



**Republic v Kisia (Criminal Case 87 of 2017)
[2025] KEHC 10720 (KLR) (16 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10720 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 87 OF 2017
TM MATHEKA, J
JULY 16, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

WINNIE MUMBE KISIA ACCUSED

JUDGMENT

1. The accused, Winnie Mumbe Kisia, is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, Cap 63 of the Laws of Kenya.
2. The particulars are that on the 8th day of April 2015 at Kasooni Sub-Location, Mbooni East Sub-County within Makueni County, she murdered June Chebuoge alias Ndinda Kisia alias Kavake
3. The prosecution called eight (8) witnesses in support of its case.

Prosecution's case

4. PW1 was Dennis Kavoi Mutuku, a minor. He testified that he was a resident of Konza Village and was neither going to school nor working. That he was staying with his grandmother Sabina Mutei. On 08/04/ 2015 he was at Kilawa and he ate lunch at home with Yusuf who had been employed at the house as a shamba boy, Winnie the accused and another boy he did not know and had only seen him on that day. After lunch, they rested outside the home under a tree.
5. At around 1.00pm, the children Jane Chebuoge and Chepkorir returned from school. He did not know whose children they were. They were given lunch and then they went to look out for the squirrels. At 4.00 p.m., he went to graze the goats at the shamba. The children were looking out for squirrels near the gate of the house and he left them there.
6. Dennis testified that he was in the field and around 6.00 p.m he heard Winnie calling Chebuoge. She then called him and asked if he had seen Chebuoge and he said that he had not seen her. At 7.00 p.m.,



- he took the goats home where he found Winnie, Yussuf, Chepkorir and the other boy. He locked up the goats and Winnie told him that Chebuoge had run away. She used to run away before and would then return. She used to leave in the evening and return the next day at 1.00 p.m. He did not know why she used to run away. They did not look for her. They ate and slept and Chebuoge had not returned.
7. The next day it rained in the morning and he asked Yussuf to assist him to herd and graze the goats. They took them to someone's field but were asked to leave by the owner. The goats were then dispersed and when he went to look for some of them, he found Chebuoge lying under a tree. He called her and left her there. When he returned, he realized she had been rained on and there was blood on her nose.
 8. He told Yusuf that they should carry her home but Yusuf told him to go home and call Winnie. He found Winnie at home with another lady and when they returned, they looked at Chebuoge and said that she was dead. They returned home where Winnie called her mother and informed her of the death. Winnie's mother told them to report to the police.
 9. Yussuf was left at home while he (PW1) together with Winnie and the other lady went to the police and wrote their statements. The police collected the body at about 4.00pm.
 10. He stated that they had lived with Chebuoge at the home from August 2014 but he did not know whose child she was. She was about 9 to 10 years. He testified that they were staying with Winnie at the home but she was not looking after the children.
 11. He said that the children were looked after well but he did not see anything else they did that day other than look out for the squirrels. He identified Winnie in Court. He said that his grandmother and Winnie's mother are sisters. Scholastica is Winnie's mother and his grandmother is called Sabina.
 12. Further, he said that there was a day June Chebuoge slept outside and she said she had slept in the field. When he saw her in the field, she did not appear hurt.
 13. On cross examination by counsel for the accused, he said that he used to herd goats and there were no cows. They had lunch on that day before the children returned from school. On that day Winnie had a small child she was breastfeeding and the child was not yet able to walk. June Chebuoge was also called Kavake and Chepkorir was older than Chebuoge. When June and Chepkorir arrived, they were served with food by Winnie. The lady who used to work in the home was called Mrs. Mumo and she was there. After lunch, Winnie told the child to go to the shamba and make sure the squirrels did not eat the crops. They used to do that every day after lunch and would come back at 5.00 p.m.
 14. On 8th April 2015, Yussuf also went to the shamba on the lower part. It was the same shamba where the children were. When he (PW1) let out the goats, he saw June and Chepkorir near the shamba and passed them. When he last saw June, it was about 4.00 p.m at the shamba and she was with Chepkorir . When he heard Winnie calling Chebuoge, she was using the name Kavake. He heard her call many times when he was grazing the goats. Winnie called him from the house and asked whether he had seen her and he said that he had not seen Kavake. He said he did not see Yussuf. He said there were trees and one could not see the home from where he was. He did not see Winnie leaving the home.
 15. When he went back to the home, he found Winnie, Chepkorir and the one whose name he did not know. Mrs. Mumo had left the home after finishing her work. It was normal for June and Chepkorir to run away and they (PW1 & the rest) did not know where they would sleep. One day when they ran away, they said they had slept under a tree. They did not know why they slept there. He denied any knowledge of what killed June.
 16. He confirmed that there was a statement they wrote at Kalawa police station on 14th April 2016. He stated that the second further statement was longer because Winnie told them not to say or tell her



- mother that there was a man at her house. The man slept at Winnie's house. They went to the police station with Winnie, Yussuf and the assistant chief. He confirmed that they were arrested the 1st day they went to Kalawa police station on Friday and they stayed there for more than a week.
17. He testified that before being released, the police asked them to write another statement. In the first statement, he did not state that Winnie's friend was at the house. Yussuf said that they should tell about the the man's presence in the house. He denied any involvement in the murder and said that he did not know how the body of June came to be in the forest. He stated that on the day Winnie was calling Kavake, he did not see Mbula the assistant chief as he never went to their homestead.
 18. He stated that there was a mango tree near the assistant chief's house and June and Chepkorir used to pick mangoes there. That there is a day they stole mangoes from Mbula's farm and returned with mangoes in a sack. Mbula later cut down the mango tree. He did not know if Mbula took the sack of mangoes. That the man who was with Winnie was arrested. He heard that the man was to be brought to the police station but did not see him and had not seen him since that day. That the man slept in Winnie's house on the night of 8th to 9th April 2015.
 19. PW2 was Faustina Mwikali Mbindyo, a resident of Kalawa, Kamine village and a casual laborer. She recalled that on 8th April, 2015 at 12.00 noon, she was at home. She went to Scholastica's home at 12.00 noon to undertake some work. She found Winnie outside her house on her own and they chatted. While they were talking, a boy called Dennis came running and said that he had seen the child Kavake in a thicket asleep. He said that he tried to call her but she did not respond. She knew Kavake as she would meet her when she came to work at their home but did not know whose child she was.
 20. As Dennis was telling them about the incident person she didn't know came from Winnie's house. Winnie told them to go and see Kavake and they all went i.e PW2, Winnie, the man and Dennis. They were led to the thicket by Dennis and she saw the child lying on the ground . She said it was about 2 kilometers from the home.
 21. Winnie called her mother Scholastica and informed her. She escorted Winnie to the police station where she made a report and then returned home. She did not know what happened thereafter. She returned to the Police Station on 17th April, 2015 to record her statement. She said that she did not know Kavake very well.
 22. She said that she had not worked there many times and would return home before the children arrived from school. She had known Winnie for a short while and they did not have relationship. She identified Winnie in court.
 23. On cross- examination, she said that she used to work at the home in the morning and leave at lunch. She used to arrive at 8.00 am and leave at around 12noon. On that day, she had gone with her small child of 1 year and 2 months and had arrived at 12 noon because it had rained. On 8th August, 2015 she had also gone there to work but she left early at noon. She saw Winnie on 8th August, 2015. There was also a man that she left there.
 24. She testified that the children, June and Chepkorir did not find her on 8th April, 2015. Dennis found her but not the children. That Yusuf was guarding the maize shamba so that the squirrels would not come in. She was also to guard the farm against the squirrels on that day but did not do it.
 25. PW3 was Bendetta Kasaku Tanui. She testified that she was a resident of Kericho, a casual labourer and a mother of four children but one is deceased. The children are Valie Chepkorir, June Chebuoge, Jackline Chelegat and Emanuel Keptotich in the order of their birth. In August, 2012 she had 3 children and after differing with her husband, she left Kericho and went to her mother in Kibera.



