



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Kangogo (Criminal Case 34 of 2018)  
[2025] KEHC 60 (KLR) (14 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 60 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 34 OF 2018  
JM NGUGI, J  
JANUARY 14, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**GODFREY KIPKEMOI KANGOGO ..... ACCUSED**

**JUDGMENT**

1. Godfrey Kipkemoi Kangogo (the “Accused Person”) is charged with murder contrary to section 203 as read with section 204 of the Penal Code. He is accused of the murder of Irene Jepchumba Boitt (“Deceased”) on 06/07/2018 at Molo River in Rongai Sub-County within Nakuru County.
2. The Prosecution called 26 witnesses in a bid to prove its case. Its theory is that the Accused Person lured the Deceased to the Choka Falls on Molo River near Mogotio, rendered her comatose through an alcoholic drink laced with a poisonous substance, then strangled her before dumping her body down the raging falls. The Prosecution claims that the Accused Person, then, pretended that the Deceased had accidentally fallen into the river and carefully curated the scene to give that impression.
3. PW1, KR, a twelve-year old boy, testified that on the material day he was around Choka River grazing cattle. He and his colleague took the cattle to drink water at the river. As they did so, they saw the Accused Person and a woman by the river. According to him, the couple seemed to be cordially “having fun”. They carried their shoes in their hands; and they sipped some beverage from a plastic cup. Moments later, as they drove the cattle away, K and his colleague heard screams. They ran back towards the river where they saw only the Accused Person down by the river falls. The Accused Person was, by K’s recall, holding a shirt in his hands and appeared to be in distress. He was shouting for help.
4. K ran to the village nearby and called Gilbert Kiplimo (Gilbert) to come help. As he did so, he also noticed three young men running in the direction of the falls to help the man in the falls. As aforesaid, the man in the falls was the Accused Person.



5. Gilbert testified as PW4. He also heard the screams even before K(PW1) went to call him. He ran to the river and found the Accused Person down by the falls. The Accused Person was seated on a rock, his hands on his head, with raging waters around him. He was shouting “she is gone! She is gone!” repeatedly. Gilbert asked him who he was talking about, and the Accused Person told him that his companion, a woman, had been swept off by the river. Gilbert wanted to swim across the falls to rescue the Accused Person, but the Accused Person warned him that the waters were too deep. The Accused Person asked Gilbert to make a call to a person on his phone and supplied the phone number. Gilbert made the call but the person told him that he was in Nairobi. Gilbert decided that it was not useful to inform the person on the other side of the phone what was going on in the given circumstances. Instead, he went back to the river. He now found two more people - Mathew and Dennis – at the scene. They were all figuring out how to help the Accused Person from the falls. A little later, Laban Kipngetch Kiriasi arrived with a rope. They all figured up that the rope would be the best way to help the Accused Person from the bottom of the falls. They tied the rope and rescued him using it. Gilbert was categorical that the Accused Person looked distressed as they tried to rescue him.
6. Laban Kipngetch Kiriasi testified as PW11. He testified that he got a call from Gilbert about 5:00pm about the situation at the Choka Falls. He lives nearby. He rushed to the scene in his motor cycle. He found Gilbert and one Dennis trying to help the Accused Person, who appeared to be in distress at the foot of the falls. He went down to where they were and, together, they rescued the Accused Person. By his reckoning, the falls were vicious and the Accused Person would not have survived but for their help. He, too, testified that the Accused Person appeared injured and in pain as they helped him walk to where he had parked his car.
7. The Dennis referred to by both Gilbert and Laban is Dennis Kiprono, who testified as PW14. In all material particulars, he corroborated the narratives by both Gilbert and Laban.
8. Boniface Kirwa Ng’etich, a driver of the Rock Academy in Mogotio, was also at the scene. He testified as PW18. He found a crowd of people at the river near the falls. He noticed the Accused Person, who had just been rescued from the water. The Senior Chief requested Boniface to drive the Accused Person’s motor vehicle to the hospital since the Accused Person was too shaken to drive his motor vehicle. Boniface testified as PW18.
9. The Senior Chief, Julius Kipruto Kangogo (Chief Kangogo), testified as PW19. He largely reiterated the events of 06/07/2018 at Choka Falls from when he received a call at around 5:15pm. His narration mirrors that of the other witnesses: on getting to the scene, he found the Accused Person, whom he recognized as his nephew, inside a motor vehicle, a blue Toyota Vitz. The Accused Person was crying and seemed to be in pain. Someone in the crowd told Chief Kangogo that someone, a lady, had drowned in the river and the Accused Person had tried to rescue her. He helped take the Accused Person to Berut Clinic and then headed to Mogotio Police Station to report the incident.
10. Later on, Chief Kangogo met the Accused Person’s father and, together, after learning the identity of the Deceased from the Accused Person, they went to the Deceased’s father’s house in Kiamunyi to inform the family what had happened. The following morning, the Chief went to Mogotio Police Station and on to the scene where the retrieved body was brought. Chief Kangogo testified as PW19.
11. Joseph Wafula Simiyu had seen the Accused Person and the Deceased as they made their way to the Choka Falls. He is a farmer nearby. He was bathing by the river when the couple passed by. Since he was naked, he shouted to them to wait for him to dress up so as not to cause embarrassment. He did not know the couple but remembered how they were dressed. They held hands as they walked; and they had a bottle of alcohol with them. They passed by him and went down to the falls. A short time later, he heard screams coming from that direction and he rushed towards there. On getting there, he saw



