pianist and that he also worked as a mason. He stated that he played keyboards in several churches including that of the 1staccused. He said that on 9th March 2012, he had come from playing guitar at Athusi night club when he decided to walk home. He said that at 7 p.m. he was at Nakumatt Junction when he saw the vehicle of the 1st accused and he stopped him and asked for a lift. He said that the 1st accused told him to open the back door and enter the car. He said that he sat on the back right and found inside the vehicle a woman seated on the co-driver's seat and a man seated behind the woman. None of them responded to his greetings.

20. The 2nd accused testified that while in the car the 1st accused started quarrelling with the woman. The woman accused the pastor (1st accused) of neglecting his child. That is when he asked the pastor to stop the vehicle and allow him to alight which the 1st accused flatly refused and increased the speed of the car towards Ngong direction. He says he then saw the 1st accused holding the woman by the throat and the man at the back also holding the woman from behind. That is when he asked the pastor what was going on in Kikuyu language to which the pastor responded telling him to shut up or he would kill him and wipe out his family.

21. The 2nd accused testified that he became very afraid and decided to become calm but the man at the back turned against him and beat him up and also tried to strangle him. He said he could hear the woman screaming. He heard the vehicle stop after which he heard the man who was fighting him say that the woman has run away. The 2nd accused stated that the 1st accused ordered him to shut up and to assist him make a report to the police to the effect that they had been carjacked. He said that that is when the KK vehicle arrived stopping in front of them and three people alighted and greeted them. The 2nd accused said that he heard the 1st accused report to them that they had been attacked by thugs who escaped. That when the men asked the 1st accused how it could be that they had been attacked by thugs and why they had not helped the lady the security men had just met. He said that the 1st accused fled from the scene and that is when he was attacked by the security men accusing him of having collaborated with the pastor to attack the woman. He denied it and told the security people to confirm his story from the lady, the deceased in this case. The 2nd accused said that he was taken by the police who were in Ultimate Security van and ordered to

sit next to the deceased who was bleeding profusely and in the process she lay her head on his left shoulder.

22. The 2nd accused produced his statement under inquiry taken from him by the OCS, Muthangari Police Station. There was an objection to its production by the counsel for the 1st accused. The main ground of objection was that the statement was adverse to the 1st accused as it contained allegations which impugned his character and therefore ought to be rejected. The second ground raised was that the content in it was new evidence and, was an afterthought and meant to take the 1st accused by surprise.

23. The counsel for the 2nd accused opposed that application basically for the reason the statement under inquiry formed part of the 2nd accused defence, and was made at the first opportunity the 2nd accused had. Counsel urged that the statement formed part of the committal bundle supplied to him as well as the counsel for the 1st accused and therefore the 1st accused and his lawyer were aware of it before the trial begun. He also urged that the statement was in line with accused defence and all in all was not an afterthought.

24. The objection was overruled and the statement admitted as Defence exhibit 1. The reason for overruling the objection by the counsel for the 1st accused was simply because the statement was made by the 2nd accused to a Police Officer of the rank of a Chief Inspector. It was a statement under inquiry. It was made on the day following the accused arrest. It means it was taken by the police at the earliest opportunity at the onset of their investigations even before they formed any opinion as to whether an offence had been committed. It was taken by CIP Ngundo, PW5 who was the OCS, Muthangari Police Station which investigated this case.

25. Ordinarily the prosecution ought to have produced the statement but for some unknown reason they failed to do so. Having failed to do so, it was the 2nd accused right to produce his statement in support of his case. **Section 21** of the **Evidence Act** provides as follows:

> **"21. Subject to this Act, an admission may be proved as against the person who makes it or his representative in interest; but an admission cannot be proved by or on behalf of the person who makes it or by his representative in interest, except in the following cases -**
>
> > **(a) when it is of such a nature that, if the person making it were dead, it would be admissible as between third persons under section 33;**
> >
> > **(b) when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable;**
> >
> > **(c) if it is relevant otherwise than as an admission.**

26. The 2nd accused scenario is covered under **section 21 (c).** The 2nd accused was entitled to adduce the statement being relevant to this case, whether as an admission or not.

