



**Republic v Koskei alias Nicholas Korir (Criminal Case 14 of 2017)
[2025] KEHC 2686 (KLR) (4 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2686 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL CASE 14 OF 2017
RM MWONGO, J
MARCH 4, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

NICHOLAS CHERUIYOT KOSKEI ALIAS NICHOLAS KORIR . RESPONDENT

JUDGMENT

The charge and background

1. Nicholas Cheruiyot Koskei is charged with the murder of his wife Rhoda Mumbi Mutua. The offence is contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offence are that on the night of 8th July, 2017, at Jacaranda Lake Elementaita Lodge in Gilgil sub-county within Nakuru county, he murdered Rhoda Mumbi Mutua.
2. The prosecution's case, very briefly, is that the accused set up a trip with his wife to Elementaita Jacaranda Hotel, Naivasha, intending to kill her. It is alleged that he booked a room specifically with a bathtub, to achieve his murderous intention. After the couple arrived and settled into the hotel, the accused pulled off his intended scheme by strangling his wife before carefully putting her in the bathtub.
3. Having completed the job, he then left the room and shut the door, on the pretext that he was going for a jog and to order some food. After being out for a while, he notified the reception that his wife was not answering the phone and that the door to the room was locked. With the help of hotel staff, he returned to the room to find his wife dead.

The Prosecution evidence

4. Joseph Kodonyo, PW1, testified that on 5th July, 2017 he was working at the reception at Jacaranda Hotel, Elementaita. The accused called to reserve a room for two people for 8th July 2017. He requested



a double room and specified it should be with a bathtub, saying his wife liked to bath in one. The following day he paid a deposit of Kshs 3,000/- via mpesa.

5. On 8th July, 2017 at about 3.20pm, PW1 received the accused who arrived with a lady and checked them into Room 17. Soon after, PW1 completed his shift and left for home at about 4: 30pm. He was later called that night at 10:00 pm, and was informed that the accused person's wife, whom he had checked, in had died. He came back to the hotel, and went to Room 17 where he confirmed the information. He testified in court that the deceased was the person he had checked in earlier. He also confirmed that the scene he saw in Room 17 was as depicted in photographs marked PEx 3a-3f.
6. PW1 was also able to identify the accused as the person who checked in at the hotel with the deceased on the material day. He confirmed that room 17 was fairly close to the reception – a distance which a site visit had estimated was about 75 meters.
7. PW2- Ambrose Mapesa Lusichi, testified that he was a waiter at the Jacaranda hotel where he had worked for 17 years. He remembered the accused and the deceased who checked into the hotel on the material day. PW2 saw the couple arrive in their car at about 3.30 - 4.00 pm. They parked in front of the bar. PW2 proceeded to usher them into the reception. Whilst there, the accused went back to the car and returned carrying a small bag. Later, at about 4.30pm, he attended to the couple at the pool where the accused person ordered two bottles of beer. The deceased declined a drink and therefore he returned with one glass.
8. PW2 recalled that the couple sat at the poolside until 5:30pm, before moving over to the terrace. They stayed there for a while then the accused person left the deceased alone for about 30 minutes. When he returned, the couple sat at the terrace until 6:45 pm then left. As they were leaving, the deceased asked PW2 for the menu, and the couple proceeded to their room.
9. Later at around 9.30 pm he met the accused at the terrace door. He asked him if they were ready for dinner but the accused said he had been jogging. He appeared to be sweating and breathing heavily; and was wearing a grey t-shirt and blue jeans. He left the accused and , went into the restaurant and returned to find the accused in deep thought with his hands folded. He said he had tried to call his wife but she was not responding.
10. In cross-examination, PW2 stated that the accused was in something like sports shoes; that he later went to room 17 and found it dishevelled and disturbed. The manager and a security guard were present. Accuse was lying on the bed face down crying. When PW2 looked in the bathroom, he saw the deceased lying in the tub naked. He did not smell any soap scent and the bathmat was dry.
11. In cross-examination by defence counsel, PW2 said he met the accused at about about 9.00pm; and that he was sweating. He said the security officer he had seen at the accused's room was called Kulitiang, who was on duty.
12. Dalmas Kairish, a security guard at the hotel, testified as PW3. He said he was at the reception when he was informed by Benson Sururu (PW4) that the accused had left someone in the room and that the person was not picking up the phone or opening the door. PW4 got a spare key from house-keeping, and tasked PW3 with escorting the accused person to the room with the spare key at about 9:30pm. PW3 testified that the accused thus wanted to access his room – No 17 – and needed the spare key.
13. According to PW3, he escorted the accused to room 17 with a spare key. When they got there, the accused opened the door himself using the key and entered the room. He, PW3, stood at the door and looked in. The accused did not give the spare key back to PW3. The accused went into the room, then went and pushed the bathroom door open and peered into the bathroom. He immediately came out of the room with his hands on his head. Then he went down on his knees saying that the wife had



- collapsed in the bathroom, and asked PW3 to check if she was breathing. Upon checking, PW3 saw the deceased naked in the bathtub and retreated. He confirmed that Kulitiang, the other guard, was patrolling near the rooms and also came to room 17, where he found the accused.
14. In cross examination, he said he did not see any person jogging that evening, and had, in fact, never seen or heard of anyone jogging at the hotel. In further, cross-examination by defence counsel, he said that when the accused pushed open the door to the bathroom in room 17, he did not enter. The accused then asked PW3 to check if the deceased was breathing. He admitted that in his statement, he had indicated that the accused had asked if there was a doctor at the hotel, and that he supported the accused to steady him from falling
 15. Benson Sururu testified as PW4. He stated that he worked at the front desk in the hotel where he was a guide. His evidence was that the accused came to the reception at around 9:20 pm and asked for a spare key to their room number 17. When he inquired as to why he needed a spare, the accused told PW4 that he had left his wife bathing and that now she was not picking up his calls. The accused therefore wanted a spare key to access the room. PW4, retrieved the spare key from a housekeeper, and asked PW3 to escort the accused to open his room and bring back the spare key. Shortly after, PW3, came back stating that there was a problem in the room. PW4, went up to the scene and saw the deceased body in the bathtub. This was the first time he saw the deceased.
 16. Anthony Mwai, the hotel manager at Jacaranda Hotel, Elementaita, testified as PW 5. He stated that he was in his office on the material day. Sometime after 9.00 pm, he said, he received information from PW4 that there was a problem with one of the guests at room 17. He proceeded to the room and saw for himself. He saw the accused seated on the bed with one Kuilitiang. Inside the room, the bathroom door was ajar and he saw the body of the deceased in the bathtub. It appeared lifeless.
 17. He was referred to photographs MFI 3B, 3C and 3G and confirmed that the bathroom and Room 17 looked as shown in the photographs that night. He saw a glass half full with some drink, and a bottle of Bailey's. he then called the security officer who came fifteen minutes later accompanied by police officers.
 18. His evidence corroborated what the other witnesses had seen. He also testified that he had seen the accused and the deceased at the terrace earlier that day dressed in a jumper, a pair of jeans and slip-on shoes. He confirmed that when he saw he accused in the room, the accused was dressed in the same clothes he saw him in at the terrace when he was seated with the deceased. Notably, he did not engage the accused at all.
 19. In cross examination by Mr Owuor, he insisted that the accused was dressed in a jumper, jeans and open slip-on shoes. He did not think the accused could have jogged in those shoes. He stated that when he went into the room, the bathroom floor was dry, the bathtub water was clear and the bathtub half-full .
 20. In cross examination by Mr Muriithi for the accused, PW5 admitted that his statement did not indicate the date on which it was recorded; and that he did not indicate in that statement how the accused was dressed or seated in the room.
 21. PW6- Robinson Kirimi is a cousin to the deceased. He testified that the accused called him from Gilgil on the morning of 9th July 2017 at 2:00am. He informed PW6 that there had been an accident and that the deceased had died; that the accused did not tell him the nature of the accident, but may have mentioned a bathroom and that he asked PW6 to inform the family. PW6 called Dr Micheni (PW15), who is his cousin, and asked him to find out what had happened and how they should break the news to the family at large. It was he, together with Dr Micheni, who broke the news to the deceased's father. He testified that the deceased did not drink much alcohol or partake in drugs.



22. In cross examination by Mr Muriithi, he admitted that in his statement made on 30th July 2017 he had stated that the accused had told him he found the deceased in a bathtub, and that the statement did not indicate the deceased was composed. He confirmed that the relationship between the deceased and the accused was good to the best of his knowledge.
23. PW7- Jesca Kagwiria Mutua testified that she was the deceased's sister, and that they were very close. Prior to the deceased and the accused travelling to the hotel, the deceased had brought her two children to her house on 7th July for the weekend, whilst the couple travelled. This was a usual thing and that the deceased had called her before 7th July to arrange the children's stay with her. PW7 testified that she shared a lot with the deceased and was aware about the couples' marriage.
24. She testified that the accused and deceased had generally had a good marriage. Until the last year of her life when it was a bit rocky. She said, they had fallen on some arguments, since the deceased suspected that the accused was having an affair. She testified that on the 7th July she saw the deceased and accused before their trip and the deceased was very well except for a flu she was nursing.
25. PW 7 said she received information on the deceased's death from her cousin Isaac (PW15) and the deceased's brother. She testified that the deceased was not on any long-term medication and neither was the deceased an alcoholic or drug user. PW7, testified that she had no grudges against the accused person and that their relationship had been good. Once the post-mortem was conducted, they were informed that the deceased had been strangled to death.
26. In cross examination by Mr Muriithi, she confirmed that in her statement she had stated that the accused and deceased had been staying together with no major quarrels except petty issues normal in marriage. She admitted that after the deceased's death she had gone to court to obtain custody of the deceased's children.
27. PW8- David Mutua Mwele a security officer at Jacaranda Hotel testified that he lived at Kikopey. On the material night at about 10.00pm he received a call from his manager Anthony Mwai, PW 5 who told him to come to work right away as there was a woman in a bathtub who appeared not to be alive. He called the OCS Gilgil, who told him to prepare himself and he would pass by and pick him. They went to the hotel and straight to the room where the incident occurred. There were many people in the room, and he found a woman lying in a bath tub
28. He testified that he checked around and there was no breach at the premises on the material date and time. He had inspected the premises, including the fence, and there was no breach in security. Neither had there been a breach or security incident on the premises since he started working there in 2009.
29. In cross examination he confirmed that the hotel had no CCTV, but that it was often guarded by two police officers.
30. PW9- Inspector Rita Wanekaya a police officer, testified that she was called to the hotel at about 10:00pm and helped to secure the scene of crime. She testified that the accused was very restless during that time, pacing about the room. He would stand up, sit down walk about , and sometimes sleep on the bed head covered. She confirmed the scene was as shown in Photographs MFI 3A-3H, and that that the bathroom floor had little water spillage.
31. In cross examination, she stated that there was a drink in a glass on the left side of the deceased's head in the bathtub. The deceased's bra and panties were neatly arranged; that she did not see the key to the room; and that she asked the accused a few questions, but was not the investigator.