- the man he had only shortly before seen with the woman, inside the falls frantically indicating that the woman had fallen into the falls. Simiyu, who testified as PW22, was with a certain boy whom he asked to make calls to people who could come and assist.
12. Upon the rescue, the Accused Person was taken to Berut Medical Clinic in nearby Mogotio town. He was attended to by Anthony Kibet Chepkok, a Clinical Officer, who testified as PW8. Anthony recalled that the Accused Person was brought in by some people at around 6:00pm. The Accused Person complained of pain around the right hip and elbow joint. He reported that he had sustained the injuries as he attempted to rescue a person in the Molo River. Anthony found that there was tenderness and bruises around the right iliac crest. There was pain on a range of movement on the right elbow joint. The respiratory system was clear. The cardiovascular system appeared normal. He was well oriented in time and space. The abdomen was non-tender with no palpable mass noted. Anthony concluded that the Accused Person had suffered soft tissue injuries. He prescribed pain killers. He admitted the patient for further examination and possible X-ray in a hospital of his choice.
  13. The hospital the Accused Person chose was Nakuru Maternity and Nursing Home. There, he was treated by Dr. Josephine Wambui Gachie, who testified as PW9. The Accused Person arrived at the facility at around 10:30pm, accompanied by relatives. Upon examination, the doctor found tenderness on the left back region but found no active bleeding. Since the patient had already received pain killers, she sent him for an X-ray at Nakuru PGH Hospital. The X-ray came back clear and so the doctor prescribed pain killers and discharged the patient.
  14. Irene Chebichii Cheruiyot, PW12, is the member of County Assembly (MCA) for Soin Ward, in Rongai constituency. She got a call from a constituent about a body floating in the river on 07/07/2018. She called the area Chief as well as the Chief in the bordering Baringo location (Chief Kangogo) as well as the area OCS to inform them. She then went to the scene; and while there, paid for divers to go retrieve the body. Unfortunately, due to the speed and volume of the water, the body was taken to the Baringo county side while she remained in the Nakuru side of the river – so she did not get a good glimpse of the body. She neither knew the Deceased nor the Accused Person before that day. One of the divers who retrieved the body was Samuel Ekarang Lowoi, who testified as PW13. He gave an account of the retrieval operation.
  15. It was Senior Sergeant John Mululu of Mogotio Police Station who first received the report of the incident on 06/07/2018 at around 6:00pm. The report was made by the Senior Chief of Mogotio (Chief Kangogo). The officer, who testified as PW15, recorded the information in the occurrence book and then informed his Officer Commanding Station (OCS). The OCS determined that it was already too late in the day to try and mount a search and rescue operation; and that the retrieval would have to happen the following day. Sgt. Mululu was part of the team that went to the scene where the body had been spotted, near Ole Polos Restaurant the following day. He was present when the body was retrieved by the divers and brought on shore. He took photos of the body; but shortly thereafter, Police Officers from Menengai Police Station arrived and took over the investigations.
  16. In cross-examination, Sgt Mululu stated that he found nothing un-procedural about the take-over of the investigations by Menengai Police Station since the incident had happened in the river which forms the border of the areas of jurisdiction between the two police stations and counties.
  17. Chief Inspector James Kiprotich Chepchieng, a gazetted Crime Scenes Officer, testified as PW17. He processed the scene where the body was taken after retrieval and produced the various photos of the body and the scene where the body was recovered that were taken there.
  18. Joshua Toroitich Kiptoo, a family friend to the Deceased, was informed about the incident at around 11:30pm on 06/07/2018 through a call from Gedion Toroitich, an uncle to the Deceased. Early in the



