Republic v Irungu & another (Criminal Case 51 of 2018)
[2024] KEHC 1493 (KLR) (Crim) (9 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1493 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL CASE 51 OF 2018

GL NZIOKA, J

FEBRUARY 9, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

JOSEPH KURIA IRUNGU ALIAS JOWIE ..... 1ST ACCUSED

JACQUELINE WANJIRU MARIBE ..... 2ND ACCUSED

JUDGMENT

Factual Background

1. The accused are charged jointly with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya.

2. The particulars of the offence are that, on the night of 19th September, 2018, at an unknown time at Lamuria Gardens Apartments, Kitale Lane off Dennis Pritt Road in Kilimani Area within Nairobi County, jointly with others not before the court murdered Monica Nyawira Kimani.

3. The information was read to each accused and they pleaded not guilty to the charge. As a result, the case proceeded to full hearing. The prosecution called a total of thirty-five (35) witnesses in support of its case, while each accused offered a defence without calling any witness.

4. The prosecution case is that, the deceased was residing in Juba, South Sudan and working as a Managing Director of a company known as; Millypol General Trading Company Limited situated in Juba, South Sudan. That, it is a family business dealing with Cleaning Services and Interior design and at the material time the company had a contract of cleaning services with UAP Company Limited.

5. According to the evidence of Retired Major James Kiprono Ngeria (PW19), the Security Manager at Kenya Airways, the deceased departed from Juba on 19th September 2018, at 3.58 pm on flight KQ353 to Nairobi and arrived at Jomo Kenyatta International Airport (JKIA) at 5.45pm. The passenger manifest of 19th September 2018, he produced showed that the deceased used a passport No. C034168, ticket No. 7062300860623 and sat on seat No. 28A.

6. Similarly, Teddy Mugambi Kiara (PW18), the Head of Surveillance at Kenya Airport Authority (KAA), testified that upon request by the Directorate of Criminal Investigation (DCI) to provide CCTV footage of the movement of the deceased on 19th September, 2018, observed and the DCIO Officers went to the control room and observed that, the deceased alighted from the plane at 17.38.19 hours and at 17.41 hours she was at the Immigration desk. That she went to the baggage hall, picked her luggage and exited at the international terminal towards the taxi area at 17.51.10 hours.

7. The evidence of John Oketch Otieno (PW6) is that on 19th September, 2018 at 6.00pm, he responded to a request from for a taxi from the deceased. That he picked her from JKIA international terminal area stage using his taxi registration No. KCQ 399C Nissan Wingroad, and dropped her at Dennis Pritt, Kitale Lane.

8. That, while on the way to Dennis Pritt, the deceased called a boda boda rider whom she met at Nyayo Stadium and gave him an envelope and they proceeded on, arriving at Lamuria Garden Apartments at around 7.00pm. He was paid hire charges in the sum of; Kshs 1650 and left.

9. The evidence of the prosecution protected witness (PW3 "A"), the security guard who was manning the main gate at the Lamuria Gardens Apartments where the deceased was residing is that, after being dropped, the deceased collected her house keys and clothes left at the main gate by the day guard and went to her apartment No. A8.

10. It is the prosecution evidence that the deceased was visited that evening of 19th September, 2018 by four persons.

11. The protected witness (PW3A) testified that the first person he saw arrived at Lamuria Gardens Apartment main gate at 8.00pm in a salon taxi vehicle. That he was dressed in a white Kanzu, grey jacket and maroon cap. Further he identified himself as Haron and gave out an identity card in the name of Dominic Bisera Haron.

12. That he requested to be allowed access to the deceased's apartment No. A8 and was allowed in after the guards sought for and were granted authority by the deceased.

13. The prosecution's further evidence is that one Lee Owen Omondi Madara (PW7) also visited the deceased that evening. That he arrived at the deceased's residence at 9.15pm and found her with two men whom the deceased introduced to him as; Dabool Walid, a neighbour and occupant of apartment No A9 and Joe, a Security Officer with Interpol and Office of the President.

