Republic v Bargoge (Criminal Case 62 of 2014)
[2025] KEHC 10824 (KLR) (22 July 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL CASE 62 OF 2014

PN GICHOHI, J

JULY 22, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

GEORGE KOMEN BARGOGE ..... ACCUSED

JUDGMENT

1. George Komen Bargoge (herein referred to as the Accused), was arraigned in Court on 12/5/2014 where he was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on 10th July, 2006, at Solian village of Solian Location in Koibatek District within Baringo County, murdered Alexander Kibiwott Cheserem. He denied the charge.

Prosecution Case

2. The brief facts of the case presented by 6 witness were that having worked with Dr. A. G Gachau for a long time in different places , Dr. Titus Ngulungu (PW1) was familiar with his handwriting. He produced the Post Mortem Report (Prosecution Exhibit-1) conducted on the deceased at the Valley Hospital on 14/7/2006 following request from Eldama Ravine police station.

3. According to the report, the skin of the deceased's palms had showed water logging and signs of decomposition. The body had signs of lack of oxygen before death, cyanosis seen on the nail beds and palms of the hands.

4. There was a 2 cm long bruise on the left upper limb and bruises on the upper eye lids. On the left side of the head there was a 7mm laceration on the front of the chest and an imprint bruise on the left side.

5. Internally, there was a congestion of the air ways and injury on the neck and bruising of the mesentery, particularly the spleen. The doctor concluded that the cause of death was asphyxia caused by throttling and immersion in water.

6. The deceased's elder brother Musa Cheserem (PW2) recalled that on 11/7/2006 and while at home with his brothers Aaron, Kibet and a neighbour called Peter, the Accused herein arrived at about lunch hour and in company one Kibet and informed them that the deceased slept in his house the previous night but that the deceased left them early in the morning at around 5:30 am.

7. The Accused informed them that he and Kibet had found the deceased's shoes near the dam about 400 meters from their house. He therefore inquired whether the deceased had come home.

8. PW2 explained that though he was not close to the Accused due to their age difference, he was aware that the deceased claimed that Accused owed him money. It was however not normal for the deceased not to return home in the evenings.

9. They immediately accompanied the Accused and their neighbour Kibet towards the dam where the shoes were allegedly seen. Upon arrival, they saw the deceased's yellowish/cream sweater inside the dam but it was muddy and looked discoloured.

10. PW2 went to report the issue to the Assistant Chief who came to the scene but upon arrival, they found that the Accused had vanished leaving behind his brothers. Soon thereafter, they reported the matter to the area Chief but nothing much was done.

11. The following morning, PW2 went back to the scene while in company of the area Chief and by that time, a crowd had formed. People began searching for the deceased in the dam. They ultimately retrieved the deceased's body from the dam. He noted that the deceased's mouth was closed and the stomach was flat. There was an injury near the ear and dried blood near the said injury. The arms appeared slightly bent. Together with the Chief and the Assistant Chief, they reported the matter to the police, who came and took the body to the mortuary.

12. Peter Kiptanui (PW3), was a neighbour of both the Accused and the deceased. According to him, the Accused lived about 400 meters from their house while PW2's (Musa Cheserem) house was separated from his only by a path. His evidence was that the deceased was his friend and he recalled testifying in the inquest. He stated that the deceased and Accused were friends. He also knew that the Accused owed deceased some money.

13. On 11/7/2006, he was at Paul Cheserem's (the deceased's father) home and in company of the deceased's brothers Aaron and Festus together with other people. The Accused and Evans Kibet Chepyegon reported to them that they had found deceased's shoes near the dam.

14. On hearing this, they immediately proceeded to the dam which was about 500 meters away. They did not find the shoes. Instead, they found the deceased's jumper inside the water. They waited for some time but they did not see the deceased and they all left.

15. They went back to the scene the following day while in company of many people. They eventually retrieved the body of the deceased and discovered that it had some blood on the side of the head and on the nose but he did not see any injury. The police came later and took the body.