- morning the following day, he accompanied Gedion to Mogotio Police Station where they learnt that the matter had been reported the day earlier by the Senior Chief. Together with Gedion, he went to the scene where the body was retrieved and taken to a mortuary in Nakuru. He was present during the post-mortem examination. He testified as PW16. Gedion Toroitich also testified as PW23. His evidence was essentially the same as that of Joshua. He also identified the body during the post-mortem examination.
19. Monicah Lydia Toroitich, the mother to the Deceased, testified about receiving the news of her daughter's disappearance late in the night of 06/07/2018. Her first thought, she said, was to wonder why they were being informed so late in the night – past 11:00pm – yet the Deceased had been swept off the river by 4:00pm. In any event, the following morning, together with other family members, she went to the scene where the body was retrieved and she had an opportunity to see the body. She testified as PW22.
  20. Marion Jebet Wilhamy practices small-scale chicken farming in her parents' farm in Chemogoch. She knows the Accused Person. She testified as PW2. On 06/07/2018, the day of the incident, through her boyfriend, Patrick Kangogo, she requested the Accused Person to deliver chicken feeds to her home. The Accused Person delivered the chicken feeds at around noon, in his car. He was in the company of the Deceased, a person unknown to Marion before that day. Marion offered the Accused Person and the Deceased lunch; and they all ate – rice and beans. The caretaker, Catherine Korir (PW4), joined them later as they ate lunch.
  21. Marion testified that the Accused Person introduced the Deceased as his girlfriend, and said that he planned to introduce the Deceased to his family “soon.” According to Marion the couple was in a good mood and high spirits. They were sharing drinks: Coca Cola and an alcoholic drink, Captain Morgan. The Deceased had a tumbler from which she occasionally sipped. The Accused Person had an energy drink as well.
  22. Marion requested for a lift to Mogotio when she learnt that the couple was heading that way in the Accused Person's car. They dropped her at the KCB in Mogotio as they said they were heading to Choka Falls. They invited Marion to join them but she declined. Catherine Korir (PW3) corroborated the part of the story where she was present at Marion's parents' home.
  23. The post-mortem examination was carried out on 12/07/2018 by a team of Dr. Titus Ngulungu, the County government pathologist (who testified as PW5); Dr. Andrew Gachie, who represented the family of the Deceased; and Dr. Beatrice Wambugu, who said that she had been retained to represent the Accused Person. The post-mortem examination was conducted at the War Memorial Hospital mortuary. Dr. Ngulungu signed the report.
  24. Dr. Ngulungu testified that on general examination, the body had injuries, bruises, lacerations and abrasions. These were multiple on the right eye and on the lateral aspect as well as the inner aspect of the right elbow and also the left elbow. There were also abrasions on the left and right side of the face and discolouring of the elbows and legs. These were discrete and multiple. The body also had lacerations on the left forehead below the right eyelid.
  25. On dissection, Dr. Ngulungu testified that they found bruises on the subcutaneous tissue coalescing into hematoma on the limbs, shoulders and scalp. On the neck, they found neck muscles and bruises and contusions. They were traced up to the transverse process of the cervical vertebrae. There was haemorrhage on thyroid gland and some bruises on the carotid arteries. He testified that these findings meant that there was blunt force trauma. The lungs were also collapsed and ingestion of foreign substances.



26. According to Dr. Ngulungu, the injuries were concentrated on the neck and head and were consistent with pressure from a blunt object being applied to the neck. As a result, he testified that he and his colleagues formed the opinion that the cause of death was asphyxia due to traumatic pressure to the neck in keeping with manual strangulation. The injuries on the body, he opined, were defensive in nature. He further testified that their examination showed that the lungs collapsed and there was no waterlogging or foreign matter in the lungs. This, he said, excludes drowning as a cause of death. The death, he insisted, was by manual strangulation. The deceased died, he concluded, before she reached the water.
27. They also took specimens from the organs for toxicology and histopathology. Dr. Ngulungu produced the postmortem examination report with these findings as an exhibit. In cross-examination, Dr. Ngulungu stated that he was the county pathologist and was paid a salary for his work but he conceded that he accepted Kshs. 15,000 from the family of the Deceased as “facilitation” for his services. He was adamant, however, that the amount was not payment for his services.
28. Dr. Gachie, testifying as PW6, said that he was hired by the family of the Deceased to represent it during the autopsy. He confirmed that he agreed with the findings presented by Dr. Ngulungu and with the post-mortem examination report although he did not sign the report. He agreed with Dr. Ngulungu that the cause of death was asphyxia due to manual strangulation. In cross-examination, he conceded that he did not record any individual findings during the post-mortem examination and did not sign the report but that he owned it jointly with Dr. Ngulungu and Dr. Wambugu.
29. Dr. Beatrice Wangari Wambugu testified as PW10. She, too, confirmed participating in the autopsy of the Deceased on 12/7/2018 together with Dr. Ngulungu and Dr. Gachie. However, she could not confirm who had given her instructions to participate in the autopsy on behalf of the Accused Person. She testified that she received a call from a relative who said he was calling on behalf of the father of the Accused Person. She conceded that the Accused Person did not instruct her to act on his behalf. She also conceded that she did not sign the autopsy report but insisted that it was the product of the joint efforts of herself, Dr. Ngulungu and Dr. Gachie.
30. Stephen Matinde Jebel Webe (Webe) is the Assistant Government Chemist who received the toxicology samples taken from the body of the Deceased and tested them. He testified as PW7. He testified that on 13/07/2018, PC Edwin Wainaina No. 85669 submitted some post mortem specimens for analysis as followsItem B – blood sampleItem E – vitreous humorItem K – kidneyItem L – LiverItem S – stomach
31. Each of the specimens were indicated as being from Irene Jepchumba Boit (Deceased). The samples were accompanied by an exhibit memo form where it was desired that he ascertains the presence of any chemical substances.
32. Webe did an examination of the samples. He testified that he detected propoxur carbamate pesticide in the liver. This would indicate that the deceased had ingested the pesticide some time before she died. Webe further testified that carbamate pesticides are poisonous and may be harmful if ingested in sufficient quantities. The act by attacking the central nervous system.
33. Webe also detected alcohol (ethanol) at a concentration of 207.7 mg per 100 ml in the blood and 156 per 100 ml of the samples of the vitreous humor. These, he testified, are normal levels for an adult. He did not detect any other chemicals. Based on his findings, he concluded that a combination of the pesticides and the alcohol could have contributed to the death of the Deceased. He was, however, unable to make a conclusion that the pesticide and the ethanol were definitively the cause of death. He prepared a report which was signed on his behalf by my colleague, Dr. Mwendo Muthini. He produced the report in evidence.



