Republic v Akoyo & another (Criminal Case 51 of 2016)
[2025] KEHC 10302 (KLR) (18 July 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE 51 OF 2016

JRA WANANDA, J

JULY 18, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

JOHNSTONE AKOYO ..... 1ST ACCUSED

DANIEL KIPRUTO KIRWA ..... 2ND ACCUSED

JUDGMENT

1. The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on 3/7/2016, at Mafuta farm in Eldoret West Sub-County in Uasin Gishu County, they jointly murdered one Naomi Muthoni Kamau.

2. The accused persons were initially represented by Ms. Cherono Advocate. They took plea on 26/7/2016 and pleaded not guilty. Subsequently, Mr. Henry Kenei Advocate took over representation of the accused persons. The case then proceeded to trial in which the Prosecution called 6 witnesses after which it closed its case. PW1 to PW4 testified before Omondi J (as she then was) upon whose elevation to the Court of Appeal, the matter was taken over by Ogola J, who then took the evidence of PW5. Upon Ogola J's transfer, I took over the case and PW 6 testified before myself.

3. I may just mention that at both stages of a new Judge taking over the case, the provisions of Section 200(3) of the *Criminal Procedure Code* requiring the accused persons to be given an opportunity to elect whether to pray for recalling of witnesses, were complied with. On both occasions, the defence elected to proceed with the case from where it had stopped.

4. After the Prosecution closed its case, this Court, by the Ruling delivered on 1/03/2024, found the accused as having a case to answer and placed them on their defence. In their defence, the accused persons testified before me as DW1 and DW2, respectively, and gave sworn testimony.

5. I will now recite and recount the testimonies given by the respective witnesses, and/or the evidence given, both for the Prosecution and for the defence.

6. PW1, one Janet Chepkorir Kemei testified that the deceased as a neighbour and a friend. She stated that on 5/7/2016 at about 6:00 am, she prepared her children for school and left to go to the shops but on her way, she noticed that clothes that the deceased had washed on Sunday were still hanging outside, she inquired from a neighbour whether she had seen the deceased but the neighbour had not. She testified that after making her purchases, she returned home then took her goats to graze in the deceased's compound, she met another neighbour whom she also inquired from whether she had seen the deceased but who, too, had also not seen the deceased. PW1 testified that she then noticed that the door to the house of the deceased was ajar, she entered the kitchen which was detached from the main house and noticed that there was cooked githeri and utensils were strewn all over. She stated further that she tried to enter the main house and noticed that it was locked from inside using a nail, she then forced the door open while calling out the deceased's name, she sensed a rotting smell and she called another neighbour. She stated that she then saw someone lying on the bed in the bedroom and when she checked, she noted that the person was dead, and that the body was about 2 metres away, she called other neighbours and one of them phoned the children of the deceased. In cross-examination, she stated that the time when she went to the home of the deceased was about 10.00 am on 5/07/2018.

7. PW2 was one Benard Mburu, who testified that he is a maize trader and the deceased was his neighbour. He stated that on 4/7/2016, he received a phone call from the 2nd accused who told him that he had 50 kgs of maize for sale. He testified that he thus went to the 2nd accused's house where he purchased the maize and paid him Kshs 1,200/-, and that the 2nd accused was in the company of 1st accused during the transaction. He stated that he asked the 2nd accused where he got the maize from and the 2nd accused told him that it was his, that on the next day he heard that a woman had been killed and some of her property, including 50 kgs maize bag and mattress stolen, he went to the scene and heard people stating the same at which point he told them that the 2nd accused had sold him 50 kgs maize, the police were informed and they arrested the 2nd accused, and that the 2nd accused led the police to the 1st accused. He told the Court that he knew the accused persons very well since the 2nd accused was his neighbour and maize supplier while the 1st accused was the 2nd accused's friend, and that it was not his first time to buy maize from the 2nd accused. In cross-examination, he gave the phone number of the 2nd accused as 0729\\\ which he stated he had always saved in his own phone and insisted that it is the same number that the 2nd accused phoned him from on that day. He also said that the price that the 2nd accused sold to him the maize was cheap. He agreed that the maize was traced to his house and that is the one who directed the police to the 2nd accused to avoid his being arrested.

8. PW3, James Kimani Alexander testified that the deceased was his mother. He stated that on 5/7/2016 at about 10:30-11:00 am, a neighbour phoned and told him that his mother was very sick, that he therefore phoned his siblings, and together they proceeded to their mother's home. He testified that on arrival, they found a huge crowd outside their compound, he rushed to his mother's bedroom and found her covered in her bed, he noticed that her legs faced the upper side of the bed and the head faced the lower part, that her body was cold and she did not respond to touch or sound, and he realized that she was dead. He testified further that when he turned her head, blood oozed from the nose and mouth, he noted that blood had oozed through the mattress to the floor, he also noted the presence of some mud on her head and realized that their mother had been killed. He stated that his sister also noticed that the mattress was not the one they had bought for her as the one that they had bought was 6x4 but the one she was lying on was 3x6, and that she also had different beddings. He added that they also realized that a new duvet they had bought for her, a radio, 50 kg maize and a thermos were missing, he rushed to Soweto Police Station where he made a Report, and the police came and collected the

body. He testified that the post-mortem was later conducted and they were told that their mother died as a result of strangulation.