She met a man called Josphat Blakie who introduced her to a woman called Scholastica in September 2012. Scholastica employed her to sell water at a salary of kshs 5,000/= per month. She worked at Scholastica's shop in Kibera for one month and then Scholastica forced her and the children to go to Kalawa in January 2013. It was Scholastica's son who took them to country bus and travelled with them to Kalawa. After one-week Scholastica went to Kalawa and she (PW3) told her that she wanted to go back home. She did not have a telephone to contact her relatives when she left for Kalawa. Scholastica insulted her and returned to Nairobi after a week with June, the deceased. Scholastica's sons Kasee & Kevin started to beat her. She stayed at Kalawa for six months. She reported to the police station. Scholastica did not pay her and she had no fare to go back home. Another child of about 8 years called Diana was brought from Kibera by Scholastica's daughter called Carol. The child was brought by a daughter of Scholastica called Carol. The child used to cry a lot. Scholastica then called and asked that the child be taken back.

26. She testified that she reported to the police station as she wanted to go back but was being prevented by Scholastica. She sold water and made Kshs. 600/= and went back to her parents in Nairobi in August, 2013. She got a job at a hotel and got a house for her children. Joseph Blakie told her that Scholastica wanted to say hello to the children. In December, 2015 when she was at work, a child of Josphat Blakie told her Scholastica had taken her two children to buy them shoes. She went to look for her children and found Scholastica's husband who told her that he did not know anything about the children. She called Scholastica who told her to take her where she wanted. PW3's father told her to tell the chief and the chief told her to report to the police. She reported at the Police Post at Kenyatta and was then told by the chief to talk to the children officer. They wrote a letter to Scholastica and Scholastica and her husband told her (PW3) that the children had been taken home to Kalawa. They went to Kalawa, where they found Scholastica who took Blakie to her home. She (PW3) went to the police station at 6.00 p.m. and stayed there until morning. The police told her to take the letter to the chief and the chief told her that they could not help her.
27. She went to the home of Scholastica and found the children looking out for squirrels at the farm. She returned to Nairobi and went back to the police station. Scholastica went to the children home and wrote that she would return the children. She (Scholastica) however took the children. She (PW3) was pregnant at the time and she went back to Kericho Police Station and children home and at that point her cousin told her that her child June had died. June was then 8 years old. She identified a clinic card (MFI) showing that June was born on 15th July, 2007.
28. Her cousin called her on 9th April, 2015 and told her that she was wanted in court. She travelled on 10th April, 2015 with her child's father and went to her cousin's house at Kibera. Her cousin told her that her child had packed her clothes and was found dead under a tree. She reported to the police at Kenyatta Police Post and then went to Kalawa Police Station on 13th March, 2014 with her cousins, father, uncle, brother, children officer and father of her child. They were nine.
29. She remained at the police station at Kalawa and the children officer and police went and fetched Scholastica, Winnie, Dennis Yusuf, Chepkorir and the chief. She knew them all from when she was working there. They said that the child packed her clothes and left and that they did not see her again. They stayed at the police station on 13th March, 2015 but did not see the child's body. They went back to Nairobi with Chepkerui.
30. On 14th March, 2015 the DCIO recorded her statement and on 15th March, 2015, they were shown the child's body. It was decomposed and she could only identify the deceased through a black mark on the forehead. The postmortem was done on 23rd August, 2015 at Machakos Hospital and she identified her child. She saw that the ribs, leg and throat were broken. Chepkorir told her that Winnie sent the



- deceased for a steel wire of 5 Kshs but the deceased brought a steel wire of 10 Kshs. That Winnie started beating the deceased with a stick. She then took the child to the house and got the chief who told her that the child was dead..
31. On cross-examination, she said that she did not report at Kalawa Police Station how Kalee and Kelvin were beating her. Scholastica's home was near the stage and the assistant chief was a neighbour of Scholastica. She confirmed that she did not make any report to the assistant chief or chief and that she was not being locked up or retrained. She testified that she had gone to Kalawa for her children. That when Joseph told her that Scholastica wanted to say hallo to the children, he is the one who took the children himself.
 32. She said she did not go to report to the police when she found that the children had gone to Scholastica's, that June who was 6 years old then was refusing to go back with her and would cry. She said she gave the letters from the children officer to the police. Scholastica was not charged in court and she (PW3) was also not charged in court. She denied wanting to kill her children and stated that it was Scholastica who told the children officer on 13th January 2014 that she (PW3) wanted to kill her children.
 33. She said that she could not take the children there because the children officer and Scholastica were insulting her and were against her. They gave her authority to go home to deliver and Scholastica took the children. She (PW3) took them to Primary School in Kericho. She denied being a drunk or putting her children at risk after differing with her husband. She said she was not communicating with her children. The children were not taken by Winnie. That she left Keronga at the homestead and got to meet Denis at the police station. She did not know him before. That when they went to the Kalawa Station after the death of the child, Scholastica, Mbula, Winnie, Chepkruui and the rest were taken from the home before the OCS. She said that the OCS did not want to tell the truth and was hiding information on how the child (deceased) was beaten and she did not know why. She said that Chepkorir told her Winnie had beaten the child for buying the wrong steel wool. She denied killing her child and said that she used to care for her. She told the court that she had faithfully taken the child to clinic for 9 months according to the clinic card and never abandoned her. She said that her husband was not in court because it was not his case.
 34. PW4 was Valentine Chepkorir. After voire dire examination she was found to be of sufficient intelligence to give evidence and to appreciate the importance of telling the truth. The court noted however that she did not understand the effect of an oath and took her unsworn evidence. She testified that Mutheu was not her name; she was 12 years old and in standard three at Thulgul Primary School; stayed with her mother and father and her mother whose name was Bendetta Kasalu. She did not know her father's name. she named her siblings and stated that her sister June Chebkwogen was no longer with them because she was killed.
 35. She could not remember the name of the place they staying with Chebkwogen in 2015 but recalled Dennis, Karoga, Yusuf and Winnie. She identified Winnie in court. She could not remember the date Chebkwogen was killed but told the court that on the day she died, they woke up, washed legs and went to school. Winnie made for them tea in the morning. She could not remember the name of the school they were then. She was then in standard two and June was in standard one. The school was not near the home. There was no other person in the home only Winne. They left school at 1.00 pm and went home. They found Winnie, Dennis, Karoga and Yusuf. Karoga used to look after the cows. There were only two children at the home, her and June.
 36. When they got home, they removed their school clothes and put on home clothes. Winnie served them githeri which they ate. Winnie then told them to go look out for the squirrels at the shamba. There was