34. The substantive investigating officer in the case was No. 75265 Pamela Rono of Menengai Police Station in Nakuru. She testified that she received a report on 07/07/2018 by one Richard Boit, a resident of Kiamunyi that the Deceased had drowned the previous day at the Molo River. She proceeded to the scene at Choka Falls and to the scene near Ole Polos Restaurant where the body was taken when it was retrieved.
35. She testified that she took over the investigations from Mogotio Police Station. She supervised the drawing of the sketch map, the retrieval of the items of relevance and interest – including the mobile phones of the Accused Person and the Deceased; the clothes and shoes found at the scene; and the car belonging to the Deceased. She channeled these items to the relevant investigation agencies for further or forensic examination.
36. Cpl Rono testified that while the incident had been reported as a drowning, she formed the opinion that it was not as soon as she got to the scene. She testified that her investigations showed that the Accused Person had gone to the Choka Falls with the Deceased; and that he was the last person seen with her. Her assessment of the scene persuaded her that the Accused Person’s narrative was not truthful. She quickly formed the opinion that what she was investigating was a homicide. Her suspicions, she said, were fortified when she saw the body of the Deceased since she had what appeared to be an injury to her face. She said that when the autopsy was carried out, her suspicions were borne out since the pathologists concluded that the cause of death was manual strangulation and not drowning. She also said that with the autopsy results, she began investigating the incident as a murder.
37. She sent the Deceased’s mobile phone number for forensic examination. She produced the mobile phone handset and the print-out as evidence. She said that the conversations between the Accused Person and the Deceased found in the phone convinced her that the Accused Person had actuated a plan he had to kill her and then made up the scene to look like an accident. The witness referred to messages that stated the following, for example:
  - a. One message sent by the Accused Person at 9.30am on 4/7/2018 said: “I am now”. Then at 9.31am, he sent another one saying “Hmm”. Then another one saying “Your days are numbered”.
  - b. The next one was sent at 9.33am saying: “Yes you will pay for all your sins”. At 9.34am another text says: “Am the paid party..... in business terms the drawee.”
  - c. Then at 9.36am another message by the Accused Person to the Deceased read: “Yes I have a business with your ass.”
  - d. At 9.47 am, he wrote: “I am here”. Then another one at 9.47 am also saying “I am hungry”.
38. Cpl Rono concluded that these messages showed a malicious intention to harm the Deceased. Coupled with what she thought was a suspicious scene at Choka Falls; the fact that the Accused Person was the last person seen with the Deceased; the results of the autopsy result; and the toxicology report all confirmed to Cpl Rono not only that the Deceased was killed but that she was killed by the Deceased.
39. When confronted in cross-examination with her recorded statement which stated that witnesses at the scene told her that they had seen the Accused Person and the Deceased seemingly happily holding hands together as they walked to the falls; and that she had seen photographs of them lying on each other in seemingly happy embraces while kissing at the falls, Cpl Rono would still not accept that these were two people in love and concluded that there was no way of telling “what was in their hearts.”
40. The electronic forensic examination on the Deceased’s phone was carried out by No. 89158 PC Ezra Kipsaina attached to Cyber Crimes Forensic Unit at DCI Headquarters. He testified as PW25. He



received an exhibit from the Investigating Officer on 27/07/2018 with a request to examine the exhibit and give a report on the same. The exhibit we received is:

a. Oppo mobile phone IMEI No. 861227XXXXX3132 paired with Safaricom sim card No. ICCID No. 892540210XXXXX82178C

b. B-Sandick ultra Memory Card Serial No. 7063CRXXX4S5 of capacity 16GB.

41. He was expected to retrieve text messages and images from the exhibits as per the exhibit memo form.
42. From mobile phone, he retrieved text conversations for the diverse dates between 15/5/2018 to Thursday July 5/7/2018. From the memory card, he retrieved images stored from 7/8/2018. These images appeared to him to have been sent to another number on that date. He produced both the exhibits and the reports of the extracted messages and images.
43. The report contained text messages which were, it was common to both the prosecution and the defence, sent by the Accused Person. However, the conversation, even by the admission of the witness appeared slanted. He conceded that the person texting seemed to be engaging in a “monologue” which seemed unnatural but insisted that the text conversations had not been altered nor any of the texts erased. In his defence testimony, the Accused Person, with the consent of the prosecution, produced transcripts of the conversations some which filled in some missing details and tended to show that the transcript produced by the prosecution was, in fact, not complete.
44. In a ruling dated 28/04/2022, the Court placed the Accused Person on his defence finding that – the Prosecution had adduced reasonable sufficient evidence of the matter in respect of which it had the burden of proof to require the Accused Person to respond to the Information. In doing so, the Court pointed out that it would have been improper at that stage to assess the strength or weakness of the prosecution evidence by taking a view of the witness reliability or overall theory of the case unless the Court had come to the conclusion that the state of the evidence called by the Prosecution, taken as a whole, was so unsatisfactory, contradictory, or so transparently unreliable that no court, properly directing its mind, could properly convict on the evidence. In the Court’s view, this forbiddingly high threshold was not met in the case hence requiring the Accused Person to answer to the Information before assessing the evidence as a whole while taking its weightiness into account.
45. Placed on his defence, the Accused Person gave sworn testimony and called no witness.
46. He testified that he is a car dealer London Estate, Nakuru. He told the Court about his relationship with the Deceased, and the events leading up to her death. After an initial meeting in 2008, the two reconnected in 2017 and began dating later that year. On July 5, 2018, the Accused Person traveled to Nakuru to spend time with Deceased. The following day, they visited the Choka Falls after running errands and spending time with the Deceased’s cousin and having lunch at Marion’s (PW2’s) home.
47. The Accused Person testified that while they were at the waterfalls, the couple drank alcohol and took photos. He said he turned away for a wink of a second to pick up what he thought was an incoming phone call. When he turned back afterwards, he could not see the Deceased. He initially thought she had entered a nearby cave. Upon closer inspection, however, he noticed her hand protruding from the water. Quickly realizing that the Deceased must have fallen into the river, he ran ahead and jumped into the water to try and rescue her but the river’s strong currents made it difficult to locate her.
48. The Accused Person testified that despite the strong flow of the water, he managed to spot the Deceased near the base of the waterfall. Swimming across, he grabbed her fingers and attempted to pull her up, noticing blood oozing from her forehead as the water bounced her up. However, the current was too strong, and while trying to reach a protruding rock to call for help, he was pushed into the rock, injuring