27. The accused persons are jointly charged with murder contrary to **section 203** of the **Penal Code**. In order to prove a murder charge the prosecution must prove three ingredients namely that the deceased died, that the accused inflicted the injury that caused his death and finally that the accused had formed the necessary malice aforethought to cause the deceased death or to cause him grievous harm.

28. **Section 203** of the **Penal Code** defines murder as follows:

> ***"203. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder"***.

29. The circumstances which constitute an intention to cause death or grievous harm are set out under **section 206** of the **Penal Code** as follows:

"206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

a. **an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
b. **knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
c. **an intent to commit a felony;**
d. **an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."**

30. The accused are charged jointly for the offence. The prosecution must adduce evidence to establish that they acted with a common purpose as provided under **section 21** of the **Penal Code** which provides as follows:

> **"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

31. I have set out in great detail the evidence that was adduced by both the prosecution and the defence in this case. The 1st accused was represented by Ms Odembo from the commencement of this case. However after the 2nd accused successfully produced his statement under inquiry made by him to CIP Ngundo, Ms Odembo applied to withdraw from the case citing her feeling that she was rendered irrelevant having been overruled by the court. The 1st accused had to get himself another counsel, Mr. Muchiri after the close of the defence. Mr. Wamwayi represented the 2nd accused in this case. Ms. Onunga, learned prosecution Counsel prosecuted this case to the end.
32. I considered the submissions by all counsels and out of that I find the following to be the issues in the case:

i. **Whether the evidence by the prosecution is sufficient to sustain a conviction?**
ii. **Whether there was a dying declaration by the deceased, and if so, who does she implicate with the offence?**
iii. **Whether the prosecution have established malice aforethought?**
iv. **Whether the prosecution has established motive, and if not whether that is fatal to the prosecution case?**
v. **Whether the murder weapon or weapons were produced in evidence and whether failure to avail them vitiates the prosecution case?**
vi. **Whether the police considered or investigated the report of carjacking made to them by the 1st accused and the impact of failing to do so to the prosecution case?**
vii. **Whether the prosecution had a burden of proving how the deceased blood came to be on the accused clothing?**

33. I will consider the issues raised by counsels or which in my view arise from this case as I analyse and evaluate the evidence adduced.
34. There are facts in this case which are not in dispute. There is no dispute that the deceased was riding in the vehicle registration number KAD 313N, driven by the 1st accused when the incident occurred. There is no dispute that the vehicle in question belonged to the 1st accused. There is no dispute that also travelling in the 1st accused vehicle at the same time was the 2nd accused and another who was not arrested. There is no dispute that the deceased was able to leave the 1st accused vehicle, with severe injuries and that she led to the interception of the 1st and 2nd accused at the scene where the vehicle in question had stalled.

35. Having found the above undisputed facts I wish to state that the prosecution is relying on circumstantial evidence against the two accused persons as there were no eye witnesses to the incident.
36. Regarding circumstantial evidence, the principles which should be applied are well settled. In **ABANGA alias ONYANGO V. REP C. A. NO.32 of 1990(UR)** the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) 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."**