16. The deceased's brother Aron Kipyego Kiserem (PW4) was at the Chief's Barraza at Solian centre on 6/7/2006. After the meeting, he met one Maasai who informed him that the deceased had just arrived from Nairobi. PW4 therefore went to watch football at a hotel that evening. At around 9.00 p.m, the

deceased entered and asked him for the key to the house. He informed the deceased that the door was not locked and the deceased left.

17. On arrival in the evening, PW4 went to the house and found the deceased already asleep. The following morning, the deceased headed to Solian centre. That evening, he was going to Solian centre as usual when he met deceased, heading home but a bit drunk. He stayed at the centre until 1.00 a.m. and went home where he found the deceased asleep.

18. The next day on 8/7/2006, they were chatting when the deceased informed him that he would be leaving for Nairobi on 16/7/2006 in company of Musa Cheserem (PW2) who also worked and lived in Nairobi. The deceased left to see his classmate but he did not disclose the name of the classmate. Later that the evening , he saw the deceased playing football in the field. The deceased did not return home.

19. As was usual, PW4 went to the centre on the evening of 9/7/2006. He saw the deceased playing football and once again, the deceased did not return home that the evening.

20. PW4 was going to Solian centre at 6.30 pm on 10/7/2006, when he met the deceased in company of the Accused person. He asked the deceased why he did not return home the previous night. The deceased responded that he should not worry about him. He left him standing but a few minutes later, the deceased came back and gave him his Siemens mobile phone to keep it safe fearing that it might be stolen.

21. On 11/7.2006 at 1.00 pm, PW4, his brother Musa Cheserem (PW2), Kibet Cheserem and a neighbour named Boaz Kibet, were sitting outside the "boy's house" when the Accused arrived in company of their neighbour Kibet Kipyegon. The Accused informed them that his uncle Gilbert had recovered the deceased's shoes. They did not have the said shoes as he reported this. The Accused asked them whether the deceased had reached home.

22. Upon hearing this, they all joined Kibet and the Accused who led them for about one kilometre from their home where they showed them the deceased shoes beside the road, about 40 metres from the dam. While deliberating on what could have happened, they suspected that the deceased might have committed suicide in the dam.

23. Beside the dam, they saw the deceased's cream jumper that he was wearing when he was last seen. They rushed back home and informed their father and the Assistant Chief. The two accompanied them back to the scene but they found the jumper missing. The Accused told them that he did not know where the jumper was.

24. Since the deceased was last seen with the Accused, the Assistant Chief visited the Accused house and interrogated him. The Accused informed him that the deceased left his house early in the morning at 5:30 am. In the Accused's house, they recovered the deceased's sport shoes white in colour but the deceased could not be found.

25. In company of other neighbours, they went back to the dam the next day on 12/7/2006. After a lengthy search, they retrieved the deceased's body from the said dam . It had clothes on but the body had a bruise on the head. They called the police officers who arrived at the scene at 5.00 p.m . Upon searching the deceased's pockets, the police recovered Kshs. 1,200/= and took the body to the mortuary.

26. At the time of this incident, Benjamin Chemjor (PW5) was the Assistant Chief of Kirobon Sub Location Sabatia Location. He was at home on 11/7/2006 at 2.00 p.m. when Musa Cheserem (PW2) reported that his brother was missing and that his clothes were found near Sabatia dam.

27. He accompanied PW2 to the dam and found a very dirty jacket next to the dam. He learnt from PW2 that some shoes and a jacket were seen near the dam and that it was the Accused and Gilbert who had

reported the matter to them. He went to the house of Accused and Gilbert where he was shown a pair of white shoes and a new shirt. According to both, they recovered them near the dam and the shoes belonged to deceased. PW5 reported the issue to the area Chief (Jacob Kigen) who went to the scene.

28. The next day at around 10.00 a.m., he went back to the scene and found neighbours and the deceased's family. Directions were given for a search to commence using big hooks and sticks. The boys recovered the body. It had blood on the head and little bleeding on the nose. The matter was reported to the police who came and collected the body. He explained that according to the Accused, the deceased left their house at 5:30 am but according to Gilbert, the Accused left the house at 6:30 am.