his hip and elbow. Paralyzed briefly by the impact, he lost his grip on Irene, who was swept away by the water.

49. In the struggle, one of his legs became stuck between two rocks. He freed himself after some effort and sat on the rock, screaming for help as the Deceased disappeared into the fast-moving waters. Amidst tears, he told the Court that despite his best efforts, he was unable to save her. He was later helped by Good Samaritans who pulled him from the raging waters. Later, he learnt that the Deceased's body had been retrieved.
50. The Accused Person emphasized that his relationship with the Deceased was loving and free of conflict. He denied any involvement in her death, asserting it was a tragic accident. He expressed deep sorrow for her loss and for being accused of her death, which he said has severely affected his life, family, and business. He pleaded for the court to uncover the truth and acquit him of the charges.
51. Given this state of evidence, the overriding question for determination is whether the Prosecution has been successful in proving, beyond reasonable doubt, that the Accused Person murdered the Deceased.
52. To be successful, the Prosecution must prove the three elements of the offence of murder: Firstly, that the death of the deceased occurred; secondly, that the death was caused by unlawful act or omission on the part of the accused person; and thirdly, that the accused person had malice aforethought in causing the act or omission.
53. The ingredients of murder were identified by the Court of Appeal in *Roba Galma Wario v Republic* [2015] eKLR as follows:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

54. It is common among both the prosecution and the defence that the Deceased died on or around 06/07/2018. The definitive evidence in this regard was provided by the three doctors who performed the autopsy: Dr. Ngulungu; Dr. Gachie; and Dr. Wambugu. They all confirmed that they examined the body of the Deceased at War Memorial Hospital mortuary. The post-mortem examination report attested to the fact. The body was identified to them by Gedion Toroitich (PW23) and Joshua Toroitich Kiptoo (PW16). The Investigating Officer, Cpl Rono and Samuel Lowoi (PW13), the diver who retrieved the body equally confirmed they saw the body of the deceased on the day it was retrieved from the river. So did Ms. Irene Chebichii Cheruiyot (PW12); Joshua Toroitich Kiptoo (PW16); and the Deceased's mother (PW22). The Accused Person does not dispute the death of the Deceased either. Indeed, his narrative is that he saw her as she was swept by the raging waters of the Molo River.
55. The main question for determination is whether it is the Accused Person who caused the death of the Deceased; and if he did so with malice aforethought. Under Section 206 of the Penal Code, malice aforethought is defined 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) 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.”

56. In the present case, both the prosecution and the victim’s family, represented by counsel Gordon Ogolla both concede that there is no direct evidence linking the Accused Person with the murder of the Deceased. There was no eye witness to the alleged murder. Instead, the prosecution presented circumstantial evidence which it argues unerringly points to the guilt of the Accused Person. The task of the Court, therefore, is to determine if the circumstantial evidence presented meets the standard required by the law.

57. I have already rehashed the totality of the evidence presented at trial. The prosecution submits that the evidence circumstantially but compellingly establishes that the Accused Person is the person who unlawfully killed the Deceased. The theory explicitly submitted by counsel for the Deceased’s family and endorsed by the prosecution is that the Accused Person was an unrequited lover of the Deceased and that, having failed to win her, “carefully and meticulously choreographed, planned and executed [her murder] with skillful precision.” According to the them, the Accused Person elaborately created the scene where he would murder the Deceased and then curate it to make it seem like an accidental drowning. He did this, they argued, by organizing an excursion to Choka Falls so as to create a “perfect” scene where people would see them happily holding hands and seeming like a happy couple. However, prior to the excursion, the prosecution argues that the Accused Person had “fed” the Deceased with excessive alcohol laced with carbamate pesticide in order to weaken her for the ultimate heinous act of murder. The aim, the prosecution and the victim’s family argue, was to dump her into the river when she became comatose and then claim she had drowned. However, the plan failed because the Deceased apparently took too long to succumb to the poison; and that, therefore, the Accused Person chose to kill her by manually strangling her and then tossing her into the river. He, then, the theory goes, jumped into the falls in a bid to demonstrate that he was trying to rescue her after she fell into the river accidentally.