37. Since the accused persons both admit that they were in the 1st accused vehicle with the deceased and another, the prosecution has successfully established a nexus between the accused persons and the deceased. The evidence of PW1 and 2 clearly shows that by the time they saw the deceased she was bleeding profusely from the head. The injuries were therefore fresh.
38. The vehicle was photographed one day after the incident by PW8. The photographs are P. exhibit 6. They speak for themselves. They are coloured prints. They show numerous blood splashes, splatters and smears on the front left seat, the steering wheel the inside roof of the vehicle, the front left door and the front left window.
39. PW8 took blood swabs from various spots inside the vehicle and these were found to have the deceased DNA. The Government Chemist's Report is P. exhibit 11 and 12. The results of DNA profiling are proof beyond any doubt that the blood inside the 1st accused vehicle came from the deceased. It is also reasonable to conclude that at the time she left the vehicle that evening, the deceased had already suffered the injuries which led to profuse bleeding as witnessed by PW1 and 2, the security men and PW3, the deceased grandmother.
40. The prosecution has buttressed their case against the accused persons further. There is the evidence that the 1st accused coat and shirt were full of blood when PW1 and 2, OCS Muthangari PW5, Report Officer at Muthangari PW6 and one of the Officers who arrested the 1st accused, PW7 saw the 1st accused. PW9, the Government Chemist did a DNA profile of the blood on the 1st accused coat and shirt and found that it matched the DNA from the deceased blood.
41. In regard to the 2nd accused, he too had blood in his T-shirt and shoes and OCS Karen PW12 took both from him. The two were profiled and found to have the DNA profile of the deceased.
42. From the evidence adduced by the prosecution, I find that the circumstances from which an inference of guilt was sought to be drawn has been cogently and firmly established and that the circumstances are of a definite tendency unerringly pointing towards the guilt of the accused persons.
43. 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 prosecution, 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."

44. That requirement of the law was the subject of a court of appeal case which ruled that the statutory burden placed upon the accused persons under that section was not against the accused right to be presumed innocent until proved guilty or against the burden placed upon the prosecution to prove the case against the accused person beyond any reasonable doubt. I will quote the case later in this judgment.
45. The point I wish to make is that the statutory burden being based on a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn, that he either caused the deceased death or knows how she met her death.
46. The 1st accused in his unsworn defence explained that the deceased was in the company of two men who intercepted him at a junction and after they forced their way into his vehicle under gun point commandeered him towards Racecourse along Ngong Road. The 1st accused stated that the deceased was pushed between him and one of the men and that she lay on him and he felt wetness. The 1st accused said that the deceased and the man who sat with her in the co-driver's seat started quarrelling and even fought. He said that the vehicle stalled and that the woman and the two men left after stealing KShs.5000/- from him.
47. The explanation the 2nd accused offered was under oath. He stated that he sought a lift from the 1st accused at junction and that on boarding the vehicle he found the 1st accused had company of a lady who sat in the co-driver's seat and a man who sat behind the lady. He said that after riding in the vehicle briefly, a quarrel begun between the 1st accused and the deceased. The deceased was accusing the 1st accused of abdicating his parental responsibility over his child with her. He said that soon the quarrel degenerated into a fight where by the 1st accused produced a metal bar and started hitting the deceased on the head as the man at the back held the deceased.
48. The 2nd accused stated that when he tried to intervene he was threatened by the 1st accused with death together with that of his entire family. He said that as the 1st accused hit the deceased and he could hear her screaming, the other man attacked him and even tried to strangle him. He said that the vehicle stalled and that it was then that the other man alighted and ran away, as did the other man he found in the vehicle.
49. The cause of the death of the deceased was a head injury due to blunt force trauma. The deceased also had numerous injuries in other parts of the body including stab wounds on the face by a sharp object and an attempt at strangulation with a ligature. The pathologist also testified that the stab wounds and the injuries on the head could have caused the splashing of blood at the time that they were inflicted.
50. The ligature used to strangle the deceased was in fact recovered near the scene where the 1st accused vehicle was stopped in the form of a cable tied to two metal bars. It had blood which was found to match the DNA profile of the deceased. It was without a doubt one of the weapons used to inflict the severe injuries on the deceased. The injuries the cable and metal bars caused include the ligature markings on the deceased neck and the head injuries.
51. The doctor's finding at post mortem negates the statement of the 1st accused in his defence as to how the injuries on the deceased were caused. The 1st accused statement in defence cannot explain the splattered blood found inside his vehicle. It cannot also explain the presence of so much blood on his coat and shirt. The two items were presented before the court and the extent of the blood stain was so extensive it cannot be explained away as having been caused by the deceased laying on him. The blood on the 1st accused coat and shirt covered the entire front of the two items and therefore there is no way that could have been caused in the manner the 1st accused explained.
52. PW9 who produced the Government Chemist Report on behalf of his colleague who did the