29. According to Festus Kibet Cheserem (PW6) who is the brother of the deceased, the deceased arrived home from Nairobi on 6/7/2006 at about 5.00 or 6.00 p.m. They were together from that day until Monday 10/7/2006 at about 10.00 a.m when the deceased informed him that he was going to look for the Accused. He in turn left to run his business and upon returning home in the evening, he did not find the Accused at home, and the deceased did not return home.

30. The next day, he was with his brothers, Aaron Cheserem, Musa and a neighbour called Kiptanui, having a chat at home when the Accused and Kibet Chepyegon arrived and asked them if the deceased had come home. The Accused reported to then how Gilbert had told him that he was burning charcoal near the dam when he saw the deceased shoes and sweater near the dam.

31. Upon hearing this, they all went to their father's house and delivered the information. Afterwards, they all went to the dam and on arrival, they saw the deceased's shoes beside the dam and his sweater floating in the dam. It is then that their father reported the matter to the Chief, Mr. Ben Chemjor, who came to the dam and instructed them to leave the scene as it was and they all left for their homes.

32. They went back to the dam the following day. The police arrived and started inserting long sticks in the water and in the process, the body was retrieved. The Police then took the body to the mortuary.

33. PW6 explained that the deceased left the house on 10/7/2006 saying that he was going to look for George to retrieve a sheep he had bought from him. His mother had indeed informed him that the deceased and the Accused brought the sheep home on the night of 10/7/2006. PW6 was not aware if the deceased and the Accused had differed in any way.

Defence Case

34. In his sworn statement , the Accused's case was that he was at home in Solian Eldama Ravine on 9/7/2006 when the deceased , to who he had sold a sheep on 6th July, 2006, visited him at around 10.00 a.m. He showed the deceased the sheep but he did not take it immediately. Instead, he requested the Accused to accompany him for a drink at Solian Kwa Mawe place. They proceeded to Solian where they stayed until 2.00 p.m. and came back home.

35. They tied the sheep and escorted it to the deceased's home about 500 meters away. In the compound, they found the deceased's father, Paul Cheserem and the deceased's stepmother, commonly known as mama Daudi. They left the sheep and went back to the bar for more drinks until 8.30 p.m. They came back home arriving at about 9.00 p.m and slept in his house in company of Sylvester Kiptoo, Elly Ruto and Gilbert Kipchumba. The deceased woke up around 5.30 a.m. and told him that he was going home.

36. The next day at about 12.40 p.m., he was with Kibet Chepyegon when Gilbert Kipchumba, who had had gone to his usual place near the dam to burn charcoal, came carrying deceased's shoes. At that point, they wondered where the deceased was and whether he reached home. They therefore proceeded to the deceased's home to inquire about his whereabouts.

37. On arrival, they found deceased's brothers Musa (PW2), Festus (PW6) and Haron and asked them where the deceased was and when it was confirmed that the deceased was not at home, the Accused informed them that Gilbert had seen the deceased shoes near the dam. Faced with this information, the deceased brothers accompanied them to the dam and they found the deceased jumper on a stone near the dam. Soon thereafter, Festus (PW6) took a stick and started inserting it in the dam in search of the body, questioning whether the deceased had thrown himself into the dam. They were not successful and therefore, they all left the scene.

38. The next day, they all went back to the dam where they found several people gathered. Once again, Festus (PW6) inserted a stick in the water and on sensing the body, he pulled it out by the shirt. Later on, the Police arrived and picked the body.

39. Three weeks later, he was arrested and told to record a statement. He remained at the police station for 15 days before being released on bond. An inquest file was opened and he attended it until its completion. He was re-arrested in year 2014 and charged with murder. He maintained that he was not involved in the deceased's death. He did not know how the deceased, who was his friend, died.

40. He explained that according to the doctor, it appeared the deceased was strangled. He reiterated that they went to the bar and came back to the house by 9.00 p.m. on 9th July, 2006. They spent the night at his house and they were five of them in one room. He confirmed that the deceased was a football player. He denied seeing Aron Kipyegon at the centre where they were drinking.