14. Antony Kariuki Kaka (PW16) who also visited the deceased is said to have arrived at Lamuria Gardens at 9.20 pm but did not go to the deceased house. That he met the deceased at the parking area, as the deceased told him that she had visitors; a Lebanese neighbour and a guy from State House. That he left after five minutes and the deceased went back to her apartment.

15. Owen Omondi Madara (PW7), testified that Mr Dabool Walid was the first to leave the deceased's house, and he followed at 10.45 pm, leaving the visitor introduced as Joe with the deceased.

16. The protected witness (PW3 "A) evidence is that Mr Dominic Bisera Haron was the last visitor who left the deceased's house at 23.21 hours and that, no one else went to the deceased's house thereafter.

17. The deceased brother George Kimani (PW10) stated that the deceased was supposed to visit her mother before travelling to Dubai on the following day on 20th September, 2018 for holiday and business.

18. That on the following day, the 20th September, 2018, her family members tried to reach her on phone without success. As result, the he brother George Chiru Kimani (PW10) in the company of his girlfriend Beatrice went to the deceased's residence at Lamuria Gardens to check on her.

19. The prosecution case is that upon arrival, they found a paper bag with bread at the doorway. That they noticed that the television was on and could hear water pouring, but they could not access the house as the main door was locked. Upon checking around, they saw keys hanging on balcony door. That the deceased's brother sought for assistance from the caretaker at the Apartments, Reagan Inungu Buluku (PW13)

20. Mr Buluku then instructed the gardener Stephen Wanjohi (PW14), to get a ladder and access the house from the balcony window. The Gardener accessed the house. He testified that upon gaining access to the house, he noted the television was on and water was running in the bathroom but there was no one in the sitting room or bedroom. He then went to the bathroom and found the deceased body in the bathtub, a mobile phone next to it and with water from the shower running over it.

21. It was the evidence of the gardener Mr Wanjohi (PW 14) that he was shocked at what he saw and immediately notified the caretaker and the deceased's brother and asked them to break the main door to access the house since the key to the main door could not be traced. The door was broken down and the matter reported to the police.

22. The scene was visited by the security team from DCIO's office at Kilimani where upon No. 75179, Corporal Jennipher C. Sirwa (PW2) the scene visiting officer took a total of fifty (50) photos. The photos show inter alia; general view of the Lamuria Gardens Apartments, closer view of Block A, door 8A, yellow handbag and contents on the door handle, sitting room with blood stains on the floor and sofa set, close view of deceased's bedroom and personal belongings, general view of deceased's body with hands tied and a masking tape covering the mouth, one lower leg tied with a security seal, closer view of injuries on the back neck after the body was removed from the bath tub, view of bath tub with blood stains and blood on the bathroom floor. After the scene was processed the body was moved to the Chiromo mortuary.

23. The investigations commenced and revealed that several people visited the deceased on the fateful night. Mr Dahool Walid who was one of the people who visited the deceased on the fateful night upon learning of her death, informed her family members that he was in the deceased house that night in the company of; Mr Owen and Joe.

24. Similarly, Mr Lee Owen Madara (PW7) contacted the deceased's family members through a family friend one Jimmy and disclosed that he too was in the house in the deceased's house with Mr Dahool Walid and Joe.

25. It was the evidence of the deceased's brother that he knew a man by the name of Joe who was a former college mate and also known to the deceased. He then got his photo and showed Owen who confirmed that the photo was of one Joe who was in the deceased house on that fateful night.

26. In the meantime, the people who were in the deceased's house on the 19th September, 2018, became persons of interest to the investigators. As investigation advanced, it was discovered that the 1st accused had made a report at Langata Police Station that he had been shot 20th September, 2018, by thugs at the main gate of Royal Park Estate Langata where he was residing and injured on the chest.

27. The shooting incident matter was being investigated Langata Police station. However, a team from Homicide Department based at the DCIO Headquarters visited Langata Police Station and took over the investigations of both the shooting incident and murder.