9. He further told the Court that they informed the community about the loss of property and a search was mounted, police officers later told him that the culprits had been traced and they gave him the name of the 2nd accused whom PW3 knew as they used to call him "boy", and whom he produced to the police. He stated that the police also gave him the name of the 1st accused whom they could not find and they therefore instead arrested the 1st accused's brother, mother and wife since the brother told them that the 1st accused had told him that they had killed the deceased, and that when PW3 gave this information to the police, the 1st accused's mother phoned the 1st accused and told him not to appear because the police were looking for him. He stated that the 2nd accused was arrested after he admitted that he had sold maize to PW2 who was also arrested but the 1st accused disappeared but was eventually arrested elsewhere. He testified that he later saw his mother's property at the Police Station although he did not witness their recovery. He then identified the items in Court, namely, a blue mattress, a pink bedsheet, a radio, a pair of black shoes, brown pair of sandals, a thermos flask, 3 white plates, a D-Light and a yellow 50kg bag for storing maize. Regarding the accused persons, he stated that they were children whom he saw growing up in the neighbourhood, that his mother used to feed them and had even given them casual jobs and. He also testified that at the time of her death, their mother was living alone.

10. In cross-examination, he stated that when they arrested the 2nd accused, he confessed to the killing, and that the recovery of his mother's property from the accused persons is evidence that they killed her. He stated that his mother musty have been killed on 3/07/2016 because he had spoken with her on that day during the day. He insisted that the accused persons admitted to killing the deceased and that the 2nd accused made the admission in his presence. He agreed that he had never heard of any disagreement between her mother and the accused persons.

11. PW4 was Dr. David Chumba, the Pathologist who performed the post-mortem on the body of the deceased on 8/7/2016. He testified that the deceased was about 67 years and had features of decomposition around the mouth and neck, there was oedema on the mouth (acute inflammatory process) and also on the neck, bruises on the right side of the cheek, that the lungs were dilated and part of the trachea was broken, and that there was a fracture of the vertebral bone C3 and C4 (bones on the neck). He stated that he formed the opinion that the cause of death was asphyxia by manual strangulation. He produced the post mortem Report. In cross-examination, he stated that manual strangulation cannot be strangulation by a rope, but means strangulation by use of the hands to compress the airway.

12. PW5 was Constable Bethwel Kiprotich Tanui, who told the Court that he was stationed at Ziwa police station. He testified that on 8/7/2016 at around 1400 hrs he was instructed by the Officer in-charge to accompany (with other officers) the 1st accused who had been arrested by members of the public, they accompanied the 1st accused to Sogomo area where the 1st accused led them to a rental house where they recovered a number of items which they collected and took to the police station. He then produced the said items as exhibits. According to him, the 1st accused told them that the house belonged to a friend but who was away at that time, there was nobody in the house when they reached, and that at the police station, a son of the deceased (PW3) confirmed that the items belonged to his mother. In cross-examination, he agreed that he had not produced anything to show that he was part of the police officers who went to the house where they recovered the said items, or to show who the house belonged to, or who was the owner of the recovered items. He stated that he was the officer in custody of the items.

13. PW6 was Corporal Nyangeri who stated that he was earlier stationed at Ziwa Police Station. He testified that on 5/7/2016, he was called and informed that there was a body at Mafuta farm which report came at around 10:00 am and he, together with fellow officers proceeded to the scene and found the deceased lying on a bed covered with a blanket, there was a big crowd, the deceased was on the bed and there was blood from her mouth and she had a swollen face.

14. He stated that he took particulars, photographs and a sketch plan and they then took the body to hospital. He testified that when he went back to the station he found that the 1st accused had been arrested and some items recovered, he was later informed by members of the public that they knew the suspects (the accused persons) and that there was a 50 kg sack of maize that had been stolen from the house of the deceased and was recovered from a businessman (PW2) who told then that the same had been sold to him by the 2nd accused, and that PW2 then brought the sack to the police station. He told the Court that he is the one who arrested the 2nd accused after he was mentioned by members of the public although he was not in possession of any incriminating items when he arrested him. He testified further that he established that the deceased and the accused persons were neighbours, and that there had been bad blood between the deceased and the accused persons because the accused persons met with the deceased on 3/07/2016 and the deceased insulted them by calling the 1st accused a "thief" and alleging that the 1st accused had stolen somebody's wife, and that he was also suffering from AIDS. He stated that he got this information from the 1st accused. In cross-examination, he conceded that there were no scene of crime officers at the scene where the body was, and thus the body was not dusted. He also conceded that he did not produce the maize as an exhibit, that the items were never subjected to forensic analysis, and that this was a loophole.