41. He accused Aron Kipyegon (PW4) of having lied to Court that the deceased was playing football at 3.00 pm on 9/6/2006. According to the Accused, they went to the centre at 10.00 am and returned by 2.00 pm. They then went back late in the evening.

42. According to Accused, it was not unusual for the deceased to sleep in his house as they were used to. He told this Court that the people that spent the night with him and the deceased on the fateful night were supposed to be his witnesses, however, they were barred from testifying for him because, they were already listed as Prosecution witnesses. He stated that his advocate was the one who advised him on this position.

43. He confirmed that it was Gilbert who brought the deceased's shoes to his home. He accused Aron of lying that they found the shoes near the dam. He reiterated that the deceased left his house at 5:30 still with a hangover, and informed him that he was going home. He confirmed that the deceased paid him Kshs.1,500/= for the sheep. He also told this Court that he has never differed with deceased.

44. He testified that he was with the deceased on 6th July, 2006 and then on 9th July, 2006. He also confirmed that there was world cup on 9th July, 2006 which they watched from 8.00 p.m. to 8.30 p.m. He alleged that the deceased had fought with one Mathew Tonje causing the deceased to go to Nairobi and remain there for 9 months. The Accused did not witness that fight but he explained that the deceased informed him as much and that he was sleeping in his house to hide from Matthew.

45. He maintained that he has never differed with the deceased and that on the fateful night, himself, the deceased, Gilbert, Sylvester Kiptoo and Eli Ruto spent the night in his house. Further that Sylvester and Eli testified during inquest confirming that the deceased spent the night in his house and that the deceased left in the morning alone.

Prosecution's submissions

46. Mr. Kihara for the Prosecution submitted that though the Accused claimed that Gilbert collected the deceased shoes about one Kilometre away from the house, he failed to call the said Gilbert who is a

relative of his and a key witness who would have given a first-hand account of where he picked the shoes. It was argued that the Accused also failed to call his three brothers who allegedly slept in their house that fateful night to corroborate the allegations that the deceased slept in his house.

47. He refuted the allegations that the other people who slept in Accused's house before the death of the deceased herein were Prosecution witnesses and argued that the Accused had the discretion to call the said witnesses in support of his defence.

48. On factors to consider when faced with circumstantial evidence, he relied on the case of Abanga alias Onyango us Republic, CR. App No. 32 of 1990 (UR) where the Court held:-

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the Accused. (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else."

49. Further reliance was placed in the case of Sawe vs. Republic [2003] KLR 364, where the Court of Appeal held that:-

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the Accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the party " Accused."

50. On that basis, he submitted that the Accused and deceased were together until the last moment after they left the centre. He submitted that the Accused did not confirm if they even arrived at his house and later slept in the said house. He argued that with the dam, where the deceased was found, being between 400 meters and 500 meters from the Accused homestead, the Accused has some explanation to give despite him saying he did not have any disagreement with the deceased.

51. It was submitted that the crime scene where the shoes were allegedly retrieved from was disturbed and therefore, it was difficult to tell whether the shoes were at the Accused house or near the dam. Further that on discovery of the body, the Accused disappeared only to be arrested a few days later which disappearance raises many questions. He argued that being the last person to be seen with the deceased, the Accused is guilty of his murder.

52. Regarding the doctrine of "last seen with", reliance was placed on Nigerian case of Moses Jua V. The State (2007) LPELR-CA/IL/42/2006, where the Court, while considering the 'last seen alive with' doctrine held: -

> " Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory 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 the inference that the Accused killed the deceased."

53. Similarly, that in the Nigerian case of Stephen Haruna Vs The Attorney-General of The Federation(2010) 1 iLAW/CA/A/86/C/2009 the court opined thus:-

> " The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus, where an Accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, ' there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the . Accused person killed the deceased."