32. In cross examination by Mr Muriithi, she stated that she secured the scene; that the interrogation of the accused was done by the OCS and herself, She said she did not record in her statement the accused's answer to her question as to what had happened; that she did not arrest the accused that night as thorough investigations had not been done
33. In re-examination, she said that when she spoke to the deceased, he told her that he had gone out of the room to get food, and when he returned he found his wife dead in the bathtub. That at that point more investigations were necessary.
34. PW10-Chief Inspector Samuel Kamore testified that he was the scenes of crime officer in the case and that he is qualified and gazetted to perform scene of crime photography. He testified that he processed the scene and took and produced the photographs which were marked PExb 3A-Z and the certificate of photographic print as PExb 4. He testified that the photographs were an accurate representation of the scene.
35. He said that when he arrived at the scene he found the accused lying on the bed, scrolling through his phone. He also found the deceased's body lying naked in the bathtub. Beside her head was a glass with a substance in it and also a quarter full bottle of Bailey's. From her mouth, there was a white substance oozing out.
36. In cross examination, he said that his role was to record what he found at the scene. He said the crime scene extended to the accused's vehicle where some medications were found, and he photographed them. He clarified that he went to the scene on 8th July 2017.
37. James Welimo PW11 testified as a Forensic Toxicologist in the Government Chemist department. He stated that he analysed the deceased's body fluid samples, including eye fluid, blood, stomach contents, liver and kidney and vaginal swab. He also examined the capsules and medicines found among the deceased's items, which were all received from the investigating officer.
38. PW11 subjected the samples to a toxicology examination. From his analysis, he found that the deceased had no toxic drugs or substances in her body except for a small amount of alcohol which amounted to about a half a litre of alcohol. In his opinion, it had been ingested two days before the time of her death, and had therefore been previously in her system at the time of her death.
39. In cross examination, he stated that there were no traces of alcohol in the deceased's blood, stomach content, liver and kidney. The findings from the vaginal swab were done by Henry Kiptoo Sang.
40. PW12- IP Sammy Murage testified as a forensic digital examiner, attached to the Digital Forensic Lab at DCI Hqs. He said he received 3 mobile phones marked A1, B1 and B2. He extracted incoming and outgoing text messages and WhatsApp communication from 1st January 2017 to 8th July 2017. He signed a report PExb 11, produced a Certificate P Eb 12 and produced a CD containing the extracts of SMSs and Whatsapp messages as PExb 13.
41. In cross examination, he admitted that there were some inconsistencies in the CD report compared to the raw data information. As such he was asked by the court to issue a fresh CD based on the raw data shown to the court, which he did. He was cross examined at length on the data availed
42. PW13- Dr Dorothy Njeru testified as the government Pathologist who carried out the post-mortem on the deceased's body. She testified that both the family of the deceased and the accused person had each hired a pathologist to participate in the post-mortem. She played her role as the lead pathologist.
43. On examination of the body, she found darkening of the lips and fingernails – a condition referred to as cyanosis; there were no defensive injuries; there was bruising of the neck muscles, the outer part of



- the thyroid cartilage (Adam's apple); and softening of the bone at the base of the skull and neck with bleeding; the head had contusion or bruise on the left side around the ear (occipital temporal region) with a bruise of 6cm x 5cm and a bruise of 3cm x 2cm on the right side of the head near the ear temporal region. She also took various samples of the body for further investigation.
44. The other doctor present was Dr Gachie, who came to the same conclusion as she did.
 45. The cause of death was established to be asphyxia due to mechanical strangulation. PW13 produced the post-mortem as PEx 15 dated 11th July, 2017.
 46. In cross examination, PW13 said it was not possible to self-strangle because loss of air would eventually result in loss of grip. She stated that in her 15 years' experience she had never come across self strangulation
 47. PW14-Henry Kiptoo Sang testified as a government analyst. He said he received and analysed a blood sample and the vaginal swab, both from the deceased. He prepared a report. He found that the same did not contain sperm and hence could not compare the same with the accused's samples. His report was produced as PExb 16
 48. PW15 Dr. Issac Micheni testified that the deceased was his cousin and that he had known the accused person for the duration of their marriage. He testified that he and the deceased had since become very good friends. He testified that he received the news of the deceased's demise from PW6 on 9th July, 2017 at 2:30am. PW15 subsequently called the accused person who confirmed that the deceased had been found dead in their hotel room bathtub. PW15 proceeded to inform the deceased's father who was his uncle. It also fell on him to inform other family members including PW7 and PW16 and the accused person's brothers and sisters.
 49. They, that is himself, Richard Barno PW16, Kennedy, and the accused's brother and sister Ann and Carol, then proceeded to Gilgil. They met the accused person at the hotel with the manager. They were shown the scene of the incident which was sealed. The accused told him he had found the deceased at the bathtub dead, and due to the shock, he had hit his eye as he run away. His eye had an injury.
 50. They then arranged with the police and secured the body of the deceased which was later escorted to Nairobi for the post-mortem. He noted that the body looked like it had been in water for a long time, that it showed blue peripheral cyanosis, bulging blood vessels in the eyes
 51. PW15 testified that once they were all back to Nairobi, the post-mortem was arranged for Tuesday 11th July 2017. The accused then contacted him and asked him for an urgent meeting on Monday 10th July. He responded that it would be difficult due to his schedule. The accused persisted, and they agreed to meet in the afternoon at Barno's house.
 52. He testified that he met the accused on 10th July outside PW16's house and the accused inquired if PW15 knew the pathologist who was scheduled to perform the post-mortem on the deceased's body the next day. He stated that the accused told him that the deceased had become addicted to drugs prior to her demise and this was a source of conflict in the marriage. The accused wanted to confirm if the drugs would appear in the deceased's system during the post-mortem.
 53. PW15 further stated that the accused told him that the information he had given the police was false. He went on to say that he and Rhoda had had a physical altercation and he might have roughed up her neck. He continued that the accused disclosed to him that they, the accused and deceased, had a fight about the drug problem, which prompted him to leave the room to cool off.



54. When he returned, he said, he found a needle stuck in her arm and she was dead. So he said he set up or stage managed the whole scene for the sake of the dignity of the family. At that point PW15 told the accused to stop talking and that they needed to find Richard Barno who was a lawyer.
55. When they got to the house, PW15 called Barno and he came out of the house. PW15 told him what the accused had told him. He tried to call the accused's brother Kennedy to no avail. A decision was then made to get an independent pathologist, and in the meantime a lawyer had been called who came.
56. In cross-examination by Mr Owuor, PW15 said the accused was closer to him than most of his cousins; that he had no reason to tell a story that is untruthful; that when the accused told him that he had stage-managed the scene, he insisted they talk alone without bringing Barno into the picture; and that his main concern was whether he knew the pathologist.
57. In cross-examination by defence counsel, Dr Micheni confirmed that he had stated that the accused and deceased had a good relationship. He admitted that he had written two statements: the first about his attendance at the post-mortem and the second was written on 18th July 2017. He admitted that the second statement did not indicate that it was a 'further statement'. He said he noticed that the accused had a black eye.
58. He reiterated that the accused gave two stories; one at the hotel the other at Barnos' house on 10th July 2017, and that he recorded his second statement on 18th July 2017. He said the whole scenario did not add up because he had never heard about the deceased and drugs before; that he knew her as a staunch Christian; and that the second story also had elements of falsehood.
59. PW 16- Richard Barno testified that the deceased was his sister in law. She was the sister to his wife Jessica Kagwiria (PW7). The accused is his brother in law. He helped to identify the deceased's body prior conduct of the post-mortem. He helped the accused to hire an advocate to defend him. They had a generally familial relationship as in-laws with the accused and deceased.
60. In cross examination, he corroborated the evidence of Dr Isaac Micheni PW15. He said he and Dr Micheni spoke outside his house in a small playfield; that Dr Micheni told him what the accused had allegedly disclosed to him, being a story different from what the accused had told them. That whilst the accused had told them he had gone at 8.30pm to order supper, Dr Micheni narrated the other story allegedly told him by the accused to the effect that he and the accused had had an argument about a drug habit she had picked; that he had roughed her; that he had left the room to cool off ; and that when he came back, he had found her dead; and that his order to protect the family name, he had staged a scene and wondered whether the pathologist would uncover the real cause of death by drug overdose. He said that they walked to where the accused was and, and he decided to tell the accused not to tell him what he (the accused) had told Dr Micheni. It was then he suggested that the accused needed a lawyer.
61. In cross examination by the defence, he said that he did not record a full statement because the investigating officer felt it would not be appropriate as counsel
62. PW17- Sergeant Alice Monari testified that she was the Co-Investigating officer with Sgt Muriuki. She received a call at about 10.30pm from Sgt Muriuki. Together with her boss, she went to the scene of crime and saw the deceased in the bathtub. The floor and bathroom mat were dry; the deceased's underwear were neatly folded and placed in a rack; the water in the bathtub was clear with no foam.
63. She testified that the accused was covered in a duvet on the bed. In a brief interrogation, he informed them that at around 8.30pm that day he had left his wife bathing and went to order for a meal; that when he tried to call her she did not pick his calls; that this prompted him to come to the room where



he knocked several times but it was not opened; and that he requested an extra key, was escorted by one of the guards and when he opened he found his wife dead in the bathroom.

64. She testified that she later arrested the accused as he was the last person seen with the deceased. She stated that the room they had booked was locked with a key. There was no sign of breakage or intrusion into the compound of the hotel.

Defence case

65. Nicholas Cheruiyot, the accused, testified as DW 1 through a lengthy sworn statement. He told the court how he met the deceased, how they dated, their relationship, and employment journeys. He stated that his last employer was UNICEF, and that he had helped her in her education.
66. He testified that on the material day – 8th July 2017 – after they arrived at the hotel, he posted photographs of them at around 4.00pm, with a greeting, on the family whatsapp platform. He traced his movements as follows. They sat at the restaurant where his wife had tea and he had a whitecap beer, before moving to the terrace as they were following the sun.
67. He then went to the car to get his charger, and then went to their room to map out a route as he thought he would go jogging later. He also took his gym bag from the car to the room. This, he said, took a few minutes so he soon returned and re-joined his wife at the bar area. After some time, he said, they asked for the menu and took it to their room. It was about 6.30pm. He said they spent some quality time in the room, then he decided to leave for a jog at about 8.30pm. When he told his wife he was going for a jog, she told him she was ready to go for a bath. He said he left her walking to the bathroom.
68. When he left he shut the door. He asserted that the door was of a bang and shut type: it locks once shut and cannot be opened from the outside. On his way, he says, he met two armed and uniformed male policemen near the room. He later came to know one who was called Kulitiang. He said he jogged around the premises, for about 45 minutes to one hour. He then texted his wife to find out what she wanted to eat, but she did not respond. This would be about 9.30pm. He called his wife on phone but she still did not respond. He then went to the room, knocked on the door but there was no answer. The door could not be opened from outside without a key, so he stood there for about ten minutes then decided to go to the reception.
69. He found Benson Sururu (PW4) at the reception, and explained his challenge: that he could not access their room which was locked. His wife was not responding to his texts, calls or door knocks. So, he told them, he needed a key to get into the room. PW4 called someone to assist with a spare key, which was brought and given to the accused. He was told to give it back to Dalmas (PW3) who would escort him.
70. The accused and PW3, then went to his room along a well-lit pathway. On reaching he knocked on the door to alert his wife in case she was bathing. He opened the door, but did not see his wife. He went into the bathroom, and saw her in the bathtub. He called her but she did not respond. He said he shook her and still she did not respond. He says he then called Dalmas to check her, and asked him to look for a doctor. He says he was in shock and Dalmas held him up so as not to lose balance, then helped him onto a chair. Dalmas went off to get help
71. According to the accused, Dalmas came back running, followed by the hotel manager and Kulitiang, the guard that the accused had allegedly met when he went jogging. The accused says that at this time he was confused, and others soon came to the room. They broke the news that the deceased was no more, and called the police, who arrived and took photographs.
72. The accused said that the time between when he went jogging and when the police came was about three hours. The police came at about 11.00pm. That night he was not questioned or interrogated