15. As aforesaid, after the Prosecution closed its case, by the Ruling delivered on 1/03/2024, this Court found the accused persons as having a case to answer and placed them on their defence. As further stated, both accused persons then gave sworn testimonies and were cross-examined.

16. DW1 was the 1st accused, Johnstone Akoyo. He described the deceased as a neighbour and denied having any quarrel with her or that she had insulted him at any time. He described the 2nd accused as also a neighbour but denied conducting any business relationship with him or that he sold to PW2 any maize. He refuted PW5's (Police Officer) testimony that the maize was found in his friend's house in Sogomo and denied having any friend there. He stated that he saw the alleged recovered items for the first time in Court, refuted the Investigating Officer's testimony that he admitted or "confessed" to killing the deceased and stated that the Statement relied on in Court was not written by him. It was also his testimony that on 3/07/2016, he woke up and went to work in the farm (digging of a waterway) and he remained there until around 11.00 am when he returned home and stayed until around 1.00 pm when he went to his mother's house, about 50 metres away, for lunch, after which he returned home and stayed there until about 5.00 pm when he went to the stream to bath and later returned home to sleep for the night. He denied that he met the deceased at any time on that date, and testified that on both 4/07/2016 and 5/07/2016, he stayed at home the whole day tending to his cows until evening, and he did not therefore meet the deceased on those dates too.

17. He denied involvement in the murder and stated that he was arrested on 7/07/2016 on which date he had gone to Moiben Centre for a job offer when a neighbour phoned and told him that he should return home as there was an ongoing investigation. He stated that he returned but was arrested and taken to the police station, and thus denied that he had fled. He stated that even on 6/07/2016 he was at home the whole day. In cross-examination, he denied ownership of the exhibits produced in evidence. He agreed that he had known both the 2nd accused and the deceased since his childhood as they all lived in the same neighbourhood. He also agreed that he had no grudge with any of the

Prosecution witnesses. He stated that at the police station he was never interrogated and thus could not have admitted or confessed to killing the deceased. When shown the Statement that he is alleged to have signed at the police station, he agreed that it is the one he signed but claimed that he only signed it because he was told that his mother, who had also been arrested, would be released if he signed the Statement. He agreed that his Advocate did not raise these issues when cross-examining the Prosecution witnesses and also did not raise the issue of his claims of intimidation by the police. He stated that he does not know how to read, and thus he signed the Statement without reading it. He agreed that he lives alone. In re-examination, he stated that he was threatened with a whip and reiterated that he was never interrogated and that the Statement was never read to him.

18. DW2 was the 1st accused, Daniel Kipruto Kirwa. He denied ever selling any maize to PW2 and also denied carrying out any business with him and also denied that he sells maize. He denied phoning PW2 on 4/07/2016 and telling him that he got the maize from the 1st accused. He denied conducting any business with the 1st accused who is just a neighbour. He stated that the deceased was also just a neighbour and he never had any grudge or quarrel with her. He denied that he had conspired with the 1st accused to murder the deceased or participating in the murder. He denied that he had met the deceased a week before or even on 4/07/2016. He stated that he only heard from neighbours on 4/07/2016 that the deceased had been found murdered in her house, that he, too, went there just like many other neighbours, but while there, a police vehicle arrived and the sub-chief told him and 3 others, - Boaz Mbonyo, his mother and his wife - to accompany the police for investigations and they were then taken to the police station but after 3 days the others were released. In cross-examination, he stated that the deceased used to sometimes live with some children, or relatives, but not permanently, the children only used to visit, and thus most of the times the deceased used to live alone. He agreed that he did not have any grudge with PW2 or any other witnesses. He also agreed that the said Boaz Mbonyo with whom he was initially arrested is a brother of the 1st accused but he did not know why he, too, was arrested.

19. Regarding the Statement that was relied on in this case, he claimed that he was forced to sign it under threat and coercion after he was beaten up, although he conceded that no questions were put, in cross-examination, about this claim of threats and coercion, to the police officers who testified. He also conceded that he has never raised that claim in Court before although he insisted that he had informed his Lawyer. Asked whether the 2nd accused witnessed such beatings or coercions, he stated that the 1st accused was in a different room. About the 1st accused having an affair with someone's wife, he denied any knowledge about it. He also denied knowledge of any talk in the neighbourhood about his health and stated that he does not understand why the 1st accused stated, in his Statement, that the deceased had on 3/07/2016 insulted them about his (2nd accused) health status and the issue of the affair with somebody's wife. When shown his own Statement, he stated that the signature thereon was not his. He reiterated that he signed a document under coercion but denied that it is the Statement that he was being shown. He also denied any knowledge of the maize and where it was recovered. He also denied any knowledge of having being insulted by the deceased, and therefore that issue cannot form a motive for him killing the deceased.