54. Further reliance was placed in the Indian case of Ramreddy Rajeshkhanna Reddy & Another Vs State of Andhra Pradesh, JT 2006(4)SC 16 where the Court held:-

> " That even in the cases where time gap between the point of time when the Accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the Accused being the author of. 'the crime becomes impossible; the courts should look for some corroboration."

55. Accordingly, he submitted that for "the last seen with" doctrine to be applicable, there should be overwhelming circumstantial evidence and corroboration that exclusively links the Accused person to the death of the deceased both in terms of timing and cause.

56. In the circumstances, he urged this Court to cumulatively look at both the evidence by the Prosecution witnesses and the testimony of the Accused and arrive at the finding that the Accused's testimony failed to impeach the testimony of the Prosecution witnesses. He urged the Court to return a verdict that the Prosecution had proved the charge beyond reasonable doubt.

Accused's Submissions

57. Counsel submitted that the Prosecution failed to establish mens rea and secondly, that the Prosecution witnesses gave contradicting accounts as to the events. It was his submissions that PW2 was clearly hell bent to persecute him when he testified that the deceased rarely slept outside their home, but this was clearly contradicted by most of the Prosecution witnesses.

58. In addition, that PW2 claimed to know his brother so well but on the same breath, he did not know what his brother did for a living. Further, that though he claimed the Accused owed the deceased money, he conveniently did not state how much or for what kind of transaction or business.

59. Counsel urged this Court to take judicial notice that as a police officer and therefore an officer of this Court, PW2 knows or ought to know the reparations of falsifying evidence.

60. It was submitted that according to the Pathologist (PW1), the cause of death was throttling and immersion in water. While discrediting this finding, Counsel argued that when a person is strangled, the natural and instinctive thing to do is for one to gasp for breath which leads to opening of the mouth but PW2 categorically stated that the deceased mouth was closed, a further fact that created doubt on the Prosecution evidence.

61. Further, it was argued that though the Pathologist alleged that the cause of death was strangulation and then immersion in water, no evidence was tendered to disclose what was used in the strangulation, whether it was by hand or rope. Counsel therefore argued that whatever the means, no evidence was tendered to link the Accused to such strangulation, hence the evidence tendered in this case did not settle the issue as to how the deceased was murdered.

62. It was submitted that the evidence regarding the place where the deceased shoes were found was contradictory, that is whether by the shores of the dam, besides the road or in the Accused's house thus causing reasonable doubt as to the veracity of the said evidence.

63. Counsel also took issue with the Prosecution's failure to call the Investigating Officer and submitted that the defence was denied the opportunity to cross examine him. In support of this argument, reliance was placed in the case of Republic Versus Chonda Mwero & Another [2007] eKLR and Counsel concluded that the Prosecution has failed to prove its case beyond reasonable doubt. He urged this Court to set the Accused at liberty.

Analysis and Determination

64. For an offence of murder, the Prosecution must prove:-

    a. The death of the deceased and the cause of death.

    b. That the Accused committed the unlawful act which caused the deceased's death (actus rea)

    c. That in committing the unlawful act the Accused had malice aforethought (mens rea).

65. On proof of death, there is no doubt that deceased died on 10th July, 2006 as per the evidence on record. As to the cause of death, the Post Mortem Report by Dr. A.G. Gachau dated 14th July, 2006 indicated the cause was Asphyxia due to immersion in water. The Pathologist also noted that there was throtting with vital changes in the upper airways and multiple upper limb bruises. In Cross -examination, he told the Court that though the primary cause of death was immersion, there was strangulation before immersion.

66. It is therefore possible that the death of the deceased herein was not suicide as suspected by those who went to the scene on 11/7/2006 including PW4, PW2, Kibet Cheserem and Boaz Kibet as they deliberated on what could have happened to the deceased.

67. Regarding bruises on the body, there is evidence that sticks were used to search and retrieve the body form the dam. It was not clarified by the Prosecution as to whether the bruises could have been after the death. However, the Pathologist clarified that the primary cause of death was immersion and that strangulation was before immersion.