- at the scene by the police, and things happened fast. He was taken to the police station where he was questioned. They left the room at about 2.30 pm. He said he had no injuries on his face and no officer asked him about any injuries. That night he called his brothers but they did not pick the calls.
73. He recorded his statement at Gilgil police station with one officer Muriuki who questioned him as he wrote. Later Muriuki tried to find a room in Gilgil where the accused could sleep but there was none. They therefore returned to the hotel, where he was given a different room (No19), and was assisted by Kulitiang.
 74. He also testified about how he was called at 3.30am by Dr Isaac (PW15); about the visit by his brother Ken Koikai, sister Carol, Dr Isaac and Barno the following day, and how they went to organise for a hearse to take the body from Gilgil morgue. He also talked about visiting his children when he got to Nairobi.
 75. He refuted Dr Micheni's evidence that he had told Dr Micheni he had fought with his wife. His version was that on 10th July whilst on a visit at Jessica's house, Barno called him and they walked up one flight to a landing where he, Barno and Dr Micheni were present. Barno had then told him that since he was the last one with the deceased, he might need a lawyer. He appointed Barno as his lawyer then later changed as it was not proper to have a family member as his lawyer
 76. He explained that he was arrested on 18th July 2017 after an investigating officer told him he did not think he had gone jogging on the fateful night. He said he first heard Dr Micheni's evidence in court and had never been confronted with it before. Further, he said Dr Micheni's evidence was not referred to in his statement recorded by Muriuki.
 77. He also said his relationship with Barno (PW 16) following his evidence in court, left him confused, because at one time he was getting him a lawyer, the next he was making allegations. He also said his relationship with Jessica (PW7) was confusing because she had two statements: one in which she said he and his wife had a good relationship and the other in which she said they had been having a difficult relationship for 1½ years before her death.
 78. In cross examination by Ms Maingi for the state, the accused affirmed the cause of death as strangulation; that the deceased's body was found in the bathtub which was filled with water; that he couldn't confirm or dispute whether the floor was wet or dry as he did not make a note. He stated that he was with his wife from checking-in time at about 3.30 to 6.30pm when they got into their room.
 79. Also under cross examination, he corrected the time he left the room stating that he did not leave the room at 8.30 pm but at 7.30pm. He confirmed that he wished to correct the earlier time he had given in evidence, from 8.30pm to 7.30pm; that he spent 1 hour in the room with his wife not two; that she took a drink in the room; that once you shut the door from outside it could only be unlocked with a key. He stated that he spent I hour in the room with his wife, not two.
 80. Under further cross-examination, the accused admitted that he recorded statements on the night of the incident with Officer Muriuki and DCI Njenga. The statements were read out in court, and in both, he had indicated that he left the room at 8.30pm; That the two statements did not mention he went jogging, but instead state he left the room to order food; That the first Occurrence Book report indicates stated that he left the room to place an order.
 81. When it was put to him that his stories on going to order food and jogging were inconsistent, and that his evidence on jogging was an afterthought, he denied that it was an afterthought. He asserted that according to the two statements he left the room at 8.30pm, and denied that by the time he left the room his wife was deceased.



82. The accused admitted in cross examination that the first person he spoke to about the incident was PW6 Robinson Kirimi, but he denied that he told that he told him that his wife had been involved in an accident.
83. As regards the whatsapp communications between his wife and Moze in Uganda to whom she was confiding about their marital problems, he stated he did not know the telephone number or Moze. However, when shown a picture of 9th February 2017, of the family with Moze, he said he knew the man as Musiime, and not as Moze. He denied that his marriage was on the rocks.
84. When it was put to him that he did not go jogging, he insisted that he did and had jogged in his jeans, T-shirt and sports shoes; and that he had two beers before he went. He asserted that whilst on his jog he met Kulitiang and two police officers, and that they were his alibis, but that he would not be calling them to testify.
85. In cross-examination by Mr Owuor, and then by Mr Muriithi, the accused confirmed that he now knew Moze; He indicated that Moze was in fact a friend known as Musiime; That he was the one who introduced Moze to his wife; and that he couldn't understand why Moze was discussing their marriage with his wife.
86. DW2- Deogratius Mire Kwena Iyadi testified on behalf of the accused. She stated in her sworn testimony that she worked with accused, and that she also knew the deceased. That the deceased came to the UN as an intern and she had seen the relationship between the two grow.
87. She further stated that the deceased always passed by her office; that the accused was also like her son; that the couple had a very good relationship; that every marriage has its problems; that there was no evidence of any difficulties in their relationship; that deceased would have told her if they had any problems. She also knew the accused as a frequent jogger.

Prosecution submissions

88. The prosecution filed written submissions covering the areas hereunder.

Ingredients of Murder

89. According to the prosecution, the ingredients necessary to prove the offence of murder were set out in Criminal Appeal No 352 of 2012 Anthony Ndegwa Ngari v Republic [2014] eKLR by Justices Visram, Koome and Odek as follows:
- i. That the death of the deceased occurred;
 - ii. That the accused committed the unlawful act which cause the death of the deceased:
 - iii. That the accused had malice forethought.

The death of the deceased occurred

90. That the death of the deceased occurred by strangulation was not in contention before this court. PW13 Dr. Dorothy Njeru testified that the deceased was murdered since she died as a result of asphyxia due to mechanical strangulation as set out in the post-mortem report PEx 15. Further, the post-mortem evidence proves that the deceased was already dead by the time she was placed into the water in the bathtub.
91. PW13 explained mechanical strangulation as loss of oxygen supply to the body due to force applied to the neck. The Doctor testified that deceased did not have any defensive wounds and neither had



she been sexually assaulted. Further, that the body fluids extracted by the Doctor, were forensically examined and did not contain any toxic drugs or substances. This was evidenced by PW11, James Welimo, the Government Chemist. His analysis report on the samples was marked PEx 6. The report also shows that the deceased did not drink any alcohol on the material day. A vaginal swab obtained from the deceased also showed no presence of semen as evidenced in Pex 16 a report by PW14 -Henry Kiptoo -the government analyst.

92. PW15, PW16 and PW17 (the IO) were present for identification of the body and for the post mortem. They confirm that the Post Mortem was conducted by 3 pathologists, Pw 13 for the Government, one Dr. Gachie for the Victim's family and one Dr. Ndungu for the accused person; and that all the pathologists came to the same conclusion.

The accused person committed the unlawful act that resulted in the deceased death

93. The prosecution submitted that the accused person's plan started on the 5th of July 2017 as demonstrated by Ww1- Joseph Kondonyo. PW1 was working as a receptionist at the Jacaranda Elementaita lodge when at 12:00 noon he received a call from the accused person. The accused person sought to reserve a room at the hotel for 8th July, 2017. That he specifically ordered for a room with a bathrub. PW1 testified that the accused paid a deposit of Ksh.3000 for the room as evidenced by PEx1, which was a reservation form issued in favour of the accused.
94. The accused and his wife checked into the hotel on 8th July 2017 at 3:30pm and PW1 had prepared the room as requested and checked the couple into room 17. This was evidenced by PEx2 the registration form into the hotel. The couple checked in as Nicholas and Rhoda Koskei. They were not accompanied by anyone else.
95. The accused person was positively identified as the only person to enter the crime scene (Room 17) in company of the deceased. The accused person was placed at the scene and positively identified by PW1. PW2 and PW5 as the person who was accompanying the deceased during the entire time she was seen alive at the hotel. This fact is not disputed by the accused person. By his own admission, no one else spent time with the accused besides him at the material date, time and place. The fact of accused being "last seen" with deceased is thus corroborated.
96. The accused person claims in his sworn evidence that he sent a message from the hotel to a family WhatsApp group with the message "pokeeni salamu kutoka Elementaita" (DEx7). The purpose of this evidence is to insinuate that the deceased relatives knew where the couple was, but from the evidence adduced, they all found out the next morning. The accused, curiously, did not inform any family (his or the deceased) about the death of Rhoda until the next day.
97. He admitted that he was last to be seen alive with the deceased and that he indeed proceeded to the room in company of the deceased, where he stayed until 8:30pm. By his own evidence, he said:
- "After spending some quality time, I left for a jog. This was about 8.30" (Page 107).
98. PW2 later saw the accused at about 9:30 pm at the reception area. He appeared to have come from jogging as he was sweating and panting. From PW2's own observation, the accused was in deep thought. He told PW2 that he was trying to call his wife but she was not picking up. The accused then proceeded to the reception. Later PW2 learnt that the accused person's wife had died inside the room. PW2 confirmed that he later saw the deceased body in the bathtub and at the time saw the accused person lying on the bed in the room.



99. The prosecution submits that the accused's behaviour with PW3 is very telling and shows that the accused already knew that there was something wrong with the deceased without getting close to her. The accused did not return the spare key to the guard as soon as he opened the door to the room. Instead he went inside and peeped into the bathroom. He then immediately asked PW3 to check if the deceased was okay since she had collapsed, and that PW3 should check if she was breathing. He did not try to call her, neither did he try to save the deceased or get her out of the water, this is not normal behaviour or reaction in such an instance.
100. PW3's evidence on the accused person's unusual behaviour is crucial in showing that the accused wanted a third party to be involved in discovery of the deceased body in the tub.
101. It is worth noting that it was all the above witnesses account that there was no sign of struggle in the bathroom or in the bathtub. The bathroom floor was dry despite the bathtub having water. They also confirmed that the water was not soapy and that the deceased had no shower cap on. The photographs by PW10 confirm this position. It is not in dispute. According to the prosecution, this proves that the deceased was strangled elsewhere in the room and placed inside the bathtub after.
102. Further nothing was missing from the room, all phones were recovered and even cash can be seen on the bedside table untouched (Pex 3M). Other Prosecution witnesses testified that the deceased had not taken alcohol that evening (PW11), had not engaged in sexual intercourse (PW 14) and had not been raped (PW 13). Messages extracted from the deceased phone by PW 12 show that the marriage of the deceased and the accused was in the rocks Pw15 and the IO(PW17) both testified that the accused had an injury beneath his eye. All other witnesses testified that when they saw the accused he was either covered, had his hands on his face or was bowing down. PW2 stated accused had his face down, PW4, accused was covering his face with his hands. PW5, accused had his head bowed, PW10, accused was looking down scrolling on his phone.
103. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, The Court had this to say on circumstantial evidence:
- “...However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence.
104. The prosecution submits that all prosecution witnesses at the scene, testified that the door to room 17 is manual and could only be locked by a key. This fact was verified by the court during the scene visit. It therefore follows that the accused locked the door when he left the room (he confirms the same in his testimony). The accused locked the door, yet he still insists on making up a story that the door locked itself.
105. It was the prosecution's submission and answer to the above questions that this is the only narrative that fits into his cover up. That by the time the accused left the room and locked it, to execute the final part of his plan, which was part of the attempted cover up, he had already killed the deceased and set up the body to look like an accidental death. He then left the room and ensured to lock it, so as to have a reason to ask for the spare key and someone to accompany him to the room. He also ensured that the person who was accompanying him was the one to confirm that the deceased was dead.