Proceedings after close of the trial.

20. Upon close of the defence case on 28/01/2025, and by extension, of the whole trial, I gave the parties leave to file written Submissions. However, when the matter came up for Mention on 17/03/2025, Ms. Chelogoi, who was hiding brief for Mr. Kenei, told the Court that the defence will not be filing any fresh Submissions, and would relying on the same Submissions filed at the "case to answer" stage, dated 7/07/2023. On his part, Prosecution Counsel, Okaka A. Leonard, filed the Submissions dated 17/03/2025 on behalf of the State.

Prosecution's Submissions.

21. After recounting the testimonies of the Witnesses, Prosecution Counsel Mr. Okaka recited the essential ingredients of the charge of murder, and cited the case of *Anthony Ndegwa Ngari v R* [2014] eKLR. He submitted that expert opinion (post mortem) was availed, PW3 who identified the body, and the doctor who conducted the autopsy were not controverted, and that therefore basis for accepting the cause of death as being asphyxia by manual strangulation should easily abound. He submitted that the evidence in respect to the "unlawful act" was circumstantial and he cited the case of case of *Ahamad Abolfathi Mohammed & Another v R* [2018] eKLR. According to him, the evidence should incontrovertibly inculpate the accused persons considering that only the 1st accused was seen in the company of the 2nd accused when the 2nd accused was selling maize to PW2 at a cheap price.

22. He contended that based on Section 4 of the *Penal Code*, that sale initiated by and done in the 2nd accused's house should put him in "actual" possession, while for the 1st accused, it is "constructive", and that neither bore a grudge with PW2. He submitted that PW2's testimony was corroborated by PW5 whose credibility the accused never impeached, and who, being a police officer, testified that the 1st accused led them to recovery of the items at Sogomo. Counsel also pointed out the short time lag between the 2nd accused's offer to sell maize to PW2 (4/07/2016), the recovery, and when the deceased was found strangled (5/07/2016), and the quantity of maize missing from the deceased's house as compared to the exact quantity being sold by the accused who otherwise were non-traders. He submitted further that no one else has laid claim to the recovered items except PW3 who had prior reported them missing and recognized them as belonging to his deceased mother. On the issue of claim of ownership in the absence of receipts, he referred to the case of *Kipsang and Another v Republic* [2024] KEHC 249 in which he submitted, the Ngaira decision was cited, and submitted that in this case, the accused persons offered nothing exculpatory in their respective defences. On "malice aforethought", he submitted that Section 206 of the *Criminal Procedure Code* provides ways that this ingredient could manifest and that Courts acknowledge that it is more frequently established by, or inferred from surrounding circumstances. He cited the Court of Appeal case of *Bonaya Tutu Ipu & another v R* (2015) eKLR. Counsel submitted that the autopsy suggests that the accused did not intend the deceased should live, and he then recounted the injuries suffered by the deceased. In conclusion, he submitted that regardless of their motive, conduct of both accused in that regard ought to be deemed manifest aforethought.

Defence Submissions.

23. As aforesaid, defence Counsel elected to rely on the same Submissions filed at the "case to answer" stage. I will recount the same.

24. Counsel submitted that none of the 6 prosecution witnesses either directly or indirectly witnessed the alleged killing, and that all the 6 relied or testified on the foundation of either hearsay or circumstantial evidence. On whether the deceased's death was caused by the accused persons, Counsel, too, cited Section 203 of the *Penal Code* and the 3 ingredients listed therein as required to be proved and added that there is no eye-witness who saw the accused persons murder the deceased, and that the only reason the accused persons were arrested by the police is because of the allegation by PW2 that he had bought a bag of maize from the 2nd accused who was with the 1st accused. He pointed out that the other reason peddled by the prosecution was that the 1st accused led PW5 (Police Officer Bethuel Tanui) to a house in Sogomo area where they recovered some stolen items, and urged that this cannot be a good basis to charge someone for an offence of murder.

25. He contended that the police who presented the case to the Prosecution did not provide a basis for charging the accused persons other than the circumstantial evidence based on the allegation that PW2 bought maize from the 2nd accused and that the 1st accused led the police to Sogomo area where some stolen items were recovered. Counsel argued that the charges seemed to have been preferred whimsically, arbitrarily and without any proper investigations as there is no evidence to show that the maize allegedly sold to PW2 belonged to the deceased, or that PW2 bought it from the 2nd accused person in the presence of the 1st accused. Counsel submitted further that PW5 (Officer Bethuel Tanui) who accompanied the 1st accused failed to prove that indeed he had instructions from his superior to accompany the 1st accused to Sogomo, or that he actually led them to the alleged house, and that the police were not keen to look for the owner of the house from where they recovered the stolen items for questioning. He also pointed out that PW5 testified that he accompanied the accused persons together with other officers and the driver but none of them were called as a witness to corroborate the testimony, and that one is left to wonder why the Prosecution would leave out such crucial witnesses? He stated further that PW5 testified that he was not present when the items were stolen and he could not tell that the same belonged to the deceased as there was no evidence proving that they belonged to him, that the evidence does not link the accused persons to the death of the deceased as no evidence placed the accused persons at the scene of the crime either before, during or after the death of the deceased.