- no one else at the shamba. Winnie then called her to go and wash the utensils and when she got to the sufuria, Winnie told her to go to the shop to buy steel wire however Chepkwogen said she would go. Winnie told Chepkwogen to give her a paper and a pen and wrote for her and gave her Kshs. 10 coin.
37. Chepkwogen went to the shop but bought the steel wire of five shillings. Winnie told her to return it as she had been sent the one for Kshs.10. She went back to the shop, returned and told Winnie that the owner of the shop had refused to give her back the money. She had the steel wire of Kshs.5. Winnie then sent her (PW4) to the gate to get a kiboko (cane) which was long and Winnie broke it into two using her leg. She said that Winnie then hit June with one cane and then strangled her with the rope used to tie the cows which was outside the house.
38. . She (PW4) was outside the house with Winnie and June; that Dennis and Yusuf were not there; Dennis was looking after the goats and Karoga was looking after the cows. She said that when Winnie was caning her, June was crying but when Winnie strangled her, she was silent and. Winnie then called Mbula on the phone, who arrived touched June at the chest and said she had died.
39. Winnie then took a gunny bag from the store, she removed the rope from June's neck and put it where it was and put June in the bag and went to throw her away; that Mbula and Winnie were the ones who carried June to throw her away in the forest where there were many trees that was far from the home; and it was during the day ;that she (PW4) followed them; they removed June from the bag, put her on ground and left her there. ; that they saw her following them. They returned home did not get anyone there. When Yusuf and Dennis returned, no one told them what had happened.
40. That night Winnie cooked food – Ugali and Vegetables and went to sleep. No one asked where June was. In the morning at 7.00 a.m, Winnie made a telephone call to Scholar before she (PW4) went to school. Winnie told Scholar that Chebwogeni had died. She was told to go and report to the police. PW4 went to school and left Winnie at the house. When PW4 returned, she found Winnie with another woman whose name she didn't know. No one told PW4 anything and what was happening. After that, other people arrived with a car to carry Chepbwogen. The people were wearing police uniform.
41. They carried Chepbwogen from the forest below the garden where there are trees. PW4 did not go there when they took Chepbwogen. Scholar arrived the next day. The people did not ask PW4 what happened. PW4 went to the police station on a date she could not remember but the police did not ask her what she saw. It was only the teacher at school who asked her what she saw.
42. She said there was a time she went to the police station alone and it was not far. She told her standard two teacher called Susan. The teacher asked where Chepbwogen was and PW4 told her that she had died. She stated that they had stayed with their mother in that home but Scholar chased her away; that their mother had come for them before Chepbwogen died but Scholar refused.
43. Before Chebwogen died PW4 had gone with her mother and Scholar to the police at Nairobi but PW4 did not know what they went to do at the police. After Chepbwogen died, their mother came that morning and took her away
44. On cross-examination, she said that when they went to look out for squirrels, Yusuf was there chasing the squirrels and they were helping him. Below the shamba was a bush. Karoga was looking after the cows. PW4 could not remember Winnie sending Dennis to buy steel wire. It was Chepbwogen who was sent to buy. When Winnie was beating Chepbwogen, it was only PW4 and Winnie who were there. Dennis and Yusuf were not there. Winnie was the one who called Mbula. When Mbula arrived, he found Chepbwogen on the ground and she was not talking. Mbula and Winnie put Chepbwogen in



- a gunny bag. PW4 found them but did not tell the police what happened. Dennis and Yusuf were not there when Chepbwogen was put in a gunny bag.
45. PW5 was Robert Cheruyiot Tanui from Kericho County. He testified that he is a farmer and is married to Bendetta Kasalu (PW3). They now have four children but had five before among them Chepbwogen the deceased who was born around 2007. Before 2015, he was staying with the children and the mother. That he differed with his wife and she took the children to Nairobi.
 46. In April 2015, he witnessed the postmortem of his child June Chepbwogen at Machakos Hospital .He was with the child's mother and doctor. He identified the body and after the postmortem, the doctor told them that she had been strangled and had injuries on the chest. Before June died, they tried to get the children but Scholastica used to refuse to give the children. He didn't know where Scholastica took the children. He did not know the accused before June died.
 47. On cross- examination, he said that he knew and saw the accused when they went to see the deceased's body at Kalawa Mortuary and saw her at Kalawa Police Station. He had been called before when the children were taken by Scholastica. He went to the children office at Nairobi at DC's office but did not get the children.
 48. PW6 was Dr. Stephen Musembi of Makueni county referral Hospital. Who testified on behalf of Dr. Waithera whom he worked with at Machakos Hospital. He knew her handwriting and signature. He testified that the report referred to the body of a young female African body which had decomposed skin slippage, lacerations on right neck, suspected strangulation marks on neck with deep muscle compression. No other noted external injuries.
 49. On further examination there was fracture on the ribs – 5th – 11 on left side and food particles on airway. Nothing was noted on other systems. The opinion was that cause of death was asphyxia. There were strangulation marks on the side of the neck. The doctor signed and stamped the report in 2015. He produced the post-mortem report as exhibit 2.
 50. On cross-examination, he said that the body was decomposed. Decomposition noted was relevant. Depending of the level you may not be able to note some external injuries. Internal injuries will not be affected. There was no indication of what was used to strangle the deceased. No indication if it was hands or a rope. There were no other external injuries other than strangulation and broken ribs. If the mother said leg was broken, he could not go by that as a professional doctor. If the child was whipped all over the body, it may cause death depending on what part of the body was whipped. Dr. Waithera did not indicate whipping on the body. Lacerations were only on the neck. The fracture on the ribs could be caused by a stick depending on the size of the stick. It was only on left side of the ribs. The doctor noted suspected strangulation on the neck, with deep muscle compression.
 51. PW7 was Yusuf Machio Idris, born in Matungu and resident of Matungu testified that his work was painting and decorations and was aware of the case before court. He knew the deceased as Kibet but was not sure. He knew the accused as Winnie. He was living with his mother from October 2014. In December 2014 his mother shifted from Githurai to Kibera Laini Saba where he met Winnie. Winnie's mother employed him to sell water. They got used to each other and she told him that she would employ him at home.
 52. Winnie took him to Ukambani in April 2015 where met a young man called Denis and two young girls – Kipkorir and another. Winnie and her young daughter were there. Winnie's mother told him to work in the farm while Denis herded the goats. After sometime, Winnie's mother left on 7/4/2015 for Nairobi.
 53. After she left, a male visitor arrived whom he did not know. Winnie welcomed him like a special visitor.



54. At 5pm, he decided to go and take a bath near the toilet. He entered to help himself and when he came out, he met Winnie carrying the child who appeared to be unconscious. The child was lying on the shoulder and there appeared to be froth oozing from the mouth and nose. The head of the child was bent. Winnie told him that the child had fainted but did not tell him the cause of the fainting. He then returned into the house where he used to sleep with Denis.
55. After five minutes, Winnie returned and told him that he should keep what had happened secret and she would pay him. After that, she told him to go to the farm and she called the elder sister of deceased from the gate to go and wash utensils. It was around 6pm on 8th. He went to the farm but did not stay there for long and decided to return. He found that Denis had returned. The sister of the deceased was washing utensils. Winnie was not there. Then Winnie called him and Denis loudly and said that her daughter had disappeared the way it had been her habit. They ate dinner and slept.
56. He did not ask Winnie any questions as he was not used to her. He had been there for only 7 days. Winnie went to her house with the visitor and he went to sleep. In the morning at 11am, Denis took the goats to a neighbor's farm. He was together with Denis but on different sides. That was when Denis noted the body of a child, the deceased.
57. Denis called him and told him that they try to wake up the child. He told Denis not to touch the body and to go call someone from the house. They called Winnie who went with her man and a woman who was weeding maize that day. Winnie's man said "this is trouble". Winnie said that they should report to the police. Then Winnie, her man, Denis and the woman left to go to the police. After a short while Winnie, the woman and Denis returned. Winnie's man did not return. They returned with the police.
58. They put the child in a sack and put the body in the police vehicle. The next day, Winnie's mother arrived from Nairobi and said that they should all record statements. They proceeded to the police station. He testified that Winnie reminded him not to reveal that he was an employee and to say that his mother was a friend of her mother and that he had gone only to visit. He told her that that was not true. He also said that Winnie told him to say that the child was injured in his presence. Since he did not have any person to explain the situation, he recorded what he was told. He recorded a statement with the police that day. He recorded that the child disappeared in the evening and that in the morning, they found her dead. He conceded that that was not the truth.
59. He stated that could not remember the date he recorded the first statement but that he was arrested together with a neighbor, maybe a subchief, and they were in the cells for 3 days. They were not assaulted by the police. That on 18th April, he decided to record his independent statement giving the evidence he tendered in court. That nobody forced him to record the 2nd statement. That in 2015, he was 17 years old. After recording the second statement, the police told him that they would be attending court. The police then took him to Matungu and gave him bond. He never returned to the homestead of the Winnie's mother again. He was in that homestead for 7 days. He had no grudge with Winnie. He identified Winnie in court.
60. On cross examination, he said that he was born in 1998. He had his identity card in court (ID reflects 1999). He was told by his grandmother that he was born in 1998. He came to know the accused in 2015. He was not employed by accused but her mother. He had lived for a week then he saw a male visitor join them. The male visitor was welcomed as a special guest. That when he asked who he was, the accused called him a loose talker.
61. That his work in the farm was to drive away birds and guard the farm, the children, the deceased and her elder sister Chepkorir would assist him. That day at 5pm, he felt like going back to take bath. He did not take a bath after seeing Winnie with the child. He did not talk to the child. The child was being