68. The defence Counsel's argument that there was no clarification as to whether strangulation was by hand or rope is not sound. As there is no evidence that Counsel is also an expert in this field, he is not competent to argue that "when person is strangled, the natural and instinctive thing to do is one to gasp for air which leads to opening of the mouth."

69. It is therefore clear that the death of the deceased herein was not from natural cause. Another human being was involved. As to whether the Accused was responsible for his death, there is no evidence as to what transpired so that the deceased could end up in the dam from where his body was found on 10th July, 2006 immersed in water. There was no eye witness.

70. The brothers of the deceased (PW2, PW4 & PW6) together with a neighbour (PW3) testified that the Accused reported about the disappearance of the deceased and alleged that his shoes were found somewhere near the dam where the deceased was immersed.

71. The Prosecution also relied on the evidence by PW2 and PW3 who alleged that the deceased owed the Accused money and therefore, that could have been a motivation for the murder. That evidence is indeed the reason that the Prosecution has relied on circumstantial evidence and the "last seen doctrine."

72. On circumstantial evidence, the Court of Appeal had this to say in the case of Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR): -

> " However, it is altruism 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 as strong basis for proving the guilt of an Accused person just like direct evidence."

73. However, the line of evidence by witnesses herein was not clear. What came up from PW6's evidence is the deceased left the house on 10/7/2006 saying he was going to look for Accused to retrieve a sheep he bought from the Accused.

74. It was confirmed that indeed the sheep had been brought, by both the Accused and the deceased, to the deceased's mother on the night of 10/7/2000. Though there was Kshs. 1,200/= allegedly retrieved from deceased's pocket by the police before taking the body to the mortuary, that money was not produced. Further, the Accused alleged to have paid the deceased Kshs. 1,500/-. The evidence around the issue of the money owed and in relation to this death was not clear.

75. Further, the Prosecution's argument based on allegation by PW2 that the Accused vanished from the scene immediately the body was retrieved from the dam, was refuted by PW4 who confirmed that the Accused was at the scene throughout. With the contraction, that allegation cannot be used to argue that that the Accused must have had a hand in this death.

76. On 'last seen with' doctrine, the Court of Appeal in *Kimani v Republic (Criminal Appeal 41 of 2022)* [2023] KECA 1390 (KLR) held that:

> " The doctrine of 'last seen alive' is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before their death was responsible for his or her death and the Accused is expected to provide an explanation as to what happened."

77. Similarly, the Court of Appeal in Dida Ali Mohammed v Republic, Nakuru Court of Appeal Criminal Appeal No. 178 of 2000 (UR) held that:

> " Then there is the circumstantial evidence which shows that it was the appellant who was the last person seen with the deceased before her death...As to when the deceased left the appellant's home and up to where the latter escorted her are matters which were peculiarly within the appellant's knowledge which we think, under section 111(1) of the *Evidence Act*, he was the only person who could but did not explain. And the evidence of recovery of the deceased's body consequent upon information the appellant gave are all circumstances which when taken cumulatively lead to irresistible conclusion that the appellant and no

other person killed the deceased, and which exclude any other reasonable hypothesis than that the appellant killed the deceased."

78. Further still, the Court of Appeal in Moingo & Another v. Republic [2022] KECA 6 (KLR) held 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."

79. Also, the Court of Appeal in Moingo & Another v. Republic [2022] KECA 6 (KLR) held 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."

80. It was the Prosecution case that since the Accused was the last person to be seen with the deceased and being that he is the same person that reported the deceased's disappearance and the alleged recovery of his shoes near the dam, he is the one that caused his death.

81. For this doctrine, the Prosecution heavily relied on PW6's evidence that on the fateful day, the deceased informed him that he was going to look for George. Reliance was also placed on the evidence by PW4 that he saw the deceased with the Accused person on 10th July, 2006 at around 6.30 pm in Solian centre to argue that the Accused was the last person to have been seen with the deceased before his death.

82. The Accused indeed confirmed that he was with the deceased in the evening before his death, spent the night at his house until morning when the deceased allegedly left his house only to be found dead at the dam. Further evidence by the Prosecution reveals that though the Accused claimed that the deceased left their house at 5.30 am, Gilbert, the uncle to the Accused, informed him that the deceased slept in their house but left at 6:30 in the morning.