28. Chief Inspector Otieno (PW35) testified that as investigation progressed, it was discovered that accused persons had made contradictory statements on how the shooting incident occurred.

29. Subsequently thereto the gun involved in the shooting incident was recovered and the first accused arrested. He was then subjected to an identification parade and allegedly positively identified as the one of the people who visited the deceased's house on the fateful night. He was held as a suspect and charged accordingly.

30. The second accused was charged jointly with the first accused on the ground that vehicle used in the murder belonged to her. Further she was within the vicinity of the murder and that she gave a false statement to the investigators over the shooting incident intended to divert the investigators attention from the murder investigation. Furthermore, she assisted in the concealing evidence through burning of clothed involved in the offence and sealing the bullet hole on the wall in her house.

31. At the close of the prosecution case, the accused were placed on their defence.

32. The first accused testified vide a sworn testimony that, he works as a Security Consultant. That on the 19th September, 2018, he dropped the second accused at work at 8.05am and returned home at Royal Park Estate, Langata. That in the afternoon, the house help informed him that employees of Kenya Power and Company Limited had an issue with electricity and he attended to the same.

33. That he left home at 4.30pm and arrived at Road House along Dennis Pritt road at 5.00pm, where he met with a friend, Jennings Olando (PW8) and were later joined by two ladies, Chelangat and Juju. That after having food and drinks, he left with Jennings Olando (PW8) to go and get fuel for his vehicle.

34. It is the first accused evidence that after roaming around, he fuelled the vehicle and dropped Mr Jennings Olando(PW8) back to Dennis Pritt road to pick his vehicle and then proceeded to club Forty Forty in Westland, where he joined the second accused and Governor Sonko's entourage. That the accused left for home at 4.00am.

35. He further testified that, the following day he dropped the second accused at work and went back home where he stayed until 8.00pm when he went to pick her from work. However, an argument ensued between him and the second accused and they left for home. That when they arrived at home, the second accused threw his personal belonging out of the house.

36. That as he was thoroughly drunk, he forgot that he had a gun and the gun went off injuring him on the chest. That, as the gun belonged to his friend and neighbour Brian Kasaine Spira (PW17), he rushed to Brian's house to inform him to go and secure the gun. Mr Brian (PW17) Kasaine secured the gun and assisted him to go to Langata Hospital for treatment but he was referred to Nairobi West Hospital where he was treated and was later admitted at Kijabe AIC Hospital.

37. The first accused denied any knowledge of the deceased and maintained that he had never met her before her death. However, he acknowledged that he knew her brother Mr Kimani (PW10) who was his college mate. Similarly, he denied knowledge of one Dominic Bisera Harun.

38. He further denied having left Road House with Jennings and/or giving him the second accused's car to drive. He equally denied burning of any clothes. He stated that the short allegedly stained with blood stains was not the one recovered from his house.

39. That he reported having been shot by thugs because it is Mr Brian Kasaine (PW17) who came up with that narrative as he had not acquired his gun lawfully. The first accused generally denied committing the offence.

40. The second accused gave her defence through an unsworn testimony and stated that, on 19th September, 2018 the first accused dropped her at work at 8.00am. That she worked up to 9.00pm and as she was leaving work, she was invited to attend the former Governor Mike Sonko's interview and attended the same until 10.00pm when she and the Governor's entourage left for Q-Lounge and then to club Forty Forty at Westlands. That the first accused joined them at around midnight and they stayed there up to 4.00am when they left for home.

41. She further testified that the following day the first accused dropped her at work as usual. That on that day, when she read the news item on the death of the deceased, she did so in the ordinary course of her work as a news caster.

42. She denied knowledge of the deceased and stated that she had no reason to want the deceased dead. That she was never at Lamuria Gardens Apartments. Furthermore, she had no control over her vehicle while in the custody of the first accused. She further denied participating in the burning of any clothes and maintained that she was not at the scene of the murder. She adopted the statement of the first accused and Chelangat Ruto (PW11) in support of the alibi defence she raised.