106. All the above evidence is supported by the doctrine of last seen, according to the prosecution who cited HCCRC 38 of 2015 Republic v Dissan Kipchirchir where it was held that

“...Regarding the doctrine of “last seen”, it is trite that where it is applicable, it has the effect of shifting the burden of proof onto the accused person to give an explanation as to how the deceased met his/her death; failing which he would be presumed to be the culprit.

Malice aforethought

107. The prosecution further submitted that from the post-mortem evidence, it is clear that the deceased was strangled to death. The act of strangulation shows the pure intention to end the deceased life. In *Musimbi v Republic Criminal Appeal 107 of 2020 (2023)KECA 287 (KLR)*, where the Court of Appeal specifically noted that malice aforethought could be inferred where death was caused by strangulation. The court in that case stated as follows:

“The post mortem conducted by PW9 revealed that the deceased died from asphyxia due to ligature strangulation and drowning. We find that there was malice aforethought since it is evident that the attacker's intention was to halt oxygen flow into the deceased's body which led to her unfortunate death.

108. In the instant case, death was by asphyxia due to mechanical strangulation, and PW13, the pathologist noted the absence of defensive wounds, meaning that the deceased did not fight back.

Premeditation

109. In addition to the inference above, the Prosecution adduced evidence that showed planning by the accused. The accused asked his wife to join in the trip (Pw 7). He alone made the reservation, made sure to ask for a room with a bathtub while volunteering, unprompted, that his wife liked to take baths (PW1). He admitted to setting up the scene of crime to save his wife's reputation (PW 15). He sought to influence the post mortem, asking to be told the Doctor who would conduct the post Mortem (PW15).

110. Further, the accused brought drinks from outside the hotel which were used in setting up the scene of crime. The drinks were not bought from the hotel as the only alcoholic drinks the hotel served the accused with were beers (PW2).

Deceased relationship with the accused

111. It is evident from the data obtained from the deceased phone as extracted by PW 12, that their marriage was not doing well. From the messages the deceased wrote while confiding in her friend it is evident that she suspected the accused of infidelity. PW 7, a sister and confidant to the deceased, also gave evidence of a troubled marriage between the deceased and the accused. The accused strenuously rejected this evidence, painting a picture of a happy couple in his evidence in chief and through his witness, DW2.

Admission

112. PW15, testified that once they were all back to Nairobi, the accused contacted him and asked him for urgent meeting which took place on 10th July. Pw15 testified that he met the accused outside Pw16s house and the accused inquired if Pw15 knew the pathologist who was scheduled to perform the post-mortem on the deceased body the next day. The accused went into much detail about the circumstances surrounding the deceased death. He told him that the deceased had become addicted to drugs prior



to her demise and this was a source of conflict in the marriage. The accused wanted to confirm if the drugs would appear in the deceased system during the post mortem.

113. The accused stated that they had had a fight with the deceased where he may have roughed up her neck and he had thereafter left the room. The accused further stated that when he came back to the room he had found the deceased dead with a needle in her arm. The accused stated that he had stage managed the scene in order to protect the reputation of the deceased person and the family.

The accused person's defence

114. The accused gave sworn testimony in his own defence and called one witness. His witness knew nothing about the case save for what the accused had told her. His defence did not cast doubt on the prosecution case. According to the defence his defence of alibi is an afterthought and he failed at his attempt to conceal the deceased cause of death by staging the scene of crime.
115. In his defence, the accused lies about material facts, serves a conspiracy, a general denial and a pseudo alibi. He alleges a conspiracy by the police, the hotel and members of his family to kill his wife and blame him. None of whom he has a grudge with. He denies that his marriage was troubled despite evidence tabled by the prosecution. He denies that he made voluntary admissions to Dr. Isaac (PW 15) before the post mortem despite acknowledging that they were good friends who even came to pick him up from the scene the next day and assisting him thereafter. He admits that he had a good relationship with the deceased family, including PW16, who he admits assisted him to get a lawyer.
116. All the information provided by the accused regarding what transpired on the material day is contradictory. However, upon impeachment of his statements, he admits that his two initial statements to the police did not mention jogging and that he told the police that he had left the room to buy food. He also told Dw2, his very dear friend and witness that he left the room to order for food.

Alibi defence

117. According to the prosecution, the accused had a pseudo alibi, saying he went to jog, from 8.30pm, in the dark, in uneven terrain, in jeans and a t-shirt after drinking alcohol. Further, that despite the accused testifying that he had his gym kit in the room he apparently opted to jog in the same clothes he was wearing when he arrived: see evidence of (PW2, PW3, PW5). In addition, PW3 testified that during his patrol on that night, he did not see the accused person until he met him at about 9:00 pm. The prosecution submitted that, in essence, the alibi was made up.

Accused's submissions

118. The defence counsel's submissions were made under various heads as follows.

The prosecution did not prove actus reus and mens rea on the part of accused.

119. It was submitted that it is trite law that on a charge of murder the prosecution must prove three elements of the charge beyond reasonable doubt. i.e fact of death, act of the accused in the death (actus reus) and malice aforethought i.e. the intention to kill.
120. In this case, the fact and nature of cause of death are not disputed. However, the accused denies any intention to inflict any harm on his loving wife or inflicting the blow (actus reus) that killed her.
121. The defence submitted on the prosecution's final submissions which were to the effect that: the killing of the deceased was premeditated by the accused; and that the accused lured her to a secluded resort with the motive of killing her to end their troubled marriage. This submission is sheer conjecture.



From the testimony of PW7 Jesca Kagwiria Mutua the trip out of town was not a secret. The deceased informed her of the trip in advance and arranged to leave their children with her. Both PW7 and the accused testified that such arrangements were normal. It was also the evidence of the accused that the trip to the hotel was jointly planned with the deceased after discounting other out of town places. As such, the allegation of luring the deceased does not arise.

Proof of motive

122. The defence submitted that nothing turns on the room with bathtub booked by accused. First, on cross-examination by defence counsel, PW1 Joseph Kodonyo conceded that the accused had never been to the hotel. As such he had no prior knowledge of the nature of the rooms. Second, PW1 conceded, on cross-examination by defence counsel, that the accused made the choice of room with bathtub as per the options PW1 gave him. He affirmed the same on re-examination by the prosecutor thus; “Normally when guests enquire, we give options of the rooms we have e.g. twin rooms, double rooms etc. When I gave option of room types accused opted for a room with bathtub”
123. The alleged motive of a troubled marriage is not supported by credible evidence. In addition to paragraphs 18 of our earlier submissions on a no case to answer, we submit that the believable evidence is that the marriage was not troubled at all. This fact emerged first in the probation officer’s pre-bail report on record dated 17th July, 2017.
124. The Defence through the accused and DW2 also led unimpeachable evidence that the marriage of the accused and the deceased had no issues that stood out.
125. The defence cited the Court of Appeal holding that just as the presence of motive will strengthen the case of prosecution, so will its absence weaken the case. This was in *Nzuki v Republic* [1993] eKLR, where the Court held thus (page 4);

“No doubt the prosecution is not obliged to prove motive, but just as its presence can greatly strengthen the case for the prosecution, so its absence can weaken it.”
126. The prosecution thus submits that in the instant case, the absence of a motive weakens the case of the prosecution that is based purely on circumstantial evidence.

Alleged admission of the offence by the accused to PW15 is not credible.

127. Since PW15 was not a person in authority over the accused, the alleged admission is to be treated like any other admissible evidence told to witness by an accused and can be believed or rejected. In our submission, the so-called admission is for rejection. First, the telephone call allegedly made by the accused to set up the meeting where he allegedly gave a story to PW15 tending to admit the offence was not authenticated and was disputed by the accused.
128. In *Sango Mohamed Sango & Another v Republic* [2015] eKLR the Court of Appeal in rejecting an alleged confession made by the 2nd appellant held thus (page 7):

“We agree with Counsel for the appellants that proper evidence that this alleged phone call was made by the 2nd appellant to PW2, including, the number from which the call was made, the number to which the call was made, the time, the date, the ownership of the respective telephone numbers, among others, should have been led. As it is, there is no credible evidence on record that the call was ever made.”



129. Second, the processing of the admission lacks an iota of credibility. As the record shows PW15 recorded two statements. The first on 11th July, 2017, confined to participation at the post-mortem. By then, the accused had already allegedly admitted the offence to him on 10th July, 2017. Yet, as the record shows, on 11th July 2017, PW15 did not pass that information to the police officers who attended the post-mortem i.e Cpl. Muriuki and PW17 Sgt Alice Mulari as per evidence of the pathologist PW13 and as indicated on the post-mortem report.
130. Instead, PW15 waited for 7 days until 18th July, 2017 when he purportedly recorded the statement of the confession with the same Cpl. Muriuki. As the record also shows, the second statement of PW15 was not designated as a further statement and it contained much more evidence than the initial statement. The defence thus submitted that a subsequent statement should not only be designated as a further statement but should also be limited to clarifying or correcting the initial statement but not introducing substantially new evidence as if the makers were entirely different persons. It was also submitted that the same caution that applies to subsequent reports to the police should also apply to witness statements subsequent to the first statement to avoid embellishment.
131. In the case of Benjamin Nzioka Makau & Another v Republic [2020] eKLR, this Court, Odunga J, (as he then was) held thus (page 7);
- “The importance of the first report was restated in Tekerali s/o Korongozi & 4 Others vs. Rep (1952) 19 EACA 259 where it was held that: “Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.” [Emphasis ours]
132. PW16 Richard Bamo is the purported corroborating witness of the admission. However, just like PW15, he also attended the post-mortem with Cpl. Muriuki and PW17 Sgt. Mulari on 11th July, 2017 aware of the admission told to PW15 the previous day. Yet, he too, never informed the said police officers. Even worse, PW16 told the story in Court without a pre-recorded statement about it, and not even on examination in chief but on cross-examination.
133. In rejecting such evidence given without prior statement, the Court of Appeal in Nyangau v Republic [2023] KECA 400 (KLR) held thus (para 30):
- “In addition to the danger of misidentification we have noted, the evidence of the dying declaration adduced at trial is also substantially weakened by the fact that it was first given on the witness stand. The witness (Samuel) did not record the dying declaration in his statement to the Police. While he insisted that he failed to do so because the question was not put to him by the officer recording the statement, that does not relieve our discomfort with the fact that the first time that the evidence was raised was on the witness stand”

Accused had no reason or cause to kill the deceased.