58. It is true that, often, circumstantial evidence is the best evidence to secure a conviction. Unlike direct evidence, which proves a material element of a legal action, circumstantial evidence proves other facts from which one may infer the existence of material elements. In Kenya, the Supreme Court has comprehensively restated the principles applicable in considering circumstantial evidence in criminal cases in *Republic vs Ahmad Abdolfadhi Mohammed & Anor* 2019 eKLR as follows:

“

“(55) The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is “indirect [or] oblique evidence ... that is not given by eyewitness testimony.” It is “[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact.” It is also said to be “[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence....”

[.....



(59) To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative, but also, in the words of the Indian Supreme Court, “the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established....” As was stated in the case of *Kipkering Arap Koskei & Another v. R* (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the “...the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, ...”

[60] As was further stated in the case of *Musili v. Republic* CR A No.30 of 2013 (UR) “to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt.” The chain must never be broken at any stage. In other words, there “must be no other co-existing circumstances weakening the chain of circumstances relied on” and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. “Suspicion however strong, cannot provide a basis for inferring guilt.”

59. The principles to be gleaned from this decision, in short, are that for circumstantial evidence to justify the inference of guilt, the evidence must irresistibly and unerringly point to the accused as the person who committed the crime; the incriminating factors must be inconsistent with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt; and the chain of events must be so complete that it establishes the guilt of the accused and no one else.
60. The question in the present appeal is whether this threshold has been met.
61. The prosecution argues that the chain that leads to the inescapable conclusion that the Accused Person murdered the Deceased; and did so with malice aforethought is that:
- a. The texts that the Accused Person sent to the Deceased in the period before the incident show a motive for murder. The motive, the prosecution argues, is that the Accused Person was not advancing as much as he wanted in forging an intimate relationship with the Deceased and was, therefore, frustrated;
  - b. The Accused Person then planned an excursion to Choka Falls but it was only a ruse in order to get an opportunity to kill the Deceased;
  - c. The Accused Person laced alcohol with propoxur carbamate pesticide, a poisonous pesticide, which he then got the Deceased to ingest with a view to rendering her comatose so that he could easily dump her into the river at Choka Falls during the excursion.
  - d. That the plan having failed to go as designed since the Deceased failed to respond to the poisonous substance as quickly as the Accused Person had envisaged. This forced the Accused Person to resort to “Plan B”: to manually strangle the Deceased and then toss her body into the waterfalls.
  - e. The Accused Person, then, jumped into the waterfalls and pretended that he was attempting to rescue the Deceased.



- f. The autopsy results demonstrated that the Deceased had died of manual strangulation and not from drowning; and the toxicology report further confirmed that the Deceased had ingested propoxur carbamate pesticide hence providing further independent proof of the prosecution theory.
- g. Finally, the prosecution urges that the doctrine of “last seen” should be applied here since it is not in question that the Accused Person was the last person seen with the Deceased; and the Deceased was later found dead of manual strangulation. The ineluctable conclusion absent any other reasonable explanation by the Accused Person (and none was offered), the prosecution insists, can only be that it is the Accused Person who caused the death of the Deceased.
62. On its part, the Defence strongly opposes the idea that the threshold has been met for circumstantial evidence to secure a conviction in the present case. The Defence attacks the prosecution theory on three main aspects. First, the Defence attacks the evidence of motive. It draws on the testimonies of the people who saw the couple on the date of the incident to impugn the prosecution narrative that the Accused Person had an axe to grind with the Deceased. Further, the Defence attacks the forensic evidence from the Deceased’s phone as manipulated, one-sided conversation aimed at drawing an out-of-context inference that the two lovers were at loggerheads while, in fact, their love was blossoming at that time.
63. Second, the Defence argues that no evidence was placed before the Court to connect the Accused Person with the alleged poisoning of the Deceased. The Defence, in fact, argues that the opposite is true: that the evidence adduced showed that the Accused Person had shared lunch with the Deceased and PW2 and PW3 before heading to Choka Falls; and that they were sharing a drink together.
64. Third, the Defence strongly contests the contents of the post-mortem report as incredulous and urges the Court to disregard both that evidence and that of the three pathologists as biased. The Defence strongly argues that the autopsy report was the product of the biased mind of Dr. Titus Ngulungu who was acting out of the influence of the Deceased’s family’s instructions. The Defence points out that Dr. Ngulungu admits to receiving Kshs. 15,000 from the family of the Deceased. Further, Dr. Gachie, was hired by the Deceased’s family. Finally, Dr. Wambugu, who ostensibly represented the Accused Person, admitted that she was not instructed by the Accused Person, and did not know exactly who hired her. Both Dr. Wambugu and Dr. Gachie further conceded that they did not sign the autopsy report though Dr. Ngulungu claimed it was their joint product. The Defence cites *R v Masalu (1967) EA 355* for the proposition that in certain circumstances the Court should disregard a post-mortem report when it is explicitly prejudicial to the Accused Person; and does not appear to represent the product of an independent expert witness.
65. As aforesaid, a circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in such combination only because the Accused Person did what is alleged against him. Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, then it is not sufficient to establish the guilt of the Accused Person.
66. Has this forebodingly high standard been reached here? In answering this question, the Court must recall that in assessing the circumstantial evidence, each of the elements in the chain relied on by the prosecution must be proved beyond reasonable doubt. Proof beyond a reasonable doubt is the highest standard of proof possible. Because a person’s liberty is at stake, this high standard is required by our



judicial system. This standard was described by Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 (King's Bench) thus:

... the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. 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 the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it's possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

67. Or as was described by Chief Justice Shaw over a century ago in quoting *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850), a formulation recently approved by the US Supreme Court in *Victor v Nebraska*, 114 S. Ct., at 1244 (1994) (quoting *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850) and discussing the Court's use of the Webster charge in *Sandoval v. California*, 4 Cal 4th 155 (1992)) citing the famous Webster Jury Instructions thus:

For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt.

68. And what is "reasonable doubt"? Again Chief Justice Shaw in *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850) has provided a pragmatic working definition:

What is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of the law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proven guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal.

69. As the cases have suggested, "reasonable doubt" is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. As the US Supreme Court has variously pithily described it, "reasonable doubt" is a doubt that would cause a reasonable person to hesitate to act. See, for example, *Holland v. United States*, 348 U.S., at 140, 75 S.Ct. at 137.

70. Considering the evidence available in this case, can it be said 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 Accused Person"? (See *Joan Chebichi Sawe versus Republic* [2003] eKLR.) Upon consideration of all the evidence and the submissions of the parties, I have come to the considered conclusion that the evidence falls short of the required standard to sustain a conviction on the basis of circumstantial evidence. I say so for four reasons:



- a. First, the evidence of motive – which was the glue for the prosecution narrative faltered at three places:
  - i. One, the forensic electronic evidence of text messages sent by the Accused Person fails to establish that there was animosity between the Accused Person and the Deceased sufficiently to trigger plans to murder the latter. In the first place, most of the text messages are quite mild and indicate a typical love relationship. The toxic innuendoes the prosecution attempted to give some of the texts were, at best, ambiguous and, at worst, out of context. For example, there were series of texts where the Accused Person tells the Deceased: “Yes, you will pay for all your sins”; then: “Am the paid party....in business terms the drawee.”; and shortly thereafter, “ Yes, I have a business with your ass” before announcing “I am hungry”. The prosecution sought to paint these as threatening messages. In fact, they can be read, in the context of lovers, as “sexy” or “romantic” messages. This can be interpreted as such if one can considers the very next messages. The following appear as the consecutive texts by the Accused Persons immediately following these so-called threatening messages:

Accused (GK): Boo (9:49am)

GK: I miss you more my love (9:50am)

GK: You will have me soon love. Just pray we get a whole day to ourselves (9:52am)

GK: That would be awesome (9:54am)

GK: Almost getting to Machakos town (9:56am)

GK: Uhm, hatari sana (9:58am)

GK: But vumilia, Friday if you wont be working we will spend the whole day together. (9:58am)

It seems apparent from this series of texts by the Accused Person to the Deceased, that this was a couple still in love. That these messages immediately followed the one stash of messages the prosecution present as threatening and as enunciating a motive for murder significantly weakens the prosecution case.

- ii. Two, the forensic electronic evidence also appears, and this must be said with utmost respect to the investigators, to have been altered. The texts are so unnaturally one-sided that they induce the unmistakable sense that the responses by the Deceased were removed so as to create a more threatening context. The forensic examiner himself (PW25) admits that the monologue, as he called it, appeared unnatural. A good example is presented in the reproduced texts in the preceding paragraph. It seems apparent to the cursory reader that the Accused Person was in dialogue with the Deceased but the responses by the Deceased have been excised from the supplied transcript. This, then, would make the whole transcript presented by the prosecution to build a theory of motive suspect, unreliable and untrustworthy.
- iii. Three, although the prosecution suggests that the Accused Person was “acting” all “lovey-dovey” with the Deceased on the date of the incident, independent evidence seems to suggest that the couple had real intimacy on that day. PW2 and PW3, who shared lunch with them testified that the two of them seemed to have been genuinely in love. Indeed, PW2 testified that the Accused Person stated that he would introduce the Deceased to his family “soon.” Further, strangers they met on the way to Choka falls stated that the two were holding hands as they sipped a beverage from a tumbler. It would have taken some clairvoyance for the the Accused Person to know which of the strangers he met on the way to Choka Falls that day



would be available to testify so that he could “act” as though he was in love with the Deceased as a ruse to later on kill her. In any event, all the evidence point to the fact that the Deceased was happy to be in the company of the Accused Person; and no evidence of strife between them was presented by the persons who encountered them on that day. This includes the evidence of PW2 and PW3 who had lunch with the couple; and that of K(PW1) and Simiyu (PW22) who saw them as they walked hand in hand to the falls.