26. He submitted that it is only PW2 who tried to create a link by testifying that he bought a bag of maize from the 2nd accused in the presence of the 1st accused but he failed to tender any evidence to prove his assertions, and that he in fact poked holes on his own evidence by confirming that it was not his first time buying maize from the 2nd accused. Counsel cited the case of *Abdala bin Wendo and Another v R* (1953) 20 EACA166 in regard to placing reliance on the evidence of a single eye-witness. He argued that the other witness who attempted to put the 1st accused at the scene is PW5 who was however not able to corroborate his evidence with photographs or testimonies of other witnesses noting that he alleges that they were 5 people who were led by the 1st accused to Sogomo area. He cited the case of *Sawe v Republic* (2003) KLR 364. Counsel urged the Court to look at the doubts in the Prosecution's evidence in trying to link the accused persons to the death of the deceased, and submitted that such doubt is on whether the accused persons killed the deceased and stole from him, on whether PW5 accompanied the 1st accused to Sogomo area, on whether the exhibits now before the Court were actually recovered from the accused persons, and on whether the items allegedly recovered belonged to the 1st accused noting that he is not the owner of the house.

27. He submitted further that no witness gave evidence to demonstrate that the accused were seen at the scene of crime, that it is doubtful whether PW2 who was found with the bag of maize was not involved in the death of the deceased together with the owner of the house where PW5 recovered the stolen items and that PW2 could have killed the deceased and created a red herring by accusing the 2nd accused. He argued that the Prosecution's inference of the accused persons' culpability is based on the circumstance that PW2 bought maize from the accused persons, but the fact that a bag of maize was missing in the house of the deceased cannot be conclusive to point to the guilt of the accused persons. He submitted that it is trite law that where a case rests entirely on circumstantial evidence, the evidence must be examined. On what constitutes "circumstantial evidence", he cited the case of *Musili Tulo v R* Criminal Appeal No. 30 of 2013, the case of *Abang alias Onyango v R* Criminal Appeal No. 32 of 1990 and also *Sawe v R* 2003 KLR 364. Counsel urged further that the Prosecution failed to discharge its burden as the Prosecution is expected to establish existence of the two elements of the crime of murder, they must prove that indeed the accused persons killed the deceased (*actus reus*) and that they had malice aforethought at the time of the killing (*mens rea*).

28. According to him, the Prosecution failed to lead any evidence to demonstrate that the accused are responsible for the death of the deceased in order to prove existence of actus reus, that there was no eye-witness yet the two elements must be demonstrated sequentially as there cannot be mens rea without the actus reus, and that the Prosecution having failed to demonstrate the act of killing, and failed to lead evidence to demonstrate that there was an intention (malice aforethought) on the part of the accused to kill the deceased. On the issue of *mens rea* and *actus reus*, he cited the case of *Ronald Nyaga Kiura v Republic* [2018] eKLR, and the case of *Joseph Kimani Njau v Republic* (2014) eKLR. He argued that the Prosecution failed to prove any element as required by Section 203 on malice aforethought and cited the case of *Libambula v Republic* [2003] KLR 683, the case of *Republic v Tumbere S/O Ochen* 91945) 12 EACA 63, and also the case of *Ramanlal Trambaklal Bhatt v R* [1957] EA 332. According to Counsel, the case is founded on quicksand and it is apparent that a conviction would be untenable as there are many unanswered questions.

Determination.

29. Section 203 and 204 of the *Penal Code* under which the accused are charged provide for the offence of murder and the punishment for it. Under these provisions, the Prosecution has a duty to prove, beyond reasonable doubt, that the accused, by an unlawful act or omission caused the death of the deceased through "malice aforethought". The sections read as follows:

> 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
>
> 204. Any person who is convicted of murder shall be sentenced to death."

30. For the Court to make a finding that an accused person committed the offence of murder, the Prosecution must establish the following elements; (a) death of the deceased, (b) proof that the accused person(s) committed the unlawful act which resulted in the death of the deceased: and, (c) malice aforethought.

31. In this case, the death of the deceased and cause thereof are not disputed. The deceased was found dead in her bedroom on 5/07/2016, and from the post mortem performed by PW4 (the doctor), the cause of death was established to be asphyxia by manual strangulation. According to the doctor, manual strangulation is not strangulation by a rope, but means strangulation by use of the hands to compress the airway.