134. Contrary to the prosecution’s strenuous effort to show that the accused had a motive to kill his wife, the evidence of the accused to the effect that his marriage was not troubled at all was corroborated by the evidence of DW2 Deogratious Mire Kwena Iyadi. DW2 had known the accused and the deceased for 8 years since 2009 and they were her friends. She vouched for the serenity of their marriage. Her last



conversation with the deceased was 10 days before her passing when all she told her was her intended trip to the accused's home town of Kitale to see her nieces, as corroborated by PW6 Kirimi.

The Alibi Defence

135. The record is explicit that the accused put forth his alibi defence at the earliest opportunity at the pre-trial hearing. His alibi was that although he was within the hotel compound, he was not in the room when the deceased was killed. In fact, he indicated this fact to PW2 even before the deceased was found dead and thus without contemplation of these proceedings. As such, the alibi was never an afterthought. The law on alibi defence in Kenya is long settled and, with respect, does not require the aid of foreign jurisprudence. When an accused puts forward an alibi as an answer to a charge, he does not assume any burden of proving that answer. The burden of proof remains on the prosecution.
136. The prosecution cited the case of *Karuri v Republic* [2023] KEHC 17254(KLR), where this Court, Mwangi J, held thus (para 26 to 28);

“Further, Mativo J (as he then was) aptly said in *JMN v Republic* (Criminal Appeal E017 of 2021 [2022] KEHC 279 (KLR) as follows... “12. The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.’ The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi. Once an accused person discharges the evidential burden of adducing evidence of alibi, it’s the duty of the prosecution to disprove it. The duty of the court is to test the evidence of alibi against the issue adduced by the prosecution and if there is doubt in the mind of the court the same is resolved in favour of the accused.”

The prosecution did not prove actus reus and mens rea on the part of accused.

137. The defence submitted that it is trite law that on a charge of murder the prosecution must prove three elements of the charge beyond reasonable doubt i.e fact of death, act of the accused in the death (actus reus) and malice aforethought i.e the intention to kill.
138. In this case, the fact and nature of the cause of death are not disputed. However, the accused denies any intention to inflict any harm on his loving wife or inflicting the blow (actus reus) that killed her.
139. In its final submissions the prosecution submitted to the effect that the killing of the deceased was premeditated by the accused. That the accused lured her to a secluded resort with the motive of killing her to end their troubled marriage. The defence position is that this submission is sheer conjecture. From the testimony of PW7 Jesca Kagwiria Mutua the trip out of town was not a secret. The deceased informed her of the trip in advance and arranged to leave their children with her. Both PW7 and the accused testified that such arrangements were normal. It was also the evidence of the accused that the trip to the hotel was jointly planned with the deceased after discounting other out of town places. As such, the allegation of luring the deceased does not arise.
140. The prosecution filed a response to the accused's final submissions which I have considered.



Analysis and Determination

Ingredients of Murder

141. The ingredients necessary to prove the offence of murder are widely acknowledged, and have been rightly stated by both parties. The Court of Appeal (Visram, Koome and OdekJJAs) highlighted them as follows in Criminal Appeal No 352 of 2012 Anthony Ndegwa Ngari v Republic [2014] eKLR :
- i. That the death of the deceased occurred;
 - ii. That the accused committed the unlawful act which caused the death of the deceased;
 - iii. That the accused acted with malice forethought.

The death of the deceased occurred

142. That the death of the deceased occurred by murder is not in contention before this court. PW13, Dr. Dorothy Njeru, testified that the deceased was murdered. The post mortem report (PExb 15) concluded that she died, not as a result of an accidental fall in the bathtub. Instead, she was manually strangled by the neck, leading to death by asphyxiation.
143. PW13 explained the asphyxiation as mechanical strangulation resulting to loss of oxygen supply to the body due to a force applied to the neck. The Doctor testified that the deceased did not have any defensive wounds and neither had she been sexually assaulted. Further, that the body fluids of the deceased extracted by the Doctor, were examined and did not contain any drugs or toxic substances as per forensic examinations. This was the evidence of PW11, the Government Chemist James Welimo, who analyzed the samples and produced the report marked PEx 6. The report also shows that the deceased did not drink any alcohol on the material day. A vaginal swab of the deceased further showed no presence of semen as evidenced by PW14 (Henry Kiptoo), the Government analyst) in PEx 16.
144. The only question is: it being clear that the death was by asphyxiation, who caused the manual strangulation of the deceased?

An appreciation of the crime scene and the surroundings based on a Scene Visit

145. At the instance of the parties, the Court visited the scene of the crime on 4/7/2019. A diagramme was provided by the hotel which the Court wrote on as the various places visited by the couple were located and distances agreed. All parties and counsel were present. The Deputy Registrar also prepared a report of the Scene Visit which was adopted at the proceedings of 29/10/2019.
146. Distances were agreed as follows: From the Parking lot to the Reception was about 50 metres. Behind the reception were the Lobby, Bar and Terrace. The distance from the Terrace to the Swimming Pool was another 50metres.
147. The distance from the Reception up the walkway to Room 17-19 (Warthog Block) was about another 80 metres. Room 17 was also visited: It has a main door and two other doors inside: One to the bathroom and another connecting to Room 18. According to the Report:
- “The main door has a manual latch which can only be locked manually from inside the room and not automatically banging of the door.; any access from outside must be opened with a key”



148. The information from the scene visit assisted the court with determination of distances and gave an appreciation of how the movements from place to place occurred, and gave a general appreciation of the lay of the scene.
149. Whether the accused person committed the unlawful act that resulted in the deceased death
150. The prosecution submitted that the accused persons plan started on the 5th of July 2017 as demonstrated by PW1- Joseph Kondonyo. PW1 worked as a receptionist at the Jacaranda Elementaita lodge. At 12:00 noon on that day, he received a call from the accused person who sought to reserve a room at the hotel for 8th July, 2017. The accused person specifically ordered for a room with a bathtub. PW1 testified that the accused paid a deposit of Ksh.3,000 for the room as evidenced by PEx1, the reservation form issued in favour of the accused.
151. The prosecution's case is that the accused person was positively identified as the only person to enter the crime scene (Room 17) in company of the deceased. The accused person was placed at the scene and positively identified by PW1. PW2 and PW5 as the person who was accompanying the deceased during the entire time she was seen alive at the hotel. This fact is not disputed by the accused person. By his own admission, he spent time with the accused spent time with the deceased on the material date, time and place. The fact of accused being "last seen" with deceased is thus corroborated.

Circumstantial evidence and the Doctrine of Last seen

152. In the present case, there is no doubt that there was no eyewitness availed to testify, who actually saw the occurrence of the deceased's death. In the absence of direct evidence, all the evidence availed by the prosecution is circumstantial.
153. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court had this to say on circumstantial evidence:
- “...However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence.” (Emphasis added).
154. Circumstantial evidence cannot be relied upon willy nilly. It has been held in numerous cases that in order to justify a finding of guilt, the circumstantial evidence, taken as a whole, ought to be such that the inculpatory facts lead to the irresistible conclusion of guilt and that there should be an absence of any co-existent facts that are exculpatory or explicable on any other reasonable hypothesis save the guilt of the person accused. See *Teper v Republic* [1952] AC 480; *Kipkering Arap Koskei & Anor v Republic* [1949] 16 EACA 135 and *Ndurya v Republic* [2008] KLR 135.
155. As to circumstantial evidence, it was further stated in *Julius Suvi Ndambu v Republic* [2016] eKLR as follows:
- “From the post-mortem report, there can be no doubt that the deceased's death was caused by someone who intended it or intended grievous harm to her. However, no one witnessed the murder hence the prosecution relied on circumstantial evidence to connect the appellant to the murder.



For a conviction to be rightly based on circumstantial evidence such evidence must meet a certain criterion. This Court in *Musili Tulo vs. Republic* [2014] eKLR, while discussing the criteria observed,

“It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-

- 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
- 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.”

156. We now discuss the circumstantial evidence that was availed at the hearing.

157. PW2, Ambrose Mapesa was the waiter at the hotel. His testimony was that when the couple arrived at the hotel, he was at the bar and saw them arrive. Their car parked outside the bar, and the couple walked to the bar. As they needed to be served at the reception, he escorted them there and got PW1 to serve them. He went back to the bar. The couple then went to the pool area and he served them. He said the couple stayed at the poolside area until 5.30 or thereabouts. They then moved to the terrace. He was the only waiter that served the couple.

158. The deceased ordered ginger tea, whilst the accused had momentarily gone somewhere, but soon returned. At around 6.30 – 6.45 pm the couple got up to go to their room. The deceased asked for the menu and it was brought. The couple then left to their room.

159. The accused confirmed in his evidence that when they left the bar/reception area they went to their room. He stated that:

“We asked for the menu then went to the room with it. We spent some time in the room. We knew we had to place an order. After spending some quality time, I left for a jog. This was about 8.30 pm”

160. Clearly, the accused was with the deceased from the time they got to the hotel to the time they went to the room at 6.30-6.45pm according to the evidence of PW2. Further they were together from 6.30pm until at least 8.30pm according to the accused’s evidence in chief and from his statements. There is no doubt that he was the last person seen with the deceased, and that the deceased was found dead in the bathtub just one hour or so later.

161. There was testimony that the room they had booked was locked with a key (PW17). That there was no sign of breakage or intrusion into the compound of the hotel. - He is a security officer at Jacaranda testified that there was no breach at the premises on the material date and time. He inspected the premises, including the fence and there was no breach in security (PW8).