analysis read descriptions of the various exhibits received by the Government Chemist. Of the 1st accused shirt and coat the Government Chemist described them as ***"heavily stained with blood".*** Of 2nd accused T-shirt and shoes he said they were ***"moderately and lightly stained with blood respectively"***.

53. Furthermore the 1st accused clear innuendo in his defence was that the deceased was already injured by the time she entered his vehicle. That being so how did the splatter at the rear part of the inside roof of the vehicle and on the steering wheel occur?

54. There were other facts which do not support accused theory in defence. Why did the 1st accused lie to PW2 that he wanted to lock his vehicle only to use that opportunity to escape? His conduct was without a doubt the conduct of a man with a guilty mind. He then reported at Muthangari Police Station, instead of Karen Police Station which was nearby and more direct to access?

55. The other issue was the fact the 1st accused had a very minor injury on him. The P3 form doctor described it as a small bruise on the upper mid forehead. If he was carjacked by such ruffians capable of inflicting the kind of injuries found on the deceased, how was he spared? Yet from his defence he was the target. The other thing is the fact he still had money on him when he reported at Muthangari Police Station yet he claimed he had been robbed. Still on the money I find it was capable of an innocent explanation. The rest of the other facts are not.

56. I find that the 1st accused was not telling the truth. His theory does not add up. I find that the 1st accused ran away from PW2 to escape arrest for this offence, and further that his report of a carjacking later was meant to cover up what he had done.

57. The 2nd accused defence was under oath. His was an admission of the facts of the case. His explanation as to how the injuries inflicted upon the deceased were caused tallies with the doctor's finding. It also ties up with the recovered murder weapon as it fitted with the nature of the injuries found on the deceased particularly the head and neck areas. It also ties up perfecting with the splatter of blood found inside the vehicle on the windows, doors, roof, seat and driving wheel.

58. The pathologist testified that he confirmed as requested by the police that the deceased was not pregnant. The issue of parental responsibility could not have been about an unborn child unless the deceased was lying to the 1st accused. I noted from the evidence of the deceased relatives that the deceased had a child. There is a possibility it was that child they quarrelled about. I give the 2nd accused the benefit of doubt over that issue.

59. The 2nd accused explanation of how he entered the vehicle appears suspect. He said he had walked from town headed to Kawangware. How he came up to junction and yet there were other shorter routes raises queries. Apart from that he remained consistent that he had sought a lift from the 1st accused. He also maintained that the ones who attacked the deceased were none other than the 1st accused and the other man who left the scene before PW2 and his team appeared. His defence, as well as his statement under inquiry were all self serving statements which implicated his co-accused. However, I noted that the 1st accused stated in his defence that he was giving the 2nd accused a lift.

60. This leads me to the issue of whether there was a dying declaration by the deceased and if so, who did she implicate with the offence? It was the prosecution's submission that the deceased made a dying declaration that those who attacked her were inside the 1st accused vehicle. Ms. Onunga urged that when the deceased saw the 2nd accused she identified him as one of them. The others she said included the pastor.

61. The 1st accused introduced himself to court in his defence as a Preacher by profession. It is clear that when the deceased said that her assailants were in the 1st accused vehicle and that they included pastor, the deceased was describing the 1st accused as her attacker.

62. As to whether her statement was a dying declaration, I find that it was. In **CHOGE -V- REP[1985] KLR 1** the court of appeal observed as follows:

> **"The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the**

exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."