32. The first question is therefore whether there is proof that it is the accused persons who committed the "unlawful act" which resulted in the death of the deceased.

33. As aforesaid, being a criminal charge, the Prosecution bore the duty to prove the charge beyond any reasonable doubt. The term "beyond reasonable doubt" was described and/or explained in the leading case of *Woolmington v Republic* 1935 AC 462, as follows:

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove

the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

34. In this case, it is not in dispute that there is no eye-witness to the murder of the deceased as she was simply found lying dead in her bedroom and the autopsy later established that she was murdered by way of what the doctor referred to as "manual strangulation" which he explained to mean strangulation by use of hands to block the airway. As correctly observed by defence Counsel, the Prosecution case against the accused persons is therefore based primarily on "circumstantial evidence". The Prosecution must therefore satisfy the Court that the "circumstantial evidence" presented does not amount to mere suspicion. This is because, as was held by the Court of Appeal, in the case of *Mary Wanjiku Gichira v Republic* 1998 eKLR, suspicion alone, however strong, cannot provide a basis for inferring guilt, which must be proved by evidence.

35. As to what constitutes "circumstantial evidence" and in what manner it can sustain a conviction, the Court of Appeal, in the case of *Ahamad Abolfathi Mohammed & 2 others v Republic* (2018) eKLR, stated the following:

> " 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. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -
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> "It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

36. As to how "circumstantial evidence" may be established such that it can sustain a conviction, the Court of Appeal, in the case of *Abanga alias Onyango v Republic* Criminal Appeal No. 32 of 1990, guided as follows:

> " 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 the guilt of the Accused;
>
> (iii) the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else."

37. The Court of Appeal, again, in the case of *Joan Chebichii Sawe v Republic* [2003] eKLR, the Court observed 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 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."

38. It is therefore generally agreed that for "circumstantial evidence" to carry the day, the Prosecution must establish that there are no other co-existing circumstances which could weaken or destroy the inference of guilt. It is also agreed that in a case reliant on "circumstantial evidence", each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge (see *Mwangi & Another v Republic* (2004) 2 KLR 32).

39. In this case, PW2, one Benard Mburu, was the Prosecution star witness. He testified that he is a maize trader and the deceased was his neighbour. He stated that on 4/7/2016, he received a phone call from the 2nd accused who told him that he had 50 kgs of maize for sale, he then went to the 2nd accused's house where he purchased the maize and paid him Kshs 1,200/-. He testified that the 2nd accused was in the company of 1st accused during the transaction, he asked the 2nd accused where he got the maize and the 2nd accused told him that it was his, that however on the next day (5/07/2016), he heard that a woman had been killed and some of her property, including 50 kgs maize bag and mattress stolen. He stated that curious about this information, and its coincidence with the 50 kgs maize that had been sold to him by the accused persons the day before, he went to the scene and told the people about the sale, upon which the police were informed, they arrested the 2nd accused, and who on the same day, led the police to the 1st accused. He testified that he knew both accused persons very well since the 2nd accused was also a neighbour and maize supplier and was a friend of the 1st accused, and that it was not his first time to buy maize from the 2nd accused. In cross-examination, he pointed out that the price at which the 2nd accused sold him the maize was suspiciously low.

40. PW3, James Kimani Alexander, a son of the deceased testified that when he arrived at the scene, he and his siblings noticed that some of their mother's belongings were missing and which included, a mattress, beddings, a radio, 50 kg maize and a thermos. He stated that the police later informed him that the culprits had been traced and they gave him the names of the accused persons both whom he knew, and who were later arrested. He testified that the 1st accused admitted to him that they had killed the deceased, which information PW2 passed to the police, and that the 2nd accused admitted that he had sold maize to PW2. He testified that he later saw his mother's property at the police station, namely, a mattress, bedsheet, radio, pair of shoes, pair of sandals, thermos flask, plates, a D-Light and a yellow 50kg bag for storing maize, all which he identified to the police.

41. PW5, Constable Bethwel Kiprotich Tanui, testified that the 1st accused was arrested by members of the public and presented to the police station. He stated that on 8/7/2016 at around 1400 hrs, he and other officers accompanied the 1st accused to Sogomo area where he (1st accused) led them to a rental house from where they recovered a number of items which they collected and took to the police station, that the 1st accused told them that the house belonged to his (1st accused's) friend, and that at the police station, PW3 - son to the deceased – came and confirmed that indeed the items belonged to his mother.

42. PW6, Corporal Nyangeri, the Investigating Officer, testified that he established that there was bad blood between the deceased and the accused persons since the 1st accused told him that the deceased had, on the previous day, 3/07/2016, insulted the 1st accused by labelling him a "thief", alleging that he had stolen somebody's wife, and claiming that he was suffering from AIDS.