162. PW2 testified that he saw the accused again at about 9:30 pm at the door to the terrace area. To him, the accused appeared to be sweating and breathing heavily or panting. He was wearing a grey t-shirt and blue jeans. PW2 asked if they were ready for dinner but the accused told him that he had been



- trying to call his wife but she was not picking the phone. He, PW2, left the accused for a short while, went into the restaurant and returned.
163. From PW2's own observation, the accused was in deep thought with his hands folded. According to PW2 the accused then proceeded to the reception. Later PW2 learnt that the accused person's wife had died inside the room. PW2 confirmed that he later saw the deceased body in the bathtub and at that time he also saw the accused person lying on the bed in the room.
164. From the evidence, the next person the accused apparently saw was PW3 that night was Dalmas Kairish, a waiter at the hotel. PW3 stated that he went to the reception at about 9.00pm to pick tea for his colleagues at the gate. He was then called by Benson Sururu (PW4) who told him there was a guest who had left someone in the room and needed a duplicate key as the guest was not answering his calls.
165. Sururu tasked PW3 to escort the accused with a duplicate key to the accused's room. When they got to the room, they found the deceased's body in the bath tub.
166. It was submitted by the defence that that there being no evidence that the accused was seen killing the deceased, the prosecution case against the accused is based on purported circumstantial evidence and mere suspicion.
167. The accused further submitted the basis of the purported circumstantial evidence is, first, that the accused was the last person seen with the deceased alive, second, the allegation that the accused had an injury around one of his eyes insinuating he might have fought with the deceased, third, that the accused had a motive to kill the deceased based on an allegation that the deceased suspected the accused of infidelity, and fourth, that the accused admitted and/or confessed to PW15, Dr. Isaac Micheni and PW16 Richard Barno, that he assaulted the deceased and arranged or re-arranged the scene.
168. It is true as argued by the defence, that there is no evidence on record to the effect that the deceased and the accused were in any verbal or physical altercation, especially as they were in full view of the staff of the hotel. However, as regards, the "principle of last person seen with deceased", the law is as stated in *Kamau v Republic (Criminal Appeal E131 of 2022) [2024] KECA 1193 (KLR) (20 September 2024)* where the Court of Appeal said:
- “ 33. The record is unequivocal that the appellant was the last person to have been seen with the deceased a few hours before her death. In particular, after they left PW3's house they were accompanied by PW4, who saw the two turn into their gate, and then continue onwards to her home. Being the last person to have been seen with her, the circumstantial evidence pointed inextricably to him to extricate himself from blame. Given the circumstances, under section 111 of the *Evidence Act*, the burden now rested upon him to explain what happened to her or how she met her death. In his defence, he stated that, after he left her in the house, he went to get his motorcycle; that when he returned, he found his wife was dead. He did not proffer any explanation as to how the deceased met her death, and nothing in the evidence pointed to any other person as having been responsible, since PW1 and PW2 were asleep in nearby rooms, but did not hear any screams coming from the deceased.
34. When the totality of the evidence is considered, it becomes apparent that the appellant failed to prove his innocence and, having failed to do so, an adverse inference must be drawn that he and no one else was the person who caused the death of the deceased as no other reasonable hypothesis can be drawn.



35. Concerning malice aforethought, section 206 of the *Penal Code* specifies that: 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.”
36. In the locus classicus case of *Republic vs Tubere S/O Ochen* [1945] 12 EACA 63 it was held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
37. This position was reiterated by the Supreme Court of Uganda in *Rwabugande vs Uganda* [2017] UGSC where it laid down the circumstances from which an inference of malicious intent can be deduced as follows: The weapon used, (b) the part of the body targeted i.e. whether it is a vulnerable part or not, (c) the manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted and (d) the conduct of the accused before, during and after the incident i.e. whether there was impunity.”
38. In the instant case, the evidence adduced was that the deceased was strangled, and that she had a cut wound to the head. It was obvious that the act of strangulation by exertion pressure on the neck was an act that was deliberately intended to kill her, so that there can be no question that malice aforethought was established.
39. Consequently, given that the deceased died from strangulation, and that the appellant, who was the last person to have been seen with her did not provide any explanation on how she was strangled, or absolve himself from her death, and considering that malice aforethought was established by the manner of strangulation, we are satisfied, that the learned judge rightly concluded that the prosecution proved its case to the required standard that the appellant murdered the deceased.”
169. In the *Kamau v Republic* case cited above the Court of Appeal referred to the case of *Moingo & Another v. Republic* [2022] KECA 6 (KLR) where the Court of Appeal reiterated that:
- “The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased).” See also *Ngeno vs Republic (Criminal Appeal 24 of 2016)* [2024] KECA 757 (KLR). (Emphasis added).



170. In light of the foregoing, I accept that the doctrine of last seen is applicable to the present facts in this case.

The alleged jog and Alibi

171. However, the accused had a defence. He brought this out at the pre-trial conference when the defence counsel stated that the accused was present at the hotel, but was not in the room when the death occurred.

172. The accused stated in his evidence that he went out on a jog at 8.30 pm, and on the way met two uniformed police officers, one of whom he later came to know was called Kulitiang. After jogging, he called the deceased who did not respond. He said he even went to the room and knocked on the door but she did not answer. He stated that he could not open the door as it was a bang and lock type which needed to be opened from outside once shut.

173. He then went back to the reception to get help to enter into the room, and according to him that was when he discovered the deceased dead in the bathtub. On its part, the prosecution alleges he did the act before he left the room. If the alibi stands, the prosecution's case against the accused instantly fails. It is therefore necessary to inquire more keenly into the alibi.

174. Black's Law Dictionary 10th Edn, defines "Alibi" as follows:

"A defence based on the physical impossibility of a defendant's guilt by placing the defendant in the location other than the scene of the crime at the relevant time."

175. Section 111 of the *Evidence Act* provides for instances where the burden of proof may shift to the accused person. It states:

“(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 defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or



- (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or
- (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.” (Emphasis added)

176. From the foregoing, it is clear that if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused, the accused is entitled to be acquitted.

177. The law on alibi is clarified in a number of authorities. In *Kimotho Kiarie v Republic* [1984] eKLR the Court of Appeal (Kneller JA, Chesoni & Nyarangi Ag JJA) Criminal Appeal 93 of 1983 stated as follows:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable; *Said v Republic* [1963] EA 6. The judge erred in accepting the Senior Resident Magistrate’s finding in the alibi because the finding is not supported by any reasons. It is not possible to tell from the judgment of the Senior Resident Magistrate if the correct onus was applied and if the prosecution was required to discharge the alibi *Raphael v Republic*, [1973] E A 473. The defence of alibi was rejected for unrevealed reasons. That was a grave omission. The errors of law on the finding on identification and on the alibi are of such a nature that it is reasonably probable that without them the Senior Resident Magistrate would not have convicted the appellant. The appeal succeeds, the conviction is quashed, the sentence and the police supervision order set aside and the appellant shall be set at liberty forthwith unless he is otherwise lawfully held. That is the order of this court.”

178. There is no doubt that the duty to prove the falsity of an alibi lies with the state; and that it is not for the accused to prove his innocence. In the case of *Karanja v Republic* (1983) KLR 501 the court held that:

“the burden of proving the falsity, if at all, of an accused’s defence of alibi lies with the prosecution. The court also held that the court may, in testing the defence of alibi, weigh it against all the evidence adduced to see if the accused’s guilt is established beyond all reasonable doubt ...”

179. Thus, as already pointed out, it is not the role of the defence to prove the alibi. If the alibi introduces into the mind of the court a doubt that is not unreasonable, that is sufficient to lead the court to affirm the alibi, and the doubt is adjudged in favour of the accused. It is apt to refer to several authorities which bind this court on the question of alibi. The Court of Appeal has adopted some principles from jurisdictions outside Kenya on this issue. For this purpose, I will quote rather extensively from the said authority to maintain focus on the core attributes surrounding the question of alibi, including its reasonableness.

180. In *Erick Otieno Meda v Republic* [2019] eKLR in the Court of Appeal at Kisumu (*Asike Makhandia, Kiage & Otieno-Odek JJA*) Criminal Appeal No. 55 of 2015 stated:

“18. In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence



entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of *Kiarie v Republic* [1984] KLR, this Court stated:

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

19. In the recent case of *Victor Mwendwa Mulinge v R*, [2014] eKLR this Court rendered itself thus on the issue of alibi:

“It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution....”

20. Comparatively, in the South African case of *S v Malefo en andere* 1998 (1) SACR 127 (W) at 158 a - e the court set out five principles with respect to the assessment of alibi evidence:

- (a) There is no burden of proof on the accused to prove his alibi.
- (b) If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.
- (c) An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."
- (d) If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").
- (e) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.

21. In another persuasive South African case of *R - v - Biya* 1952 (4) SA 514 (A) at 521C - D Greenberg JA said:

“If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.”

22. In *S v Sithole* 1999 (1) SACR 585 (W) at 590g - i it was correctly stated:

“There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if



there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus, in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken.”

23. The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:
- (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.
 - (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
 - (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
 - (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See *Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)*)
24. In the instant matter, the two courts below considered the alibi defence raised by the appellant. The question is whether the defence of alibi adduced by the appellant can stand. The law prior to the repeal of Section 235 of the *Criminal Procedure Code* required that an accused who wished to rely upon the defence of an alibi, had to give the particulars of the place where he was, and the particulars of the persons with whom he was. The law today is that it is up to the prosecution to displace any defence of an alibi and show that the accused was present at the place, and at the time the offence was committed by the accused or his accomplices. (Emphasis supplied - See *Republic v John Kimita Mwaniki [2011] eKLR*).
25. In the instant matter, the two courts below arrived at a conclusion that the alibi defence witnesses were not credible as they gave contradictory evidence as to the date when the appellant returned to his home from the funeral. In our considered view, the date when the appellant returned to his home was not a material fact in placing the appellant at the scene of crime. The material fact and date relevant to placing the appellant at the locus in quo is whether the appellant was at his house on 6th June 2010 or if he was at Awasi on the



said 6th June 2010. The two defence witnesses DW1 and DW2 both place the appellant at Awasi on the material day of 6th June 2010. On the alibi defence, the evidence of DW1 corroborates the testimony of DW2. The two courts below erred in not considering the corroborative effect of the alibi testimony of the two defence witnesses. The witnesses gave direct evidence of eye witnesses that they saw the appellant at Awasi on 6th June 2010. It was incumbent on the prosecution to discount and disprove this corroborative evidence. The prosecution failed to do so and a reasonable doubt was cast on identification of the appellant as the person who committed the alleged offence. It was incumbent upon the prosecution to prove that the alleged recognition of the appellant by PW1 was not mistaken or false. No person can be at two places at the same time.

26. Given the existence of the corroborative evidence of DW1 and DW2 on record, the prosecution should have gone further and placed the appellant at the scene of crime not only on the material date of 6th June 2010 but at the time at which the offence is alleged to have been committed. (Emphasis supplied)
27. On record, there is no explicit evidence to indicate the time at which the offence was committed. The complainant's mother PW2 Silba Achieng Ouko testified that she had sent PW1 to the posho mill at 2.00 pm and that PW1 returned at 4.00 pm. In order to dislodge the alibi defence, the prosecution should have led evidence to place the appellant at the scene of crime between 2.00 pm and 4.00 pm. In the absence of such evidence, the alibi defence is probable and casts doubt on the prosecution case.
28. In totality, we find that the two courts below erred in their consideration and evaluation of the corroborative alibi defence given by DW1 and DW2. We thus find that identification of the appellant as the perpetrator of the alleged offence was not proved beyond reasonable doubt. Accordingly, we allow the appeal, quash the conviction and set aside the life sentence meted upon the appellant. The appellant be and is hereby set forth at liberty unless otherwise lawfully held."

181. The accused's alibi was that he went jogging; and that whilst doing so he met Kulitiang a police officer, before he finally called the deceased to find out what she wanted for dinner so he could make the order.
182. It is proper that I place on record in this decision the fact that the prosecution' after closing its case, applied to re-open its case to call Kulitiang to testify. The defence opposed the application. This court upheld the defence objection that th prosecution could not re-open its case because the state had always had access to Kulitiang to give evidence. Ultimately, during the defence's case, the accused declined to call Kulitiang, as he was duly entitled to. Thus, the evidence of Kulitiang was not available in support of or against the alibi in this case.
183. From the authorities cited above, several issues arise concerning alibi evidence: First, it is not for the accused to prove the alibi; Second, a successful alibi rules out the accused as the perpetrator of the offence; Third, proof of the falsity of the defence of alibi lies in the hands of the prosecution; Fourth, an alibi needs to be corroborated by other witnesses and should not be just a regurgitation of the events from the accused's point of view; Fifth, credibility of the alibi defence is essential; Sixth, consideration of the alibi is essential in the light of all the other available evidence.