- taken from the side of the farm to the house. He did not ask Denis about the matter and did not tell Dennis about it.
62. To him, it was unusual for the accused to go from the homestead to the farm. The accused told him not to say the truth, and he did that. He did not know what revenge she would do to him. She did not tell him of any specific revenge. She merely told him that he would see.
 63. The police man told him to say the truth. The police man asked him to say what happened to the child. Winnie was not present (statement dated 13/4/2015) – marked as DMFI 1 was produced as DEXHIBIT 1. After recording the first statement, he was put in the cells with Winnie and Denis and another woman who he understood was sub-chief, whose name he could not remember. They were there for 3 days.
 64. When in custody, he recorded another statement whose contents were different. Winnie told him that she would give him 5,000/= but was not given that money. He denied telling the accused that the deceased went to the farm eating potatoes.
 65. He proceeded to testify that the police told him that he was too young to work that is why he did not go back to work. IP Wafula talked to him and took him home. The police knew where he was from 2016. He denied telling Valentin Chepkorir not to talk the truth. He denied that it was him and Denis who put the body in a sack and took to the police. He denied that he was the last person with the deceased. He confirmed that the deceased assisted in guarding the farm, which was a big farm, and she guarded near the homestead.
 66. Winnie's man was also arrested. He did not see Winnie kill and did not see her placing the body where it was found. He saw her carrying the deceased. There was no other person then and he did not inform anybody until his second witness statement. When he saw the accused with the child, Denis was herding goats. There was a woman working in the homestead, but she came in the morning. It was the accused who said there was need to report to the police. It was the accused who reported and not PW7.
 67. PW8 was No. 81261 Snr. Sgt Lincoln Wafula from Guna police station Wajir County. He testified that he was at Kalawa police station earlier. On 9/4/2015 – while at Kalawa police station, one Kamba female Winnie Mumbi in company of Juvenile male Denis Mutuku reported that Denis Mutuku went to graze goats that day at a nearby bush and came across the body of a girl lying in the bush. He identified the girl as June Chebwoje alias Ndinda Kisya. Dennis went back home and informed Winnie Mumbi and together they went to the place where the body lay.
 68. Winnie Mumbi confirmed that the girl was dead. It was reported that the girl had gone missing the previous day 8/4/2015. PW8 and fellow officer Cpl Steven Kibet went to the scene where they found the body lying lifeless on its left side. On closer look, there was blood oozing from the mouth. There were black marks around the neck since it had rained heavily that night, the body looked fresh.
 69. PW8 drew sketch a plan and they removed the body to Kalawa health centre mortuary. He made reference to the sketch plan which showed the body lying on its left in a bush. It also showed a seasonal stream and blood from mouth. It was about 300 metres from the homestead of Scholastica Kisya, the mother of Winnie. The deceased and accused lived in the same homestead. He produced the sketch plan as exhibit 3.
 70. On 11/4/2015, the OCPD Mbooni East Njeru and DCI Waweru went to Kalawa station and revisited the scene. They interrogated Denis Mutuku and Winnie Mumbi. On 17/4/2015 – the OCS Kalawa police station C I Ambani, officers and PW8 – proceeded to the homestead of Scholastica Kisya and arrested Winnie Mumbi who was custodian of the deceased, Dennis Mutuku a casual labourer at the



- homestead, Yusuf Machio Idriss who was casual laborer at the homestead and the area assistant chief Christine Ndinda Malonza. Their statements were recorded at the station and they were put in custody.
71. On 20/04/2015, PW8 proceeded to Tawa Law Courts with the suspects and requested court to grant him 14 days to complete investigations. He was granted 10 days. During investigations, Yusuf Machio Idriss confirmed that on 8/4/2015 at 17:00 hrs – he was on a call of nature at the toilet and when he opened the toilet door, he bumped into Winnie Mumbe carrying the deceased. According to Yusuf Machio, Chebwoge appeared as if Mucous was oozing from the nose. Winnie Mumbe told him that deceased had fainted and she wanted to put her at the fence to see if she would regain consciousness. Further, PW8 testified that during investigations, the elder sister to the deceased namely Valen Chepkorir said that the accused had the tendency of beating her and the deceased using firewood. Valen Chepkorir recorded a statement.
 72. On 22/4/2015, the body was transferred from Kalawa health center mortuary to Machakos level 5 hospital and on 23/4/2015, a post mortem examination was conducted. He made reference to the post mortem form which said that the deceased died of blunt trauma and strangulation. His conviction, he testified, was that deceased was strangled by accused. He said that the evidence was from Yusuf and Chepkorir (sister of deceased) and both had testified.
 73. . The people who reported the death and the missing were Winnie and Mutuku. PW8 said that it looked awkward to him that they did not report the missing child earlier. The mother of the deceased used to work in the homestead. She left behind the two children. PW8 talked to her and she said that Scholastica refused to give her the children. PW8 did not find out for how long the children were left there may be 3 years. They were schooling. Idriss Machio Yusuf testified to seeing the accused carrying the deceased while unconscious in the further statement recorded by the OCS – Kalawa police station.
 74. PW8 testified that the deceased was born on 15/7/2007 and produced the clinic card as exhibit 1. He said that he released the other suspects because he did not have evidence against them. He pointed at the accused in the dock and said that she was the one she charged.
 75. On cross-examination, he said that he investigated the matter and initially arrested four people; Denis Mutuku, Idriss Machio Yusuf and Christine Malonza – assistant chief. The assistant chief was called Mbaluka. That the other two testified but not assistant chief though she recorded a long statement. He said that he found it odd for a child of 8 to disappear from home and no report made. On the day the child disappeared only Winnie Mumbe was the adult present. There was also her fiancée an adult called Geoffrey Oyugi.
 76. Geoffrey Oyugi was arrested later by the DCI – on 01/05/2015. He was an adult and present on day the deceased died. In his statement, he denied being there on the date but that he was there on an earlier date. He denied what the witness said that he was there on that day. Yusuf Idriss said Geoffrey was there. PW1 also said Geoffrey was there. PW8 said that he was convinced Geoffrey was there.
 77. According to the recorded statement, Geoffrey said he was actually there. PW8 was shown the statement and that Geoffrey did not say that he saw the accused beat the deceased. PW8 said that he would not call him as a witness as he denied the allegation against the accused. PW8 said that he was aware that the deceased and the sister would disappear from home for some days and would be searched for and brought back. That in her statement, the assistant chief Christine Ndinda Malonza attested to the two children’s habit of running away from home.
 78. He said he thought Valentine Chepkorir was confused in her testimony. He said she told him that the sister of the deceased said that the accused beat the deceased to death. That Valentine said that Mbula the assistant chief was present when the beating took place which the assistant chief denied. That she



said also said that the accused and Dennis put the deceased in the sack and took the body away which was not true. That she said she told her teacher about the fate of the sister yet when the teacher recorded her statement, she stated that the accused and others were looking for the child at night with torches. This teacher was not called as a witness. He said that the other parts of her statement did not agree to that.

79. PW8 said that the statements of Yusuf Machio did not say that he saw the accused kill. PW8 confirmed that nobody else corroborates his statement. He did not mention to anybody what he alleges he saw but stated that he was warned and promised Kshs.5,000/=.
80. PW8 said that the Assistant Chief recorded statement on how the children used to live in the homestead and the torture they suffered, yet he had not called her as a witness. He confirmed that the accused did not run away from the home and was the one who reported the death at the police station. He said that. It was after they got more time from court that they got incriminating information from young people. He confirmed that neither the parent nor guardian of Yusuf was present when he was recording his statement. Valentine's mother was present.
81. PW8 further stated that the OCS was not a witness to testify on the confession or disclosure. PW8 took a statement from accused and she denied that Yusuf and Valentine incriminated her. Geoffrey said he was the husband. PW8 thought that the accused was fearing that the deceased would tell her mother that Geoffrey came there. The accused had a child already with Geoffrey.
82. It is important to state here that evidence of PW1, 2,3,4,5 was taken by Lady Justice Nyamweya (as she then was) before the matter was transferred to Makueni, PW6,7 ,and 8 was taken by the Hon Justice Dulu J and he also formed the opinion that the accused had a case to answer.
83. When I took over it was to hear the defence.