43. At the conclusion of the trial, each party filed their final submissions which are considered herein.

Analysis and determination

44. At this point the key issue to determine is whether; the prosecution has discharged its burden of proof beyond reasonable doubt that each or both accused person(s) murdered the deceased.

45. It is trite law that in criminal cases, the burden of proving a crime lies on the prosecution to prove the ingredients of the charge beyond reasonable doubt. This is explicitly set forth in the provisions sections 107, 108 and 109 of the *Evidence Act* on proof of the existence or otherwise of particular facts in relation to the offence under consideration. The burden remains on the prosecution throughout the trial.

46. The rationale behind the proof of the prosecution case beyond reasonable doubt is based on the provisions of; Article 50(2) (a) of *the Constitution* of Kenya, 2010, which stipulates that every accused person has the right to a fair trial which includes the right to be presumed innocent until the contrary is proved.

47. There is ample judicial authority underscoring the principle on the burden proof.

48. The Supreme Court of Nigeria in Bakare vs State (1985) 2 NWLR stated as follows:

> " Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says, not admit of plausible possibilities and fanciful possibilities but it does admit a high degree of cogency consistent with an equally high degree of probability."

49. The Federal Court of United States in the case of United States vs Smith, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing In re Winship, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring) stated that: -

> " The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration."

50. The principle of proof beyond reasonable doubt is well settled in a line of authorities emanating from our courts. The Court of Appeal in the case of; Moses Nato Raphael vs Republic (2015) eKLR sums up this principle as follows:

> " The principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat. There are of course, a few instances where the law provides for the converse, and shifts this duty to the accused, but that is not the case here. This Principle is well captured in the time honoured English case of Woolmington vs. DPP (1935) A. C 462 where the court stated: -
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> > "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 the qualification involving the defence of insanity and 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."

51. The Court of Appeal in the case of Nyanjui vs Republic (Criminal Appeal 96 of 2021) [2023] KECA 1122 (KLR) (22 September 2023) (Judgment) citing the decision of Lord Denning in Miller vs Ministry of Pensions [1947] 2 All ER 372, addressed the threshold to be met by the prosecution as follows: -

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to

deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice".

52. Having dealt with the law on the prosecution duty to prove the charge beyond reasonable doubt, I shall now consider the charge herein.

53. The offence of murder is provided for under Section 203 as read with Section 204 of the Penal Code. The pertinent provisions read as follows: -

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

54. The above ingredients of the offence are settled through various decision. The Court of Appeal in the case of; Joseph Githua Njuguna vs Republic (2016) eKLR stated as follows: -

> " Under section 203 of the Penal Code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are: (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See Milton Kabulit z& 4 others v Republic [2015] eKLR."

55. Based on the foregoing provisions of the Penal Code and the Court of Appeal decision, the ingredients of the offence of murder can be summarized as follows; a) occurrence and cause of death, b) whether the death was lawful or unlawful, c) proof of commission of the offence by the accused and d) malice aforethought.

56. I shall now deal with the first element as to whether the death of the deceased occurred and the cause of that death.

57. It is the prosecution case that the death of the deceased occurred at unknown time. The prosecution led evidence through the testimony of Reagan Iningu Buluku (PW13) a caretaker, Stephen Wanjohi (PW14), a gardener at Lamuria Gardens Apartments and the deceased's brother George N. Kimani (PW10) that they were the first people who discovered the body of the deceased in the bath tub in her apartment.

58. No. 75179, Corporal Jennipher C. Sirwa (PW2), a scene of crime officer, testified that she visited the scene of crime after the report of the deceased's death was made at Kilinmani DCIO office and took several photographs, photos No(s) 27 to 42, showing the body of the deceased at the scene.

59. That the body was moved to Chiromo Mortuary and identified by the deceased's brother, George N. Kimani (PW10), the uncle, Peter Njenga. Sergeant Maina and Police Constable Biko, both of Kilimani DCIO's office attended the post mortem.