43. The testimony that the accused persons were found to have been in custody of the items stolen from the deceased inevitably gives rise to consideration of another principle of law, namely, the doctrine of "recent possession" which entitles the Court to draw an inference of guilt where an accused person is found in possession of recently stolen property in unexplained circumstances. In this case therefore, application of this doctrine would require an answer to the question whether, if indeed the accused persons were found to have been in possession of the items stolen from the murdered deceased, would entitle the Court to draw such inference of guilt.

44. The Court of Appeal, in the case of *Eric Otieno Arum v Republic* (2006) eKLR, stated as follows:

> "In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

45. Again, the Court of Appeal, in the case of Paul Mwita v Republic [2010] eKLR, the Court of Appeal stated that:

> "..... Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is especially within the knowledge of the accused and pursuant to the provisions of section 111(1) of the Evidence Act Chapter 80, the accused has to discharge that burden. The provision states:-
>
> "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, 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."

Thus while the law is that generally in criminal trials, the prosecution has the burden of proving the case against the accused throughout and that burden does not shift to the accused, however, in a case where one is found in possession of a recently stolen property like in this case, the evidential burden shifts to him to explain his possession. That explanation only needs to be a plausible one but he needs to put it forward for the court's consideration. This is what the superior court was alluding to in its judgment.

46. It is therefore the position that once the facts are established, the accused bears the evidential burden to give a reasonable explanation of how he came to be in possession of the stolen goods. However, the Prosecution, as always, still remains with the legal burden to prove its case to the required standard.

47. In this case, weighing the testimonies cited above together, I am satisfied that the testimony of PW2 that it is the 2nd accused who sold him the 50 kg maize and that the 2nd accused was with the 1st accused at the time of that transaction was sufficiently corroborated by that of PW4, PW5 and PW6. There being no other explanation on where this maize originated from, and there being no other person who came forward to claim ownership thereof, the presumption that this is the same 50 kg maize that was stolen from the home of the deceased is sound. PW2's testimony that the 2nd accused sold him the maize at a suspiciously low price also lends credence to the suspicion that this, indeed, was the stolen maize, and the accused persons were in a hurry to sell it off hence the low price. The same applies to the rest of the items that were noticed as missing from the house of the deceased after her killing and which

were recovered on the next day at a house which the 1st accused led the police to. According to PW3, the son of the deceased, the 2nd accused admitted in his presence that they (accused persons) killed the deceased. On their part, PW5 and PW6, also stated that the 1st accused admitted to committing the act. As correctly also observed by Mr. Okaka, the short duration within which the relevant chronology of events took place also strengthens the case against the accused persons. I say so because on 4/07/2016, the accused persons sold the suspect maize to PW2, on the next morning, 5/07/2025, the body of the deceased was discovered at his home, on the same day the 1st accused was arrested, and on 8/07/2016 he led the police to the house where the stolen items were recovered. Further, according to PW2, the accused persons were known friends.

48. My observation is that the evidence of the Prosecution witnesses was consistent and cogent, the sequence of events was corroborated and the testimonies were also not shaken during cross-examination. The respective testimonies sufficiently tallied with each other. It is therefore my considered view that the evidence sufficiently established that the 2nd accused (in the company of the 1st accused) sold maize to the PW3, and which maize was the same that had been stolen from the murdered deceased a day or two day before. The evidence also established that it is the 1st accused who, upon his arrest on the same date that the body of the murdered deceased was discovered in her house, led the police to the house where the rest of the items stolen from the deceased were recovered. The testimonies were consistent and were not shaken in cross-examination. No reason or motive was also given by the accused persons as to why all these witnesses would so easily gang up and give false testimony against them. They did not allege that any of the witnesses held any grudge against them.

49. Defence Counsel raised the issue that PW5 (Officer Bethuel Tanui) who testified that he accompanied the 1st accused to the house where the stolen items were recovered failed to prove that indeed he had instructions from his superior to accompany the 1st accused to Sogomo, or that he actually led them to the alleged house. He also pointed out that although PW5 testified that he accompanied the accused persons together with other officers and a driver, none of these other officers were called as witnesses to corroborate the testimony. I do not find this contention to be material as no doubts or any contradictory version other than the one given by PW5 and the Investigating Officer (PW6) was alleged by any person. Further, no reason was alleged as to why the police officers would lie about the issue. No reason was therefore given why the Court should disbelieve the police officers.

50. Counsel also submitted that the police were not keen to look for the owner of the house from where they recovered the stolen items for questioning. While this may be a valid point, it does not in any way absolve the 1st accused.

51. Defence Counsel also raised the issue that no documentary proof was tendered to demonstrate that the recovered items belonged to the deceased. My response thereto is simply that as has been held in various authorities in cases of this nature, in some instances, the law does not mandatorily require documentary evidence of ownership of property. In this case, I am satisfied that PW3, a son of the deceased, positively identified the items. In any event, there is no allegation that any one else laid claim to ownership of the items.