63. Did the deceased make the statement in extremity; was she at the point of death and the mind induced by the most important consideration to tell the truth? I believe the statement by the deceased qualifies as a dying declaration. PW3 told the court that by the time the Police, 2nd accused and security men brought the deceased to her house she was already unconscious. She did not regain consciousness. The statement was made by her shortly before she died. She was therefore at the point of death. I am satisfied that at the time the deceased made the statement, she was at the point of death and her mind at that moment was strongly induced to tell the truth. The statement was a dying declaration, and therefore though hearsay evidence, it falls within the exemption rule and is therefore admissible in evidence.
64. I find that the dying declaration implicated the 1st accused as one of those who inflicted the fatal injuries upon the deceased. The 1st accused admitted that he was seated with the deceased in the front cabin. The deceased therefore had a clear view of him and was capable of seeing his actions. That cannot be said of the 2nd accused as he sat behind and being under attack by the one in the driver's seat the deceased could not have had a clear view of those at the back. There is a possibility that her attention was distracted by the attack by the driver, denying her an opportunity to know whether all occupants in the rear seat were in cohorts with the pastor.
65. As to whether the prosecution have established malice aforethought? The evidence of the nature of the injuries inflicted and the manner in which they were inflicted is a clear demonstration that the assailants had malice aforethought to cause death to the deceased. The attempt to strangle the deceased, the very severe blunt force injuries on the head which ultimately were the cause of death all demonstrate that the intention of the attackers was to cause death.
66. I am guided by the following two cases; In **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR),** BOSIRE, O'KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

"when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt."

67. In **MORRIS ALOUCH VS REP CR. APPEALS NO 47 of1996 (UR)** the court of appeal considered what acts can constitute malice aforethought and stated as follows:

"If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days later."

68. Counsel for 1st accused raised issue with failure by the prosecution to establish at which place the offence was committed given the fact the incident took place in a vehicle which was in motion. The evidence adduced demonstrates clearly that the 1st accused and his accomplice were in a vehicle on motion as the attack took place. It is superfluous to require the prosecution to prove at exactly which place the vehicle was when the deceased was injured. It is immaterial more so because deceased did not die at the scene of attack.
69. As to whether the prosecution has established motive, and if not whether that is fatal to the prosecution case. There can only be speculation as to the motive of this attack being the deceased

child and parental responsibility. Otherwise no motive was shown to have been the motivation for committing this offence. In regard to the issue of motive the prosecution is not required to prove the motive in a murder trial, but such evidence if available wound constitute circumstantial evidence. In **Choge vs Republic (1985) KLR1** , the court of appeal held as follows:-

> "**Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.**"

70. As to whether the murder weapon or weapons were produced in evidence and whether failure to avail them vitiates the prosecution case? The prosecution produced only one murder weapon and as I have stated in this judgment it was capable of causing two of the injuries noted by the pathologist, the fatal ones on the head and the ones on the neck. Counsel for the 1st accused doubted the location where they were found as being apart from where the 1st accused vehicle was stopped. PW12 who recovered the weapon said that the scene where 1st accused was stopped was identified to him by PC Mulatya, one of his officers who he had sent to look into the matter during the night.
71. There is no doubt the weapon, two metal bars attached to a cable were the murder weapons as the deceased blood was found on them. There is no explanation for the exhibit to have had the deceased blood other than because it came into contact with her blood and that could only have been at the time of the attack. The only weapon not recovered was the one which caused the stab wounds.
72. As to whether the police considered or investigated the report of carjacking made to them by the 1st accused and the impact of failing to do so to the prosecution case? PW12, OCS Karen circulated to his counterparts around Nairobi to arrest anyone who reported a carjacking. This was because of the information the deceased had given to PW1 and 2 and also because the 1st accused fled when he realised that the two security men had received the deceased story of assault against her by him (1st accused). This was after the 1st accused had claimed he was carjacked before he knew that the deceased had already informed PW1 and 2 that she was attacked by a pastor and others in the pastor's vehicle.
73. PW5 was the OCS at Muthangari Police Station which investigated this case. He tracked down the 1st accused after his officers released him to go for treatment after he made the report of being carjacked, Further on investigating the injury on the 1st accused, and upon having the results of DNA profiling of blood on his clothes the police chose to charge the 1st accused. PW11 conducted thorough investigations including lifting of swabs and photographing the 1st accused vehicle and having blood in swabs, accused clothing and shoes profiled. PW11 also had statements taken from the accused by PW5 which he considered as part of his investigations.
74. I find that all these and other investigations that the police carried out before charging the accused with this offence were also geared at discovering whether there was any carjacking against the 1st accused in the first place.
75. As to whether the prosecution had burden of proving how the deceased blood came to be on the accused clothing? That cannot be correct. After the prosecution proved that the blood on the 1st accused clothes was from the deceased, the burden shifted to the accused to explain how the blood came to be on his clothes. That is the clear statutory burden created under **Section 111(1)** of the **Evidence Act**. The 1st accused explanation was a lie as I mentioned earlier. It did not add up in the light of the rest of the evidence.
76. As for the 2nd accused he explained that he was made to sit with the deceased by the police and that she laid her head on him. That fact was testified to by prosecution witnesses including PW3. PW2 said he saw the 2nd accused had blood stains on the T-shirt he wore even before he came into