The Defence Case

84. DW1, the accused gave a sworn testimony and testified that her name is Winnie Mumbi Kisia and is a businesswoman. She was reminded of the charge which she denied. She testified that in 2015, she was selling mangoes which she would get from Makueni to Nairobi and Mombasa. Her home is in Kalawa Makueni.
85. She recalled that on 7/4/2015, she travelled from Nairobi on mango business. At about 1:00 pm, she reached home and mama was there with Kavake and Chepkorir who were sisters. They were living with her mother who is a business woman and farmer. Her mother told her that because she had arrived, she (mother) could go to Nairobi. There was Dennis and Yusuf who were in the shamba when mama left.
86. On that 7th she cooked and slept early. The next day 8th April 2015, she woke up early and made uji for her baby. She prepared Kavake and Chepkorir for school as they were going to Kasooni primary school. She went to the neighbors to look for mangoes and returned at 11:00 am. The cleaning lady arrived and continued with her work.
87. She prepared lunch and at 1:00 pm the two children returned, changed, had lunch and continued to play. She was just in the home as the two children went to the shamba to watch over the maize against squirrels – they were with Yusuf Machio PW7. About 5:00 pm, Winnie saw Chepkorir at home. Chepkorir (PW4) was older than Kavake. Winnie asked her where the others were and she said that Kavake was with Yusuf at another side of the shamba.
88. Winnie went out of the house and began to call out Kavake but there was no response. She called Yusuf but he did not respond – both were in the shamba nearby. Dennis the herdsman arrived at about



- 5:30pm and Winnie asked where the others were. Dennis said he was not with them. Winnie called out Kavake but she did not respond. Winnie called Yusuf who responded and said he was near home. He said he had not seen Kavake. Winnie told him to look for her and tell her to go home. Yusuf returned home when it was dark and said that he had not found her. Winnie was shocked and she called mama and told her that Kavake was missing.
89. Mama told Winnie not worry because it was her habit – ni kawaida yake – to go play at the neighbours’ and return home. Kavake did not return and they slept. The following day it rained till 10:00am. Winnie prepared breakfast and Chepkorir went to school. Dennis and Yusuf went to shamba. Around 11:00 – 11:30 am Dennis returned running. Faustin was at home. Dennis arrived calling and insisted that Winnie and Faustin should accompany him to the shamba. He said it was Kavake.
90. They went with him and upon reaching, they found Yusuf standing there and Kavake was lying down. Winnie called but Kavake did not respond. Faustin touched her and said that she appeared dead. She was just lying there. She was dressed. She had been rained on. Faustin told Winnie to call her mother and she did. Mama told Winnie to go to the police station and report – Winnie went to Kalawa police station with Dennis and Faustin. They left Yusuf at home and left Kavake where they found her. They went back home as told by the police and the police arrived later. Dennis and Yusuf took the police to where Kavake was and they took her body and left with her. The next day, the police returned and took Winnie, Yusuf, Dennis and Chepkorir to Kalawa police station. The previous day Chepkorir had asked Winnie whether Kavake had returned and Winnie had said no – but told her that mum was coming.
91. That day – they went to the office of OCS where each of them recorded a statement separately. Winnie recorded her statement and went home. On 10th April 2015, Chepkorir’s mum (PW3) arrived and took Chepkorir. She had been called by Winnie’s mother. Winnie did not recall any other incident. On 17/4/2015 Yusuf, Dennis and Winnie were arrested by Police from Kalawa police station. They told them that they were under arrest and placed them in the cells. They were there for 10 days from 17/4/2015 to 5/5/2015. They were then taken to Mbumbuni and in between they were taken to Tawa court.
92. Winnie did not record any other statement while under arrest. She recalled the evidence of Yusuf Machio and the statement that Yusuf Machio produced (DEX 1) on 19/6/2021. She stated that she was issued with statement before the case started. She was shown a ‘Further statement of Yusuf Machio’ which she produced as DEX 2. Yusuf said he met her near the toilet carrying the deceased on her shoulder. Winnie said that was not true. She denied that the child was injured and also denied that the child had fainted. She said that she did not see Kavake faint. She denied telling Yusuf to keep secret what he had seen and she would pay him.
93. She denied that she forced Yusuf to record DEX 1 – and that she had promised him KShs.5000/=. She said that she was not present when he recorded DEX 2 and that she did not tell him what to tell the police. She said that on that day, she asked Yusuf Machio Idriss what happened to Kavake and he said he did not know but Kavake was found where Yusuf used to keep the animals. When she sent him to look for Kavake, he stayed for long and then he appeared disturbed (na wasi wasi). Kavake was found in a very open place and it is not possible that Yusuf had not seen Kavake. Kavake left with the sister Chepkorir in the shamba and Chepkorir left Kavake with Yusuf. Dennis was grazing in the bush near the shamba.
94. Further, Winnie testified that she heard the Investigating Officer Snr SGT Wafula saying that he decided to charge her because Chepkorir told him how it had happened. She testified that she was given the statement of Chepkorir in the name of Valentine Chepkorir Kasalu (PW4) dated 17/4/2015 and she produced it as DEX 3. She denied hitting the deceased with a stick. She denied beating the deceased



- because she had sent her to the shop to buy steel wire for 10/= and deceased bought for 5/=. She denied sending her and said that they never used to send the children. That it was the cleaning lady who would be sent. That Mama used to shop for a whole month and steel wire was in plenty at home.
95. She denied that she beat the deceased and strangled her with a rope. She denied that the child was crying and that said that she did not see the child crying. That Mbula was known to her as she was a neighbor and the assistant chief. She denied that she called Mbula. She denied that Mbula and her put the body in a sack and went to throw it away. She denied being involved in disposing of the body. She said that she read the statement of Chepkorir but did not see Chepkorir record statement when they were at Kalawa.
96. On further examination -in-chief by Kaberia, she denied writing a note for Kavake to go to the shop as stated by Chepkorir. That no shopkeeper had been called to show that the said Kavake went to her shop. She said that they were arrested on 17/4/2015 together with the assistant chief and the incident happened on 8/4/2015. That the police did not tell her why they had not arrested her. She denied that it was her and assistant chief who carried Kaveke as stated by Chepkorir. She also denied that Chepkorir followed her to where the body was. Winnie said that she did not ask the police why they did not charge the chief.
97. Winnie denied that Yusuf saw her carrying the body of the deceased in a sack. She said that as one approaches the home, one has to pass the main house, the kitchen, the cattle pen then toilet. That if Yusuf had gone to the toilet, he would have had to pass through the homestead, and he would have seen Mbula. That the evidence of Yusuf – about seeing her came after they had recorded statements. She could not say much about his age but said that he could have been 17 or 18 years old. He would not have been mixed up – hangeweza kuchanganyikiwa.
98. Further, Winnie said that Chepkorir was a child – ambaye alikuwa mtoto wa kuelekezwa sana. She said that she wanted the court to know that she had a good relationship with Kavake and Chepkorir and it was not easy for them to send any one to the shop. That she was not of the character of beating or abusing people. She denied being involved in the death of Kavake and said that she would also like to know what happened to Kavake. She said that Geoffrey, father of her son Jayden was in the home. He was arrested and released. That her mother knew about him and he was known at home. She said that she had not disagreed with Yusuf or the children and there was no reason for her to kill Kavake.
99. On cross examination, she said that she knew these children well but they had no relation. She knew her as Kavake and there was also June Chebwogen alias Ndinda Kisia, alias Kavake. They were staying home with her mum from 2011 and she did not know well how they came to be in their home. She knew their mother but not well.
100. Her mother is Scholastica Kilonzo and she has a shop in Kibera. The mother of the children is one Benedicta. She had not known Benedicta as Benedicta was not living at Kalawa. Winnie used to see her “once once”. In 2015, Kavake was 8 years and Chepkorir was 9 years. All this time Winnie did not see them visited by their parent. Winnie was not much at home.
101. They were arrested four of them – Winnie, Dennis, Yusuf Mbula and Geoffrey. The children returned from school at 1:00pm, they changed and had lunch. The child who Winnie did not know was lost. She just did not return home. Mama was not home. Geoffrey and Winnie were home. Winnie did not put in her mind that the child was lost but she called and the child did not respond. They slept not knowing where she was. Winnie called mama and mama said that it was normal for Kavake to hide and not return home. Winnie had an 8-month child then. The incident happened in their shamba. Winnie, Dennis, Yusuf and Geoffrey were at home. The police were right to investigate all of them.