52. Defence Counsel also advanced the theory that it could not be ruled out that PW2 who was the one who was initially found in possession of the bag of maize, and who claimed that the same was sold to him by the 1st accused, was not involved in the killing of the deceased together with the owner of the house where the stolen items were recovered. According to Counsel, PW2 could have killed the deceased and then created a "red herring" by accusing the 2nd accused of the offence. I am not persuaded by this theory at all. I say so because according to PW5 and PW6, investigations were carried out and although PW2 was also arrested for interrogation, it was conclusively established that he was truthful in

his allegation that he was an innocent purchaser as the maize was sold to him by the 2nd accused, in the company of the 1st accused. No reason was also advanced as to why PW2 would single out only the 2nd accused for such an accusation, and not anyone else. Both agreed that they had no grudge against each other. PW2 himself testified and was cross-examined. He maintained the same version, a cogent and clear explanation in my view, and was not shaken in cross-examination. In view thereof, and looking at the rest of the evidence on record, I am satisfied that the theory advanced by defence Counsel that PW2 may have been the culprit is untenable.

53. The accused persons also did not impress me as being truthful or credible. They gave sworn testimonies but the same was so contradictory and inconsistent in various areas. For instance, the accused persons are said to have made Statements at the police station said to have incriminated them or that they contained admissions. While of course such "admissions" even if true, would not in law amount to confessions and would not have a bearing in assessing guilt, the responses by the accused persons in regard thereto left a lot be desired. For instance, in trying to deflate the contents of the Statements, they first vehemently denied that they made any Statements at all. However, when shown the Statements, they changed tact by now admitting that yes, they indeed made the Statements but that they only did so because they were beaten by the police and forced to sign. Pressed further on the issue of the beatings, they again changed tact by alluding that they were not beaten but were only coerced or threatened with whips. Further, when asked why they had never brought up these allegations at any time earlier in the trial, even through cross-examination of the police officers, they gave incomprehensible responses.

54. Another instance of contradiction and inconstancy on the part of the accused persons was on the allegation that a day or two before the deceased was murdered, she had met the accused persons and insulted them. During the trial, it was alleged that this claim was made by the 1st accused in his Statement made at the police station. On his part, the 2nd accused denied that any such incident occurred and wondered why the 1st accused stated so and named him in his Statement.

55. The above conduct exposes the accused persons as unreliable and untrustworthy. Having heard and seen them in Court, they came out as evasive and selective in their responses. They both did not impress me at all.

56. The prosecution having proved the actus reus, the next issue is whether "malice aforethought" can be inferred from the actions of the accused persons. This is because the offence of murder is only complete when "malice aforethought" is established if, as prescribed in Section 206 of the *Penal Code*, the evidence proves any one or more of the following circumstances:

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

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

    (c) An intent to commit a felony;

    (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

57. In the case of *Hyam v DPP* {1974} A.C. the Court held inter alia that:

> " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."

58. In the case of *Bonaya Tutu Ipu & another v Republic* [2015] eKLR, the Court of Appeal stated as follows;

> "..... In the persuasive decision of *Chesakit v Uganda*, CR App No 95 of 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."

59. In this case, PW4, Dr. David Chumba, the Pathologist who conducted the post-mortem on the body of the deceased stated that the body was of a 67 years old woman and he formed the opinion that the cause of death was asphyxia by manual strangulation which, as aforesaid, he described as strangulation by use of the hands to compress the airway.

60. My finding is that the element of "malice aforethought" is easily inferred from the nature and extent of the assault executed against the deceased. "Malice aforethought" is also inferred from a consideration of the part of the body targeted – the neck. The killers were obviously aware that the vicious strangulation of the 67 years old woman could lead to her death, or at the least, cause her grievous bodily harm. Indeed, the autopsy describes some of the injuries suffered by the deceased as a partial broken trachea and a fracture of the vertebral bone - C3 and C4 (bones on the neck). Considering these factors, I am convinced that that it was the intention of the assailants to completely stuff life out of the deceased, or at least, to cause her maximum injury. To my mind, these facts easily establish the existence of "malice aforethought".

61. Under the above circumstances, I am clear in my mind that the accused persons committed the act that resulted in the death of the deceased and further, that there was "malice aforethought" in their actions. In view thereof, I am satisfied that the Prosecution has through the facts and evidence, proved the charge beyond reasonable doubt. The evidence remained credible, cogent and irresistible to point at the accused persons as the culprits.

62. For the above reasons, I find both the accused persons guilty of the charge of murder contrary to Section 203 of the *Penal Code* and as a consequence, convict them both.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 18TH DAY OF JULY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Both Accused persons present in open Court

Ms. Chelogoi for both Accused persons

Ms. Muriithi for the State

Court Assistant: Brian Kimathi