60. Dr Peter M. Ndegwa, (PW1) a pathologist of the Ministry of Health at the Diagnostic and Forensic Services, Medical Legal Section, testified that he performed a post mortem on the body of the deceased on 24th September, 2018 at Chiromo Mortuary.

61. The foregoing prosecution evidence on the death of the deceased was not rebutted by the defence.

62. As such, it is the finding of the court that the prosecution has proved beyond reasonable doubt that the death of the deceased occurred.

63. I shall now deal with the issue of the cause of death. The provisions of section 213 of the Penal Code provide the circumstances under which the cause of death may be inferred and proved by way of circumstantial or medical evidence. The subject circumstances were addressed in case of; Benson Ngunyi Ndundu vs Republic CACRA No. 171 of 1984).

64. In the instant case, Dr Peter Muruiki Ndegwa (PW1) testified that, when he performed the post mortem on the body of the deceased, he noted it was a body of a female aged 28 years. That it was wrapped in blood stained wet maroon and white bed cover. Further, both hands and right lateral leg had henna tattoos and sealing straps.

65. That on examining the body externally, he noted that there was an irregular invasive wound anterior neck measuring 7x6 cm with visibly slit trachea and air wave. That, there was blood oozing from the nostrils and the body was pale, an indication of there being no blood. Further still, there was graim ferencial subcutaneous contusions on both wrists and bruises around the wrist of both legs.

66. That internal examination revealed that the air wave had been shot through and through. Further, the trachea had been transected at the level of the thyroid gland and the right carotid artery on the neck and right jugular vein were severed, that is, cut through and through and there was some blood oozing from the vagina.

67. The doctor formed the opinion that the cause of death was "exsanguination due to severe neck injuries due to sharp force trauma" and that the probable weapon used to inflict the fatal injuries was a sharp object.

68. Based on the afore evidence of the doctor, it is the finding of the court that the prosecution has proved the ingredient of the cause of beyond reasonable doubt.

69. The next ingredient to determine is whether the death of the deceased was lawful or unlawful. In that respect, the provisions of Article 26 (3) of *the Constitution* of Kenya, 2010 states that: -

> "(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law".

70. Further, in the case of Gusambizi Wesonga vs Republic [1948] 15 EACA 65 the court stated that:

> " Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self defence of property."

71. Pursuant to the aforesaid, excusable homicides are killings which result from accident or inadvertence, or done by persons who lack the capacity to commit crimes (such as very young children or persons who are legally insane), or in reasonable defence to self, or property.

72. In the instant case, the (PW1) Dr Ndegwa did not testify to any circumstances that amounts to excusable homicide. In his cross examination by the defence, he stated that, there was no evidence of strangulation, nor a sign of bullet or gunshot. Further there was nothing unusual in the pancreas. That blood oozing from nostrils was because the throat was slit at the level of the thyroid glands. He clarified that the wound was not inflicted after death as a person does not bleed after death, in that, it is the heart beat that causes the bleeding.

73. Pursuant to the doctor's evidence above and the post mortem results, it is clear that the deceased did not die a natural or accidental death. Therefore, this is a case of homicide and does not fall excusable homicide.

74. It is the finding of the court that the prosecution has proved beyond reasonable doubt that, the death of the deceased was unlawful.

75. Then next issue to determine is whether one or both accused persons caused the death of the deceased and if so, whether they had malice aforethought.

76. In that regard and for ease of flow and understanding, I shall first consider the evidence and submissions tendered in that issue as it relates the first accused.

77. It is the prosecution's submissions that, the first accused's committed the offence of murder that he is charged with. That his conduct prior to the murder, during and after the murder implicates him in the murder.

78. That prior to the murder, the first accused stole the national identity card of Dominic Bisera Haron, which was stolen at Royal Park Estate Langata, where the first accused was residing. That he used it to disguise his identity and gain access to Lamuria Gardens Apartment where the deceased was staying and murdered her.

79. Further, several witnesses have implicated him in the commission of the offence through the clothes he was wearing on 19th September, 2018.