184. In a case like the present one where no alibi witness is called, the court must carefully scrutinize the accused's own testimony about his whereabouts during the crime, looking for internal consistency, corroborating details from other evidence, and assessing the plausibility of his story against the prosecution's story. The burden remains on the prosecution to disprove the alibi beyond a reasonable doubt.
185. In the present case, the accused stated in his statements and in his evidence in chief that he left his room to go and order food at about 8.30pm. That was his consistent story throughout. He further said that he had spent quality time with the deceased before he left the room; that he met Kulitiang whilst jogging; that he jogged for about 45 minutes to one hour. This would mean that he was with the deceased from 6.30pm when they left the reception with the menu heading to their room, up to 8.30pm when he allegedly left the room. That is to say, he spent two hours with the deceased. If true, it would also mean that he first saw the deceased dead when he opened the room with the spare key in the presence of PW3 at about 9.30pm.
186. The accused's alibi seemed to me to break down when the accused was under cross-examination. At that point, he admitted that nowhere in his statements had he even once mentioned going for a jog. Further, in cross-examination, he adjusted the time when he left the room for a jog to 7.30 pm. The net effect is that from cross-examination, the credibility of the evidence of alibi comes into sharp focus.
187. If the accused left the room at 8.30 pm, and was at the reception at 9.00 pm as testified by PW2 and PW3, then he could not have gone jogging for 45 minutes to one (1) hour as he testified, and as contained in his statements. It appears to me that this discrepancy is what informed the accused, during cross-examination, to change the time of his departure from their room to 7.30 pm, to make for a better fit for his jogging narrative.
188. In that regard, the accused had testified in chief that he left for the jog at about 8.30pm. In cross-examination by the prosecution, it was put to him that he had never mentioned going jogging in his statements; and when the statements were read out to him, he admitted that:

“From my statements, the issue of jogging is not indicated”

It was also put to him that his statements only indicated that he had gone to order food. He affirmed that, but insisted that:

“The evidence on jogging is not an afterthought. As per the two statements it is indicated that I left the room at 8.30pm. I confirm. It is not true that by the time I left the room and locked the door my wife was deceased...”

189. It is significant to note that throughout the cross-examination by the prosecution, and the cross-examination by Mr Ngunjiri for the family, the accused did not make any adjustment of the time when he left the room. It was only after the accused was cross-examined by Mr Owuor, also for the family, that he changed the time he left for jogging to 7.30pm. He stated:

“In the statement it is said I left the room at 8.30pm in the evening. I have corrected to 7.30pm But from my statement at pg 108 of the proceedings I went to get my charger [and] gym bag. This took place at the terrace. I charged and went for a jog. The record is not following...” (Emphasis added)



190. His evidence in chief, however, clearly indicates that he went for his gym bag and charger whilst they were at the terrace sometime before 6.30pm, and he did not use his charger or jog immediately after that. PW2 corroborated this when he stated in chief:

“After staying at the terrace about 30 minutes, the man (accused) went – I thought to the washroom. He stayed there about 30 minutes. The lady ordered ginger tea. When I took tea to her the man had returned. Around 6.30 – 6.45pm both man and lady got up to go to their room.”

191. It was after this that the couple asked for the food menu then went to their room. In addition, the accused testified that whilst he was in the room – which was after 6.30pm-6.45pm – he spent quality time with the accused before he left the room.

192. Further, the accused had testified that he had mapped the area for a jog before he went to the room. If true, the whole question of jogging would have been a focal priority to the accused that evening. Thus, his failure to mention going jogging at all in his statements and sworn evidence was quite curious.

193. In addition, it is also curious that the accused allegedly went jogging in his jeans when, according to him, he had all along planned to jog; had allegedly mapped the route; was known as a jogging enthusiast; and he had brought his complete gym bag with shorts, t-shirt and jogging shoes along with him, but he did not use the shorts.

Conclusion

194. Having listened carefully to the accused on this issue of alibi and assessed its plausibility, I do not find the accused’s evidence on the alleged alibi to be credible. Given all the circumstances, I find this aspect of his story on jogging to be an obvious afterthought. Accordingly, I am not persuaded of the truthfulness of the accused’s evidence of alibi and hereby reject it.

195. In the result, I find that the accused had time and opportunity of at least two hours between 6.30 to 8.30pm in the room with the deceased before he, by his own admission, allegedly went out of the room for whatever purpose including to make an order for food. By 9.00pm the deceased was dead in the same room he had been in with her.

The scenario at the bathtub and discovery of the deceased’s body in it

196. The evidence of PW3 is critical as to the first evidence of the deceased’s body being found in the bath-tub. He was an eyewitness of the events and scenario surrounding the deceased after she was discovered dead. He had accompanied the accused, on instructions from Sururu PW 4 with the spare key, to the room at around 9.00pm.

197. According to PW3, after he and the accused reached Room 17, the accused opened the door and went into the room. PW3 did not initially enter; he remained at the door. In his evidence in chief he said he then saw the accused back-track with his hand on his head, and PW3 thought he might fall so he went in to steady him. The accused told him the deceased was asleep in the bathtub and asked him to check if she was breathing. PW3 went in. He did not enter the bathroom, but saw the deceased’s body half submerged in the bath-tub.



198. In cross-examination by defence counsel, PW3 stated:
- “When accused entered the room he ‘zubaad’ as he saw no one. Then he went to the bathroom. He pushed the bathroom door. He did not enter. He asked me to check if she was breathing. I could see him opening the bathroom door as I stood inside.”
199. In cross-examination, PW3 admitted that he had stated in his statement that the accused had asked if there was a doctor in the hotel.
200. On his part, the accused in his defence testified that when he entered the bathroom, he saw the deceased in the bathtub. He called her but she did not respond. He shook her but still she did not respond. He then called Dalmás (PW3) to check her and to look for a doctor. He said he was in shock and lost his balance, so PW3 took him outside where he sat.
201. The totality of the evidence of the first entrance into the bathroom is rather passive and humdrum given the occurrence and discovery of the death. From the description of the accused by PW3, there was no visible sense of urgency, no anxiety, frustration, irritation, surprise, or shock evident, as might reasonably be expected when one first sees his loved one in a greatly endangered state. The accused doesn’t appear even to have gasped. It seems that all he asked PW3 was the rather strange question whether she was breathing, and then asked if there was a doctor.
202. Although the accused himself testified that he was confused and weak, he did not exhibit that attitude. He was not so confused, weak and unalert as not to ask for a doctor; he asked PW3 to call for one. He said he lost his balance and was led to a seat by PW3, a fact PW3 admits. However, he appears to have done nothing in the intervening time until the hotel manager (PW5) and Sururu (PW4) came to the room with PW3.
203. On his part, PW4s evidence of what he saw in the bathroom when he arrived was simply that he went in and found the deceased dead. The accused had moved to the bed where PW4 saw him sitting with his hands on his head.
204. In cross-examination, PW4 stated that there was no water on the floor, the soap had not been used, but the shampoo appeared used. Cross-examined by the defence, PW4 admitted that his statement had not indicated how the accused looked, or that he had his head in his hands. He also indicated that when the accused had come to him for a spare key, he had appeared normal.
205. On his part, PW5 (Anthony Mwai) says he rushed to room 17 after getting information from Sururu. He found the accused seated on the bed with the guard called Kulitiang there, and his head was in his hands. The bathroom door was ajar and he saw the deceased lying lifeless in the bathtub.
206. According to PW5 the accused was wearing the same clothes (a pair of jeans, a jumper and slip-on shoes) which he had been dressed in when he saw him earlier. In cross-examination by Mr Owuor, PW5 reasserted the clothing he had earlier seen the deceased in. He stated that the bathroom floor was dry. He also admitted that in his statement he had not indicated that the deceased had his head in his hands
207. It is clear from the evidence that the bathroom floor was dry, and that the soap had not been used (though the shampoo had) that the deceased had not had a normal bath. The prosecution suggested that the strangulation had occurred first, then the body placed in the bath-tub. This is not implausible.
208. The defence asserted that an intruder had entered the room, hence the missing key, and committed the offence. However, the intrusion theory is more difficult to support, given that there was no evidence



of a break-in, nothing was stolen from the room, there was no sexual abuse, and there was no forensic evidence of self-defence or any defensive action. This suggests that the culprit was probably well known to the deceased, and the event occurred suddenly within an environment of trust, rather than external intrusion.

209. Further, the missing-key theory appears to me to be a red herring in that even if the room could only be accessed with a key once the door was shut, then an intruder would have faced the same obstacle – of entering the room – that the accused allegedly faced once he left the room.

Deceased's relationship with the accused and whether it may have contributed to the murder

210. There is no doubt that the deceased and accused did not have an openly flagrant tumultuous relationship. Like many couples they were able to keep the worst of their challenges from the public eye. On this basis most of the witnesses who commented on the couples' relationship said it had only the ordinary ups and downs. None of the witnesses expressed any grudges with the accused or deceased.
211. PW7 Jesca Mutua, the deceased's sister testified that the deceased's Family was very close to hers. According to her, the couple had a good relationship until the last year of her life when it was a bit rocky. The deceased suspected that her husband, the accused, was having an affair.
212. On cross-examination, she was put to task by the defence counsel concerning her statement where she had said the deceased never complained to her of any big issue in her marriage. PW7 said having an affair is normal common issue in Kenya; that her written statement indicated that:

“Rhoda was not accepted by her husband... For about one year Nicholas came home at wee hours. She decided to confront him”

213. Still in cross examination, PW7 conceded that her further statement amended her first statement as concerns the relationship between the couple.
214. The other person who spoke about the couple's relationship Richard Barno (PW16), and husband to PW7. He said he was close to the family; that every marriage had its challenges; that they spoke of their marriages as couples but nothing ever stood out.
215. The data in the deceased's phone was examined. SMS and Whatsapp messages were produced by PW12, Inspector Sammy Nyaga Ndungu, of the Digital Forensic Laboratory at DCI Hqs as PExbs 10-14A together with their certificates.
216. PW17 Sgt Alice Monari, the co- Investigating Officer with Sgt Muriuki, took the Court using a screen and monitor through the information in the Compact Disk PExb 13A. This comprised whatsapp messages in the deceased's phone between one Moze of tel 256 7727203, a Ugandan number, and the deceased. Some of the messages were as follows (pg 88 of the proceedings):

“-On 15th Feb2017 pg 2590 CD Moze tel 2567727203 said Trust me I gotchu.