They recorded statements. Police investigated. He agreed that he produced Yusuf's statement. Yusuf said it was Winnie who reported him.

102. She stated that Chepkorir's statement was recorded in Nairobi. Chepkorir left Kalawa on 11/4/2015 when her mother and grandfather went for her. Chepkorir said that she brought the stick used by Winnie to hit Kavake with. Winnie denied that statement. On being asked by the court why Chepkorir said that Winnie sent her for the stick and strangled Kavake, Winnie answered that; "Chepkorir said many things – I was surprised. It appeared to me that ni maneno ya kupangiliwa. Ni maneno ya uwongo. Our neighbours, our assistant chief – they do not have good relationship – it is not true that I did this. It took a long time for Chepkorir – the next day she even went to school and she never said this immediately. She said it on 17th. It could be my business rivals, neighbours. The child died no doubt. I suspect Yusuf."
103. On further cross examination, she said that it was Dennis who discovered the body. Yusuf said he saw Winnie carrying the deceased on her shoulders but did not say that Winnie was carrying her in a sack. That the two of them said that they saw her in one place at same time but one said she was in a sack and the other one did not say she was in a sack. Chepkorir said that she saw assistant chief and Winnie. She wondered why both of them said that they saw her at one place but did not see each other.
104. She said that the court could also visit the scene and establish that for one to go to the toilet in their home, one must pass the whole homestead. Their home is chain linked. She recorded a statement under inquiry when she was arrested.
105. The defence case was closed at that juncture and the and the accused person filed her submissions.

Submissions by the Accused

106. The accused's submissions were filed by one Morris Kaberia, a Legal Officer at Justice Defenders, Community Legal Office Makadara.
107. It is not disputed that the deceased was killed but it is submitted that the accused not responsible.
108. It was submitted that it was the duty of the prosecution to establish the ingredients of murder as required by s. 203 of the [Penal Code](#); death and cause of death of the deceased. That death was unlawfully caused by the accused with malice aforethought.
109. That in this case the prosecution had only established the death of the deceased and the cause of death. However that they had filed to establish how the deceased was killed and who did it.
110. On malice She relied on the case of *Rex v Tubere s/o Ochen* [1945] 12 EACA 63). where the Court held and acknowledged that in determining whether malice aforethought has been established, the following elements should be considered; the nature of the weapon used, the manner in which it was used, the part of the body targeted, the nature of injuries inflicted either a single stab/wound or multiple injuries and the conduct of the accused before, during and after the incident.
111. That the post mortem report stated that there were strangulation marks on the neck of the deceased but PW6's evidence was that it was not indicated whether they were caused by hands or rope. Consequently, it could not be ascertained as to who and what caused the strangulation. Further that the post mortem report disputed the narrative that the deceased was allegedly beaten or whipped with a stick which draws the conclusion that PW4's evidence was a lie.



112. the alleged stick or rope, weapons used to on the deceased, were not produced as evidence. There was no effort made to recover them. She relied on Republic v Duncan Makau Kioko [2020] eKLR where the court held that;

“The cause of death was found to be cardiopulmonary arrest due to strangulation, lack of flow of air to the brain and head injury. The report was produced as EXB1. In cross examination she said there was no sign of a rope hanging around the neck or bruising around the neck to confirm hanging.”

113. The accused person’s conduct before, during and after death of the deceased did not portray someone that had a guilty mind. She did her best in taking care of the deceased and the sister even before the incident. This demonstrated by PW1’s evidence that; “On that day we ate lunch at home with Yusuf, Winnie and another boy I do not know..” That it was also in evidence that the accused called the children when it was nearing evening so that they could come homelike any ordinary grown-up person with children under their care would have done.

114. It was PW1 who told the court that the deceased would run away and not return, explaining why the accused did not worry so much as to go and look out for her. That it was the accused who mobilized people at home to go and report the incident to the police. That she made an immediate report to her mother and then reported to the police. It was contended that this chain of events is inconsistent with that of a person who had a guilty mind. That the accused not only made the report but she assisted the police in carrying out the investigations. That if she had been guilty, perhaps she would have run away and disappeared from the scene or attempted to interfere with the scene. That the body of the deceased was not hidden and there was no attempt to hide it.

115. Reliance was placed on Republic v Kibutha Makwalu & Anor [2019] eKLR where the court held:

“In this case, the murder weapon was never recovered. Pw1 and Pw3 testified that there were no witnesses who could give probable motive for the killing of the deceased. Going by the conduct of the accused persons after the incident, it is clear to this court that they were present at the scene so that they can assist in the investigations. Pw1 testified that he had directed herders to guard the body from the hyenas.....upon evaluation of the whole evidence am satisfied that there is lack of sufficient evidence to establish a prima facie case against the accused.’

116. This court was urged to conclude that the strength of the accused person’s defence compared with the rest of the evidence creates huge doubts on her culpability. That the prosecution failed to prove this crucial element of the offence of murder.

117. As to whether it was the accused that caused the death PW1 testified that he was not aware of what killed June and he was certain that the accused person never left the homestead at the material time carrying or doing anything as spuriously alleged. That PW1 also affirmed that no one in the homestead was involved in killing the deceased. That PW7 exonerated the accused from any wrong doing in his initial statement and PW3 claimed to have received news about the death of her daughter from one of her cousins.

118. It was submitted that the initial statements to the police when the recollection of the various witnesses was fresh and clear did not implicate the accused with any wrongdoing. These statements were recanted



later with new ones implicating her with the offence. Reliance was placed on *Terekali & Anor v Republic* (1952) when the Court of Appeal of Eastern Africa stated;

“Evidence of a first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides safeguards against later embellishment.”

119. On the credibility of the case for the prosecution, it was submitted that the prosecution brought incredible evidence (PW4 & 7) That the prosecution erred by relying on PW4’s statement which was not made on oath and which was not corroborative of the facts on record. That even the prosecution and the I.O did not believe PW4’s statement because if they did, Mbula would have been an accused person. That PW4’s statement of the accused beating up the deceased cannot be verified as her credibility has been put to question.

120. It was submitted that PW7’s latter statement amounts to a statement done out of manipulation, compulsion, intimidation or inducement. That the police used him to fix the accused person with the wrongful act. That case law has shown that previous inconsistent statements by witnesses are admissible if the same are authenticated to prove the truth as to their contents and most importantly to show that they were made. Reference was made to the UK Law Commission Report- Evidence in Criminal Proceedings: Hearsay and related Topics which states;

“A witness’s previous statement is admissible if it was contained in a “document” and sufficiently authenticated by the witness prior to trial, provided that the witness would have been competent at the time of making the statement and so long as he or she confirms being the originator of his statement and adopts it as his or her evidence.