80. That among the witnesses who testified as to the clothes the first accused was wearing on that day is Jennings (PW 8) who testified that the first accused person wore a brown short, t-shirt grey coat and a maroon cap and later wore white Kanzu on top of those clothes.

81. That when Jennings (PW8) asked the first accused why he was changing clothes, the first accused told him that he was going to a place dominated by Muslims.

82. The prosecution further evidence as led by the protected witness "PW3A" is that on the 19th September 2018, the person who identified himself at Lamuria Gardens Apartment as Haron and went to the deceased house and whom the witness identified on the identification parade as the first accused was dressed in a white Kanzu, grey coat and a maroon cap.

83. The prosecution further submitted that, the debris of burnt material recovered in a trench outside the house where both accused house were residing include a piece of white material believed to have been the remnants of the white Kanzu. That the burning of the clothes was a deliberate attempt to conceal evidence of murder.

84. Further, the first accused was positively identified through an identification parade conducted by Inspector Araman (PW28) as the person who in the deceased's house on 19th September 2018, and last seen with the deceased.

85. Finally, the prosecution submitted that the first accused deliberately lied to various investigating officers that he was shot by robbers and confessed in his defence that he lied regarding the shooting incident, proving that he committed the offence of murder and was diverting the investigators attention from investigating the same.

86. The victim's family on its part fully associated themselves with the prosecution submission and further submitted that, the government analyst report revealed that the short which the first accused was wearing and which was recovered from where he was residing had the deceased's blood.

87. That, the first accused's defence that he did not know the deceased has been disproved by the telephone records showing he had been in communication with the deceased.

88. Furthermore, a video retrieved from his cellular device and recorded by him shows that he had earlier been at the deceased's house in the company of the deceased's brother.

89. However, the first accused on his part, submitted that the description of the clothes the person who was in the deceased's house was wearing that is; white kanzu, grey coat and maroon cap, as described by the prosecution witnesses; Lee Owen (PW7) and Jennings Olando (PW8), is not specific but generic, there were no specific marks thereon and anyone can wear those clothes.

90. Further, whereas Jennings (PW8) states that the first person had a grey coat, Lee Owen (PW7) does not make reference to any coat. Furthermore, Walid who was in the house with Lee Owen (PW7) did not mention white kanzu, grey coat or maroon cap in his statement to the police. In addition, Jennings (PW8) told the court that the first accused had a bag while all the other people in the deceased's house did not talk about the bag.

91. That, the person whom Mr Lee Owen (PW7) described as the Joe working at State House, resides at Eastleigh and comes from Emali has not been proved to be the first accused herein.

92. The first accused further submitted that, the evidence of Owen (PW7), Walid and the security guard (PW3A) at Lamuria Gardens Apartments differs as to the time the suspected killer entered and left the deceased house.

93. That further whereas Walid said the person entered the house at 8.00pm, Owen (PW7) on the other hand said he found the person in the house when he arrived there at 9.00pm during news bulletin and left him there at 10.40pm, and yet, the entry in occurrence book at the main gate shows that the person identified as Haron entered the apartments at 11.21pm and left at 11.31pm after ten (10) minutes.

94. Further, whereas the protected witness (PW3 A) affirmed that the person in the identity card was the first accused, when Haron appeared in court, he did not look in any way like the first accused.

95. The first accused argued that the deceased knew someone by the name of Bisera Haron and that is why she authorized the guards to open for him. That nobody by the name of Joe was cleared at the gate and therefore it is Lee Owen (PW7) who introduced the name; "Joe".

96. That Kaka (PW16) and Owen (PW7) who were also with the deceased on the fateful night were not subjected to an identification parade, so that the protected witness (PW3A) could identify them as the people who visited the house of the deceased that fateful night.

97. Further, the investigating officer should have investigated Kaka (PW16), Lee Owen (PW7) and Walid who were in the deceased's house to establish whether, they matched the DNA of the two unknown male found on the strappings used to tie the deceased and tape used to cover her mouth.