contact with the deceased. The t-shirt was an exhibit. The blood stains were minimal. It could not be compared with the clothing of the 1st accused which can only be best described in the words of the Government Chemist as having been heavily stained in blood. Considering that the deceased blood was everywhere inside the vehicle, it is not a wonder that the blood could have entered the clothing of anyone inside that car.

77. As to whether the evidence by the prosecution is sufficient to sustain a conviction? I was satisfied beyond any doubt that the deceased was carried by the 1st accused in his car and that she sustained severe injuries from which she died less than 12 hours later. The 1st accused gave obvious lies that he was a victim of carjacking, yet the amount of blood on his clothes and inside the vehicle spoke of one who carried out a vicious attack on a person, the deceased, who was helpless. It is by sheer miracle that she managed to leave the vehicle and to report the incident to PW1 and 2 before slipping into unconsciousness.

78. The court of appeal has had occasion to consider the effect of a finding that the accused told an obvious lie. I am guided by the court of Appeal case of **ERNEST ABANGA ALIAS ONYANGO VS REPUBLIC CA NO. 32 OF 1990,** 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 evidence available".**

79. I find the 1st accused lied about the incident. I find that he was not the victim but rather the villain. I find that the prosecution has adduced sufficient circumstantial evidence which unerringly points towards guilt of the 1st accused. I am also satisfied that and that the circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the 1st accused with another or others.

80. And in the English case of ***R. vs. Taylor Weaver & Donovan*** **(1928) 21 Cr. App. Reports 20,** the court held:

> **"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."**

81. As for the 2nd accused there are few facts which did not add up. However it is clear he remained consistent in his story. He first told it to PW12, the OCS of Karen Police Station, then in a statement under inquiry D.exhibit I to PW5. The 1st accused supported his story by admitting that the 2nd accused was in his vehicle as one seeking a lift. Unlike the 1st accused he made no attempt to escape. He did not formulate lies at the scene of incident choosing to keep quiet until he got to the senior police officers. Even though I doubted why he took a long route to Kawangware from town that alone is not sufficient to find him culpable for the offence. I give him the benefit of doubt and acquit him for this offence under **section 322** of the **Criminal Procedure Code**.

82. I am satisfied that the prosecution has proved its case against the 1st accused beyond any

reasonable doubt. I find the 1st accused guilty of murder contrary to **section 203** of the **Penal Code.** I reject the 1st accused defence, find him guilty of murder under **section 322** of the **Criminal Procedure Code** and convict him accordingly.

SIGNED & DELIVERED AT NAIROBI THIS 21ST JULY, 2016.

LESIIT, J.

JUDGE