- a. Second, the conduct of the Accused Person shortly after the incident, as narrated by independent witnesses, raises doubts whether he was, as the prosecution theory paints him, a perpetrator who was putting an “act”. The five witnesses who were the first on the scene all uniformly testified that they formed the opinion that the Accused Person was genuinely distressed at the scene as he cried for help and tried to assist in rescuing the Deceased who had already been swept by the raging water. The five are: K(PW1); Gilbert (PW4); Laban (PW11); Dennis (PW14); and Simiyu (PW22). All these witnesses, in both examination-in-chief and in cross-examination stated that they felt that the Accused Person was genuinely distressed at the scene. Two of them (Gilbert and Laban) described in detail the efforts to rescue him and how dangerous the exercise was. They explained that the Accused Person had jumped into a zone in the falls which was dangerous because of the raging waters. They also described the pain and injuries that the Accused Person had.
- b. Third, there was no conclusive evidence linking the Accused Person to the presence of the pesticide in the Deceased’s body. The toxicology report suggested that traces of propoxur carbamate pesticide were found in the liver of the Deceased. The prosecution suggested that it was the Accused Person who somewhat induced or caused the Deceased to ingest the pesticide. However, no evidence whatsoever was produced to prove this assertion or otherwise link the Accused Person with the ingestion of the pesticide. There was, for example, no evidence to show that the Accused Person had purchased the pesticide or otherwise had access to it. The prosecution simply leaves it to conjecture that the Court will presume that the Accused Person caused the ingestion. That presumption would be impermissible absent evidence that would compel its deduction. This evidence of the pesticide being present in the body of the Deceased was an important cog in the prosecution theory and its being left hanging significantly weakened the prosecution case.
- c. Fourth, the autopsy report on the cause of death was credibly impugned by the Defence. Three doctors – including the County Pathologist, Dr. Ngulungu – apparently conducted the autopsy. It would have been expected that each doctor would reach his conclusions and do a report. At the very least they should have produced a joint report signed by the three of them. Instead, although Dr. Gachie and Dr. Wambugu claimed on the witness stand that they stood by the report produced by Dr. Ngulungu, they could not explain why they had not signed it or why they did not file their own reports explaining how they reached their conclusions. This procedural aspect of the generation of the autopsy report assumes some uncommon significance when it is considered that two of the doctors – Dr. Ngulungu and Dr. Gachie - were paid by the family of the Deceased; and it is unclear who paid the third doctor – Dr. Wambugu – who was ostensibly representing the Accused Person during the autopsy but who conceded on the witness stand that the Accused Person never instructed her; and that she got instructions over the phone from a person who claimed he was representing the father of the Accused Person. She could not forthrightly say who paid



her and, further, she conceded that after the autopsy she did not take a report to the Accused Person or his family.

This level of involvement by the Deceased's family coupled with the unresolved questions surrounding the involvement of Dr. Wambugu raises valid concerns about the independence of the doctors and the opinion revealed in the autopsy report they produce.

Additionally, in-cross-examination, Dr. Ngulungu conceded that drowning can cause asphyxia; and that it is possible that the injuries on the Deceased's body could have been caused by objects in the river as she fell or as she was violently carried by the water. He testified, further, that certain kinds of shock – including a fall from a certain height - can cause asphyxiation but that it is very unlikely that fright can cause asphyxiation. He also confirmed that the wind pipe was intact and that only the thyroid gland appeared injured.

These concessions, in my view, are substantial because, in the face of the state of the evidence in this case, they congeal to raise reasonable doubts about the prosecution theory. Without corroborative evidence, the autopsy report alone would be inadequate to put in motion the presumptions and deductions that would allow the Court to draw the conclusion that the evidence of circumstances here point unerringly to the Accused Person as the guilty party; they do not exclude every possible hypothesis except that it is the Accused Person is the person who killed the Deceased; and the chain is not so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the Accused Person

71. The upshot is that it is not possible, in the circumstances of this case, to say that the circumstances point unerringly to the Accused Person; and he alone; and to the exclusion of any other possibility that he planned for and caused the death of the Deceased. It is true that the circumstances here finger the Accused Person as suspicious, perhaps even shadowy. Yet, suspicion, however strong and vehement is not enough; and cannot take the place of evidence in convicting an Accused Person. Here, too many questions are left unanswered by the prosecution theory; and too many possibilities are left on the table to reach the forebiddingly high standard of conviction on circumstantial evidence. The evidence here, cumulatively, simply leaves reasonable doubt; and those doubts must be resolved in favour of the Accused Person.
72. After due analysis, therefore, I find that the evidence tendered by the Prosecution is not sufficient to prove the count of murder against Accused Person beyond reasonable doubt. Consequently, I find that the Accused Person is not guilty of the of murder of Irene Jepchumba Boitt (“Deceased”) on 06/07/2018 at Molo River in Rongai Sub-County within Nakuru County as charged. I, accordingly, acquit Accused Person under section 322(1) of the Criminal Procedure Code. He shall be set at liberty unless otherwise lawfully held in custody.
73. Orders accordingly.

**SIGNED AND DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JANUARY, 2025.**

.....

**JOEL NGUGI**

**JUDGE**

**DELIVERED AT NAKURU THIS 14<sup>TH</sup> DAY OF JANUARY, 2025.**

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**PATRICIA GICHOHI**

**JUDGE**