98. That the prosecution has failed to answer the question of who the first accused is; whether he is the person described by the protected witness (PW3A) as Haron or by Lee Owen (Pw7) as Joe. That, the first accused having denied being either of them the burden shifted to the prosecution to prove the same.

99. The first accused submitted that Jennings (PW8) lied when he testified that he drove the motor vehicle KCA 031E. That Jenning's DNA was not found in the vehicle and that Jennings (PW8)'s evidence that the first accused dropped him in town is not supported by IC3 capture.

100. The first accused further submitted that, the vehicle KCF 031E captured on IC3, differs from the first accused's vehicle and was only introduced to match Lee Owen's (PW7) statement that Joe stated that he stays at Eastleigh implying that the prosecution was out to frame the accused.

101. That it is therefore clear as stated by the first accused that Jennings (PW8) had his vehicle and was dropped at Road House to pick it. Further Jennings (PW8) could not remember the clothes he wore when asked by Hon. Justice Wakiaga but could recall what someone else wore.

102. The first accused reiterated that the short allegedly found in their residential house and entered in the inventory is indicated as; brown khaki. That, khaki is not a colour but a type of material, a combination of fabric consisting of; cotton, rayon and nylon. Further despite defence request to the prosecution to produce a photo of the short upon recovery and/or before or during examination, the prosecution failed to do so.

103. That the inventory did not indicate that there was blood stains on the short and neither did the scene visiting officer see it. That, the hole made on the short during analysis is big enough for anyone to have seen the blood stain. The first accused submitted that although he wore a brown short, the short produced in court is a faded yellow short and not the short he wore.

104. He further submitted that, the allegation that he called Brian Kasaine (PW17) asking for paraffin is not supported by the call data or WhatsApp data. Further, nobody saw the fire burning and the burnt materials included a puff jacket with a zipper not a grey coat. Furthermore, the coat with zip was not produced in court but removed from exhibits, so as not to contradict the prosecution case.

105. The first accused submitted that the allegation by Brain Kasaine (PW17), that he used air conditioner to burn the suspect material is not supported by the evidence of the Government analyst who found the presence of paraffin and not alcohol which is not contained in air fresheners.

106. The first accused maintained that he had no motive to kill the deceased as confirmed by the investigating officer, Chief Inspector Otieno (PW35) that the motive of the killer was not established.

107. Further, it is submitted that as the keys to the deceased's house were habitually left at the gate, anyone else could have held duplicate keys to the deceased's house.

108. Furthermore, it is possible the deceased's Sudanese boyfriend was in Kenya on 19th September, 2018, as the investigating officer did not inquire from Immigration Department when he entered and exited Kenya, nor from Safaricom Kenya Limited, whether he had another mobile number. That the message from the deceased "come help me sleep" could have provoked a fight between the deceased and her Sudanese boyfriend leading to her death.

109. That the deceased phone was on until 20th September, 2018, though allegedly submerged in water, thus begging the question as to whether she was murdered on 19th or 20th September, 2018.

110. The first accused further submitted that the identification parade process was flawed as the witnesses had seen him at the DCIO's office before the parade and there was news all over media over his arrest. Further, the officer who conducted the parade lied that the accused did not have a sling yet the investigating officer confirmed he had the sling.

111. It is submitted that neither Walid nor Owen (PW7) gave the description of the person they were identifying before the parade was conducted. The first accused relied on the case of; Mbithi Kioko Mutua vs Republic (2020) eKLR which quoted the rule established in Francis Kairuiki Njiru and 7 others vs Republic [2001] eKLR (Crim App. No 6 of 2001), that for the court to rely on identification

parade, it must be positive and free from possibility of error. That, the surrounding circumstances must be considered and whether eye witness gave the description of the suspect to the police.

112. The first accused submitted that this case is based on circumstantial evidence which does not meet the required threshold, as set out in the cases of; Joan Chebichii Sawe v Republic [2003] eKLR and Mamush Hibro Faja v Republic [2019] eKLR.