Witness may be cross examined on an oral or written statement made before the trial which is inconsistent with his or her oral testimony. The evidential use of the earlier statement is governed by the common law. If the witness accepts the earlier statement as being true, it is evidence of its facts; but where the witness denies the truth of the earlier statement it is not evidence, being nothing but hearsay, in which case the earlier statement reflects only on the witness’s credibility. If the witness does not admit making the earlier statement, then the making of the statement may be proved”

121. It was submitted that PW7, a competent witness, testified in court about the existence of a previous statement which in reality tallies with PW1’s, PW2’s and PW3’s statements over what happened in connection to the incident. That the first statement to the police by PW4 is a true reflection of what happened and as such, the second statement stands impugned.

122. The accused also relied on *Kinyatti vR* (1984) eKLR where the court stated;

“From the authorities reviewed, it is apparent that a statement made by an observer or participant is admissible as evidence in criminal proceedings if made on an approximately contemporaneous occasion so as to exclude any possibility of its having been concocted or contrived illegal to the makers advantage regardless of whether or not he testifies at the trial. Such a statement may be proved as original evidence when the fact that it was made, as distinct from its truth (a) is in issue i.e whether or not it was made; (b) is relevant to an issue (regardless of whether it is true or false) or (c) affects the credit of a witness by either enhancing (as when he is consistent) or neutralizing it (when he is inconsistent).



123. It was submitted that the evidence of the previous statement made by PW7, which implicitly indicated that the death of the deceased was not as a result of the accused person doing, was in fact true. That PW7 did not rebut the fact that he recorded two conflicting statements.
124. The court was urged to find that reliance of witness evidence of a suspect who was already in custody at the time in question meant that he could easily be induced to fabricate facts in order to win his freedom.
125. It was submitted that there are a lot of inconsistencies and contradictions from the facts on record. That PW4 differs with PW1 and the rest of the witnesses on whether there were other persons at the homestead at the material time. That PW4 differs with PW1 on whether the accused person left the material home at any material time. That there was a grave contradiction relating to the presence or not of the assistant chief who was adversely mentioned by PW4 but all the other witnesses denied ever seeing her at the home during the incident. That it would have been prudent for the assistant chief to appear as a witness so as to clear the air on her alleged involvement in the case. That the assistant chief was readily available as she is still the current chief but the prosecution did not call her hence raising a suspicion that they are protecting adverse evidence coming to light against their case. That in a bid to cover up the inconsistency, the Investigating Officer (PW8) claimed that the minor must have been confused as to who she saw. That if such a key witness can be confused and or mistaken as to what she saw, how can her testimony be verifiable?
126. Further, it was submitted that PW8 readily admitted that it is only PW7 who alleged that he bumped into the accused person whilst in the toilet. That other contradictions include the fact of the previous beatings on the minors where PW1 asserted that the accused treated the minors well while PW4 stated that it was not the case. That the initial report is inconsistent with the later versions that were later given in court by PW4 and PW7 in particular.. Reliance was placed on *Joseph Maina Mwangi v Republic CA No. 73 OF 1992 (Nairobi)* where the Court of Appeal (Tunoi, Lakha & Bosire JJ.A) held;
- “in any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of section 382 of the *Criminal Procedure Code* viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”
127. Further reliance was placed on *Onubugu v State 119741 9 S.C 1 Kem v State [1985] 1 NWLR* where the court stated;
- “Where prosecution witnesses have given conflicting version of material facts in issue, the trial judge by whom such evidence is led must make specific findings on the point and in so doing must give reasons for rejecting one version and accepting the other. Unless this is done, it will be unsafe for the court to rely on any other evidence before it.”
128. This court was urged to reconcile the discrepancies and reconcile them with the whole evidence to find that the accused person is innocent and that the prosecution failed to meet the standard of proof as expected. It was contended that the flaws in the prosecution case are so fundamental and cannot be cured under section 382 of the *Criminal Procedure Code*.
129. It was submitted that although the prosecution has the discretion to decide on the number of witnesses to testify in trial, failure to call an adversely mentioned witness might lead to a reasonable inference



being inferred. Reliance was placed on Daniel Kipyegon Ng'eno v R [2018] eKLR where the court held;

“the unexplained failure by a party to give evidence or call a witness or tender certain documents may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party’s case. The failure to call a witness or tender documents can allow evidence that might have been contradicted by such witness or document to be more readily accepted. Further, where an inference is open from the facts proved, the absence of the witness or documents may be taken into account as a circumstance in favor of the drawing of the inference. But the absence of a witness or document cannot be used to make up any deficiency in the evidence. Thus, it cannot be used to support an inference that is not otherwise sustained by the evidence. The rule cannot fill gaps in the evidence or convert conjecture and suspicion to inference.”

130. In light of the above, it was submitted that failure to avail the assistant chief and a shop keeper who are alleged to have interacted with the accused person and the victim respectively was fatal to the case as they could have shed light to the court on whether the allegations in question took place or not. That the failure to avail them means that the gaping holes in the case were not filled and the same should persuade this court to create a reasonable inference in favor of the accused.

131. In conclusion, it was submitted that this is an unfortunate case which ought not to have resulted into the death of an innocent young child. That it was a total failure of the system. The words of Dwight D. Eisenhower were quoted to wit; “...The search for a scapegoat is the easiest of all hunting expeditions...” Further, the words of Robert Bloch were quoted to wit; “...the man who can smile when things go wrong has thought of someone else he can blame it on...”

132. Reliance was placed on Elizabeth Wathiegeni Gatimu [2015] eKLR where the court) stated;

“Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge. In 1997, the Supreme Court of Canada in R v Lifchus suggested the following explanation: -

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt. On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high.



In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond reasonable doubt”

133. It was submitted that it is only morally just that the accused person be awarded a benefit of doubt on the charges and be set free in the interests of justice.

Analysis and determination

134. In *Anthony Ndegwa Ngari v R* [2014] eKLR, the Court of Appeal summarized the ingredients of the offence of murder to be;
- a. The death of the deceased occurred and its cause.
 - b. That the death was caused by an unlawful act committed by the accused (*actus reus*).
 - c. That the accused had malice aforethought (*mens rea*).

Proof of death & its cause

135. The investigating officer (PW8) and his colleagues collected the deceased at the scene and the post mortem report (P.Ex 2) confirms the death. The report also indicates that the deceased was identified by her parents PW3 and 5 at the mortuary. Accordingly, the deceased’s death was sufficiently proved.
136. The post mortem report indicates that the cause of death was asphyxia and on the section of ‘external appearance of body’, it states that there were suspected strangulation marks on the neck. The report also indicates that the 5th - 11th left ribs of the respiratory system were fractured. Consequently, the evidence has sufficiently established that the unlawful act leading to the death of the deceased was strangulation.

Proof that the death was caused by an unlawful act committed by the accused.

137. The evidence has sufficiently established that the deceased and her sister (PW4) as well as PW1 and PW7 were living at the home of the accused prior to her demise. It is also clear from the evidence that the deceased’s body was found a few meters from the home of the accused on 09/04/2015 as per the evidence of the investigating officer-PW8. Further, the evidence has established that the deceased was about 8 years at the time of her death.FpW7
138. As to whether the unlawful act was committed by the accused, it was the evidence of PW4 and PW7 which has directly linked her to the act. According to PW4, she returned from school with her sister on 8/4/2015 at 1pm and they were fed with githeri by the accused person. They were then sent to the field to guard the squirrel and thereafter, the accused called PW4 to send her to the shop but the deceased said it was her turn to go to the shop. The deceased was sent to buy a steel wire of kshs 10 but she bought the one for kshs 5. The accused embarked on punishing her using a kiboko and then strangled her with a rope. After realizing that the child was unresponsive, the accused called the Assistant Chief Mbula who arrived and said that the child had died. The accused took a gunny bag from the store where she put the deceased and together with the Assistant Chief, they carried the gunny bag and dumped the deceased at the place where she was found. According to PW4, all that happened in the absence of PW1 and 7 who were in the shamba grazing the animals.
139. As for PW7, his evidence was that on 8/4/2015 at 5pm, he came out of the toilet and saw the accused carrying a child who appeared to be unconscious and had froth oozing from her mouth and nose. The