83. PW5 also confirmed that he interrogated the said Gilbert, who confirmed that the deceased spent the night at their house but that he left at 6 .00 am in the morning. In light of that evidence, the Accused was not the last person to be seen with the deceased.

84. It was the Accused's defence that Sylvester and Eli testified in the inquest case at Eldama Ravine Magistrates Court and informed the said court that the deceased spent the night at their place and left in the morning.

85. This Court notes that though, Gilbert Bargoge, Sylvester Kiptoo Bargoge, Elly Ruto Bargoge, who allegedly shared the room with the Accused and the deceased before his death, were listed as Prosecution witnesses, they were not called testify and no reason was given as to why they were dropped.

86. Gilbert Bargoge is one of the people who allegedly shared the room with the deceased and the accused herein. He is the person who is alleged to have found the shoes of the deceased and took them home to the same house they shared with Accused. The question that arises is why he was not called as a witness in this case.

87. Though under Section 143 of the *evidence Act* no number of witnesses is required to prove a fact, the omitted witnesses were crucial in this case. Failure to call them can only give the impression that their evidence would have adverse to the Prosecution case. Indeed, the Court of Appeal in in Bukenya & others v Uganda (1972) EA 549 held that where the prosecution failed to call important witnesses to testify, the Court may draw on inference that the evidence of that important witness may have been adverse to the Prosecution case.

88. In this case, the Prosecution herein cannot accuse him of not calling said witnesses either as the burden of prove did not shift to the Accused person. There is no evidence that anyone saw the Accused with the deceased when the deceased was thrown in the dam so as to connect the Accused to the murder.

89. Indeed, the Investigating Officer did not testify in this case to elaborate on how he arrived at the decision to charge the Accused with this offence. There are glaring gaps in the Prosecution case. What is before this Court is suspicion through unreliable circumstantial evidence that the Accused may have been linked to the murder, but was held by the Court of Appeal in Joan Chebichi Sawe vs Republic, Criminal Appeal No.2 of 2002 [2003] KLR suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

90. Indeed, the Court of Appeal in Joan Chebichii Sawe (supra), the Court held that:- In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of Iris guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.

91. In this case, the evidence adduced contain co-existing circumstances weakening the chain of circumstances relied on by the Prosecution to prove that it is the Accused who caused the injuries that led to the deceased's death.

92. Concerning malice aforethought, Section 206 of the *Penal Code* states 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."

93. As to inference of malice aforethought, the Supreme Court of Uganda in Rwabugande v Uganda [2017] UGSC laid down the circumstances from which an inference of malicious intent can be deduced as follows:-

> " (a), 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."

94. Though PW1 indicated that the deceased could have been strangled before being thrown in the dam, going by the injuries sustained, there is no evidence to connect the Accused to the alleged strangulation and eventual immersion of the deceased in the dam. The strangulation could have been done by anyone. Moreover, there was no evidence that there was any bad blood between the Accused and the deceased. They all maintained that the two were friends.

95. In the Republic vs Danson Mgunya [2016] eKLR, the Court of Appeal cautioned on interferences based on circumstantial evidence as follows:-

> " Turning now to the merits of the appeal, we must reiterate that the burden was on the prosecution to adduce evidence, which would prove its case beyond reasonable doubt. In the absence of credible evidence proving the guilt of the Accused, the prosecution cannot invite the trial court to convict on the basis of inferences and conjecture..."

96. Accordingly, there is no evidence to link the Accused with deceased's strangulation and immersion in water. Considering that the Prosecution witnesses alleged Gilbert's confirmation that the deceased spent the night at the Accused place and left in the morning, the burden fell on the Prosecution to prove its case beyond reasonable doubt but they failed to discharge that burden to do so.

97. In the upshot, the Accused person is acquitted of the charge herein. He is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF JULY, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Kihara for the State

Mr. Bosire for the Accused

Ruto, Court Assistant