-Pg 2591CD Deceased on 15 Feb 2017- I don't know how to handle infidelity Tel 254 72141178

-Pg 2604 CD 15th Feb 2017 254 72141178 Deceased says he chose to spend valentine with some other lady other than me

-Pg 2602 CD 15th Feb 2017 Moze to deceased 2567727203 Moze said the Nick you know could never do that to you



-Pg 2638 CD 17th Feb 2017 Moze 2567727203 Moze to deceased asks: just for curiosity sake how long has the affair been going on for...”

Finally, in one of the highlighted messages the deceased says she no longer trusts the accused.

217. When confronted with this information during cross examination by Mr Owuor, the accused admitted:

“I now know Moze. I am the one who introduced him to my wife. I don’t know why they were discussing our relationship. I don’t know that number. I know my wife’s numbers. It is the one sending messages to my wife”

218. In a nutshell, the deceased is herself speaking in her whatsapp messages concerning her difficult relationship with the accused. As earlier pointed out, it is not difficult for couples to be secretive with the really deep challenges they face with their spouses, and only be forthcoming to a very limited circle.

219. I would conclude that it is not difficult to find that the accused and deceased had marital challenges. It is evident from the data obtained from the deceased’s phone as extracted by PW 12, that their marriage was not doing well. From the messages the deceased wrote while confiding in her friend it is evident that she suspected the accused of infidelity. PW 7 also gave evidence of a troubled marriage between the deceased and the accused. The accused strenuously rejected this evidence, painting a picture of a happy couple in his evidence in chief and through his witness, DW2.

220. The accused submitted that the prosecution witnesses gave contradictory evidence that was not credible. First, that it is only PW7 Jessica Kagwiria Mutua (sister to deceased) and PW17 who made this allegation. However, PW6 Robinson Kirimi (a cousin to deceased), PW15 also a cousin to deceased and PW16 (husband of PW7 and a brother-in-law to deceased) all testified that the accused and the deceased as a couple had a good relationship with no issues that stood out and the deceased had not complained to any of them about any issue concerning the accused –let alone the alleged infidelity.

221. It is noteworthy, that PW7 conceded on cross-examination by defence counsel that in her initial statement to the police she had indicated; “the two had been staying together with no major quarrels except petty issues in normal marriage” but she amended that status of the marriage of accused in a further statement. It is noteworthy that from the telephone data of the phone of the deceased produced by the I.O. PW17 no communication was picked out between PW7 and the deceased, let alone any allegation of strained marriage between accused and deceased.

222. In the following case the court held that the circumstances must be such as to produce moral certainty to the exclusion of any other reasonable doubt. The case is that of Julius Suvi Ndambu v Republic [2016] eKLR where it was stated:

“Did the circumstantial evidence adduced by the prosecution meet the above criteria? The fact that the appellant was seen with the deceased at the scene a few hours before her body was discovered coupled with the fact that their marriage was faced with the difficulties alluded to, in our view, did not irresistibly point towards the appellant’s guilt. The appellant and the deceased may have had matrimonial differences but numerous reconciliation initiatives had been undertaken in the past. The appellant had indeed visited his father in law in yet another attempt to resolve the dispute. Nothing was adduced in evidence to indicate any overwhelming differences as to trigger the appellant to commit the offence.”



223. The accused submitted that on the allegation that the accused admitted to assaulting the deceased to PW 15 and PW 16, this evidence was an afterthought as it does not amount to an admission or confession.
224. Further, it was the evidence of the prosecution that the deceased was discovered lifeless by the accused and PW3 after they accessed the room using a spare key which the accused had requested for from the reception. The record is also clear that PW3 testified that they were chatting with the accused as they walked to the room and he had no evidence of any abnormal behaviour from the accused
225. The accused submitted that the Investigating Officer-PW17 was explicit that despite looking for the original key, it was never found. It is apparent from the record that the prosecution seemed contented with the insinuation that the accused locked the door from outside on the disputed question of the nature of the door lock -whether normal lock or bang and lock.
226. From the evidence adduced, it can be said with certainty that the relationship between the deceased and accused was not outwardly tumultuous. The couple tried very much to keep any evidence of a strained relationship away from the family and friends. However, it cannot be denied that the couple had their marital challenges.
227. In particular, the evidence from the whatsapp messages between the deceased and Moze, their mutual Ugandan friend, clearly pointed out that all was not well between the couple, and trust was lacking. For the avoidance of doubt, it is not intended to convey that this lack of trust was the motive behind the murder, but may have contributed.

The alleged Admission

228. The evidence of Dr Micheni, PW 15, was that the accused disclosed to him that he had told a falsehood to the police regarding what had actually happened; to wit, that he had had an altercation with the deceased and had roughed her throat; and that the accused has had to recreate the scene. I agree with the defence submission that the said evidence cannot be treated as an admission or confession, but rather like any other admissible evidence. To that extent, this court relied on it as normal evidence. The court also specifically made a note on the demeanour of the witness.
229. The explanation by PW15 that he had given his first statement merely as evidence concerning his role at the post-mortem, was sufficient to explain why he had to do a second statement after July 10th when he met the accused. Thus the rule against embellishment and that truth will best come out in the first statement of a witness as set out in Benjamin Nzioka Makau & Anor v R 2020 eKLR does not strictly apply.
230. The defence also asserted that the evidence be rejected since it was not given as a further statement to the police, and was delayed from immediate recording by the police for seven days after it became available; and that the said evidence lacked credibility given that there was no proof of the phone calls setting up the meeting of 10th July 2017.
231. The evidence that there was a meeting on 10th July 2017, was corroborated by Richard Barno PW16. However, his evidence is objected to by the accused because he had not signed a written statement, and did not give his statement as part of examination in chief; and that the evidence was elicited only in cross examination.
232. The prosecution in response pointed to the provisions of section 146(2) of the *Evidence Act* to the effect that evidence can be elicited on cross-examination that may not have been provided in chief.



On this, I agree with the prosecution since there is no requirement or rule of law that evidence that is corroborative must emanate from evidence in chief of the corroborating witness.

233. After carefully reviewing the parties' submissions and the evidence, I am persuaded that the witness, Dr Micheni was credible and truthful; and I have no doubt that the discussion between the accused and Dr Micheni occurred.

Malice aforethought

234. The Prosecution submitted that they adduced evidence that showed planning by the accused. That the accused asked his wife to join in the trip (PW 7). He alone made the reservation, made sure to ask for a room with a bathtub while volunteering, unprompted, that his wife liked to take baths (PW1). He admitted to setting up the scene of crime to save his wife's reputation (PW 15). He sought to influence the post mortem, asking to be told the Doctor who would conduct the post Mortem (PW15).
235. The defence submitted that there was nothing availed by the prosecution to prove actus reus and mens rea on the part of the accused. The accused denied any intention to inflict harm on his wife or any intent whatsoever on the part of the accused.
236. The prosecution in reply to the submissions of the defence on this issue pointed to the Court of Appeal case of John Mutuma Gatobu v R [2015] eKLR where the definition of malice aforethought was highlighted as follows:

“That leaves the question of malice aforethought. With respect to the appellant's learned counsel, malice aforethought in our law is used in a technical sense properly defined under Section 206 of the *Penal Code* thus;

“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 cause 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.”

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought.



237. In the locus classicus case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 it was held that:

“...An inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.”

238. Here, the deceased was strangled. As already stated, when the accused went to the room with PW 3, the conduct he exhibited was not that of a person who was taken aback, surprised, or shocked at the sight he saw in the bathtub. Although the accused himself said he was shocked, the witness with him (PW3) did not give similar evidence. PW3 said the accused did not enter the bathroom, but placed his hands on his head and backed-tracked. The evidence shows that the accused was not experiencing the sight he was seeing for the first time. In essence, he was essentially acting as if he knew nothing about the happenings in the bathroom.

239. Further the alibi, which this court has found not credible, was intended to place a distance between the accused and the events that occurred in Room 17 between 6.30 pm and 9.00pm. With the collapse of the alibi, and given the evidence that there was no breach into Room 19 whatsoever, I find that the accused was with the deceased in the room until he left the room and got to the reception at about 9.00pm, and there reported that he needed a spare key.

240. Given the totality of the evidence already assessed, I have no difficulty in finding that the prosecution proved malice aforethought.

On failure to call material witnesses

241. I have noted the accused’s submissions that the prosecution failed to call material witnesses who appear to have critical evidence connected to the offence charged. One was the guard of Eburru Area where room 17 (Warthog) is situated, and the other is John Kulitiang ; in addition there were the two armed police officers from Gilgil Police Station who were guarding the hotel on the fateful night as per the evidence of PW8- David Mutua Mwele- the hotel’s security officer. Finally there was Moze, the person alleged to have been in communication with deceased about issues in their marriage.

242. I agree however, with the prosecution that the witnesses called did not make material contradictions in their testimonies. Further, it is trite that it is not necessary to call all other witness merely to prove the same facts.

Conclusions and Disposition

243. There was no dispute that the deceased died through an act of murder by way of being strangled by the throat leading to asphyxia. This occurred in the hotel room occupied by both the accused and deceased during the two hours immediately preceding the deceased’s strangulation.

244. The accused was the person last seen with the deceased during that time. The circumstantial evidence all points unrelentingly to the accused, whose alibi turned out to be a sham and an afterthought.

245. The deceased’s death was caused by someone who intended it or intended grievous harm to her, given that the perpetrator strangled her by the neck. That person could only be the accused who was with her throughout, up to the time of her death. However, as no one directly witnessed the murder reliance was placed on circumstantial evidence which readily connected the accused to the murder. I found that from the record the accused was last seen alive with the deceased and that the principle of last seen alive applies herein.



246. The murder occurred on the night of 8th July 2017 some-time during the period between 6.30pm when the couple came into their room together, and about 9.20pm when the accused and PW3 entered the room using a spare key and found the deceased dead in the bathtub.
247. The evidence is clear that the deceased did not in fact take a bath given that the floor was dry and the water had no soap, nor had the soap been used. There were no defensive marks on the deceased, and the bathroom was not in disorder
248. There was evidence that the bedroom of Room 17 was dishevelled suggesting and giving credence to the fact that the murder took place there, before the body was placed in the bathtub. The evidence clearly shows that there was no intrusion into Room 17
249. There was evidence that the accused disclosed to Dr Isaac Micheni, PW15, what he allegedly did. The disclosure did not lack credibility purely on account of the fact that Dr Micheni did not disclose the accused's statement to the police at the time of attending the post mortem and instead did so later on 18th July 2017.
250. In light of all the foregoing, I hereby find that the prosecution proved the ingredients of the offence of murder beyond reasonable doubt. Accordingly, I hereby convict the accused for the offence of murder.
251. The Probation Officer shall file a Pre-Sentence Report within 21 days from the date hereof.
252. Mitigation shall be on a date to be agreed.
253. Orders accordingly.

DELIVERED VIRTUALLY AT NAIVASHA HIGH COURT THIS 4TH MARCH 2025

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R MWONGO

JUDGE

Delivered in the presence of:

1. Mr Nicholas Cheruiyot, the Accused
2. Mr Muriithi, counsel for the accused
3. Ms Maingi together with Mr Atika for the State
4. Mr Owuor together with Mr Ngunjiri for the Deceased's Family