- accused told him that the child had fainted but did not tell him the cause of the fainting. He then returned into the house where he used to sleep with Denis.
140. Since PW4 and PW7 were the star witnesses, it was important for their testimonies to corroborate each other in material particulars.
141. In his evidence in chief, PW7 said that it was on 7th April 2015 at 5:00pm when he decided to go and take a bath. That he met the accused carrying the child on her shoulder and in cross-examination, PW7 was asked where the accused was headed while carrying the deceased and he said that she was carrying the deceased from the side of the farm to the house, then he changed and said it was from the side of the homestead going to the farm. PW7 did not mention a gunny bag anywhere and did not also mention the assistant chief who allegedly assisted the accused to dispose the deceased as per the testimony of PW4. Neither did he see PW4 who said she followed the two as they went to dispose of the body. PW7 agreed that he did not see the accused killing the deceased or placing the deceased where she was found. If indeed PW7 saw the accused carrying the unconscious child towards the farm or the homestead on 08/04/2015 at around 5.00pm, when did she regain consciousness so that she could be sent to the shop by the accused?
142. Further, PW7's evidence was that shortly after seeing the accused carrying the unconscious child towards the house/farm, the accused called PW4 from the gate in order to wash utensils. On the other hand, PW4's evidence was that she was called by accused to go and wash utensils, and she was with the deceased, alive. That the deceased volunteered to be sent by the accused to the shop. The contradiction here is that at the time when PW7 said that the child was unconscious, PW4 said that she (deceased) was alive and with her, and she volunteered to go to the shop.
143. This material contradiction would have been resolved by the calling of the assistant chief, the shop keeper and the accused's boyfriend who were said to have been present at material times of this case. Their absence leaves a gap in the case as to whether or not the PW4 saw the accused beat and strangle the deceased and dispose of her body together with the assistant chief, or whether PW7 actually saw the accused carrying the unconscious body of the child or he made that up?
144. Further, it is not in dispute that PW7 recorded two statements. In the first statement recorded on 13/04/2015 (D.Ex 1), he did not implicate the accused and the version therein was that the deceased disappeared in the evening and was found dead in the morning. In the second statement recorded on 18/04/2015 (D.Ex 2), PW7 implicated the accused by stating that he saw her carrying the unconscious child and in his evidence in court, he agreed that he did not see the accused killing the child or placing her where she was found. This explains his confusion as to whether he saw accused taking the unconscious child towards home or towards the farm. It is evident it was an act in making up evidence.
145. On his part, PW1 testified that the children were in the habit of disappearing and not returning home. PW1 also testified that when the children returned from school at 1pm on 08/04/2015, Mrs. Mumo (PW2) was also there however, the evidence of PW2 was that she was at the home of the accused on 08/04/2015 at 12.00 noon when PW1 arrived and told them that he had seen the deceased sleeping in a thicket. That they were led to the thicket by PW1 and they saw the deceased lying on the ground. She denied being found at the home by the children when they returned from school hence contradicting what PW1 had said. According to PW2 therefore, the discovery and collection of body by police was done on 08/04/2015 while the evidence of PW7, PW4 and PW1 was that the body was collected by police on 09/04/2015.
146. As for PW4, it was her evidence that the accused caned the deceased and strangled her with a rope. According to the evidence of PW1, the distance between the farm and house was such that two people could communicate while one was on the farm and the other at the house yet PW1 did not testify that



- he ever heard the deceased crying as a result of the alleged beating. . Further, PW4's evidence implicated the assistant chief known as Mbula and although the evidence shows that the said chief was arrested initially, it is unclear as to why she was never prosecuted if indeed he assisted the accused to dispose the deceased. At the very least, the assistant chief should have been called as a witness.
147. PW4 also testified that on the morning of 09/04/2015 as she was preparing to go to school, she heard the accused calling her mother (Schola) to tell her that June had died. This was yet another piece of evidence that the prosecution should have strived to confirm by availing the call records because such records would have confirmed that indeed the accused was aware of the death even before the retrieval of the body. The call records of the accused would also have confirmed whether she called the Assistant Chief on phone after caning the deceased as testified by PW4.
148. Further, PW4 testified that upon getting to school on 09/04/2015, she informed teacher Susan about the death of her sister. In my view, teacher Susan should have been called to confirm whether or not she received such information from PW4. It is trite that the prosecution has discretion to determine which witnesses to call but courts have repeatedly held that the prosecution is also duty bound to avail all the witnesses necessary to establish the truth even if their evidence may be inconsistent.
149. In *Paul Kanja Gitari v Republic* [2016] eKLR the Court of Appeal stated that;
- “However, it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the court to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case.”
150. PW4 also testified about a certain Karoga who used to look after cows. She said that a rope used to tie the cows was the one used by the accused to strangle the deceased. On the other hand, PW1 the herds boy testified that he only used to look after goats and there were no cows. There was also no mention of cows by PW7, PW2 and the accused.
151. Considering that it is PW4's evidence which is placing the accused at the crime scene, it was important for it to be water tight the prosecution witnesses contradicted each other in a way that leaves doubt in the mind of the court about the culpability of the accused person. In *Philip Nzaka Watu v Republic* [2016] eKLR the Court of Appeal had this to say:
- “The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.”
152. The evidence of the deceased's parents, PW3 and PW5 was that the children were staying at the home of the accused's mother against their will and it was the accused's mother who was refusing to release the children. PW3 testified that they had reported severally to the police and children's officer but they had not succeeded in getting the children until their daughter died. Unfortunately, the prosecution did not produce evidence like OB extracts or correspondence from the children office to support the claims by PW3. Further, the evidence of PW4 seemed to suggest that they were being mistreated at the home but she also testified that the accused used to give them breakfast and other meals. PW1 testified



- that the children were treated well at the home and that it was normal for the children to run away from the home and return later. That they didn't know where they would spend the night whenever they run away.
153. The accused also testified that she informed her mother that the deceased was missing and her mother responded that the deceased had a habit of not returning home after going to play at the neighbors. It appears strange that the accused and her mother would consider such behavior from a child to be normal to the extent that when the deceased did not return home on the night of 08/04/2015, the accused just slept without bothering too much. All this information raises a suspicion against the accused but it has been repeatedly held that however strong the suspicion is, it is not sufficient to sustain a conviction in the absence of water tight evidence.
154. That was the case in *Joan Chebii Sawe v Republic* [2003] eKLR, the Court of Appeal stated:
- “We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”
155. From the foregoing I have to arrive at the determination that the prosecution established that the child was killed, that the accused person was the key suspect. However, the evidence on required required to hit the standard of beyond a reasonable doubt as was illuminated by the Judge in *Elizabeth Wathiegeni Gatimu* [2015] eKLR above.
156. In the circumstances, I find that there is sufficient doubt as to who killed the child, and that doubt is resolved in favour of the accused person.
157. Before I pen off, I must wonder on this page as to what the children were doing in the home of the mother of the accused. How did they end up there against the will of the mother? How come they got there and acquired Kikamba names and were enrolled in school in those names? What are the odds that PW1 and PW7 were both minors as well, and a another minor by the name Diana had also been brought to that home from Kibera and then returned? What was going on. How come the police did not investigate this phenomena?
158. This cannot be the end of this matter. The mother of the accused person, who was the one who brought the children to the home against the wishes of the mother, and who the police did not call to confirm the 'known' running away of the children every so often, ought to be held to account for the death of this child on her farm, in her custody.
159. Hence while there is insufficient evidence to prove murder beyond a reasonable doubt against the accused person, her mother who had the custody of the child must be held to account.
160. In addition, if it is true that the mother approached various agencies- Children Officers, Police Officers, Chiefs- to get back the custody of her children and all these refused to help or do the lawful thing that is an indictment on how the system fails children- all these must be held to account.
161. And if this accused person had anything to do with the death of the said child and that it is the insufficiency of evidence that has let her off, That is upon her and her conscious. The charge of murder is dismissed. The accused is accordingly acquitted.



DATED, SIGNED AND DELIVERED ON 16TH JULY 2025.

MUMBUA T MATHEKA

JUDGE