113. He further relied on the case of; Victor Owich Mbogo v Republic [2020] eKLR where the Court of Appeal stated that:

> " To secure a conviction based on circumstantial evidence the circumstances surrounding the death should be cogent and well established, so that when all the evidence is considered in totality, it points to the accused's guilt. The circumstances should form a chain so tight that the inescapable conclusion is that the appellant caused the deceased's death".

114. Finally the first accused submitted that the prosecution has failed to discharge its duty to prove the case against him beyond reasonable doubt as required in law and that the Honorable Court should dismiss the case against him for lack of merit.

115. Having considered the foregoing evidence adduced by the parties and their respective submissions, I find the following questions have arisen for consideration, in resolving the issue as to whether the first accused was involved in the commission of the offence herein of murder: -

a. Whether the first accused knew the deceased prior to her death;

b. Whether the first accused stole and used the stolen identity card to access Lamuria Gardens Apartment and in particular the deceased's house;

c. Whether the clothes the first accused is alleged to have worn on 19th September, 2018, implicates him in the commission of the offence.

d. Whether the first accused was in the deceased's house on the material date and was the last person to be seen with the deceased;

e. Whether he was armed with a gun on the material night and used it to subdue the deceased;

f. Whether the first accused was positively identified on the identification parade;

g. Whether the prosecution has proved beyond reasonable that the 1st accused murdered the deceased.

116. I shall now deal with the first question, whether the first accused knew the deceased prior to her death.

117. The first accused categorically denied knowing the deceased prior to her death. The prosecution on their part led evidence to the contrary.

118. Having considered the evidence and submissions on that issue I find that, deceased's brother George Kimani (PW 10) testified that the first accused was his friend as they met at Kenya Polytechnic in the year 2002, where they were in the same class, studying the same course in Hotel and Beverage Management.

119. T hat, on 31st August, 2018, he was with the first accused at the deceased's apartment and the deceased mentioned to him that she was communicating with him on Instagram. That, on the material night, the witness and the first accused spent the night at the deceased's house and slept on the sofa sets in the sitting room while the deceased and the witness's girlfriend slept on the deceased's bed.

120. That further on 19th September, 2018, the deceased sent him a screen shot of the conversation she had with the first accused, wherein the first accused was telling the deceased that once he returns from Mombasa, he would go to visit the witness for a drink and the deceased told him not to spoil her brother.

121. It is noteworthy that the first accused in his evidence in chief admitted that he knew the deceased brother Mr Kimani (PW10). That they were in school together in the year 2012 and parted when he travelled abroad but continued communicating on Instagram and phone up to the end of August 2018. Therefore, it is not in dispute that the first accused and Kimani (PW10) were friends and had known each other for a long time.

122. Further in cross examination of the witness Kimani (PW10) by the first accused's counsel, the witness stated as follows:

> " The deceased was communicating with Jowie but she didn't describe how they were. I believe they were friends. There is a night we spent with the first accused in the house of the deceased. We were all happy. I slept on the couch. I woke up in the morning. The 1st accused had already gone when I woke up. I was not very drunk. I would not know what the 1st accused did with my sister when I was asleep. I don't know whether he was another man in my sister's life. If he was, I would have known. I didn't know Kaka"

123. It is the finding of the court that, based on the afore evidence of Kimani (PW10) during cross examination, the first accused did not challenge Kimani's (PW10) evidence that he spent a night in the deceased's house on 31st August 2018, before she died.

124. Furthermore, the court record indicates that the court was shown a video said to have been retrieved from the first accused's cell phone, allegedly recorded by him, which shows that the first accused had been to the deceased's house in the company of the deceased's brother prior to her demise.

125. The prosecution further evidence on record as led by, No. 70110 Corporal Jonathan Limo (PW33) attached to Safaricom Law Enforcement Liaison, as a data analyst, is that, he examined data from telephone number; 0727010675 registered in the name of the first accused; Joseph Irungu Kuria, and numbers 0704170422 and 0715775856 both registered in the name of the deceased, Monica Nyawira Kimani. That he noted "on 1st September 2018, the first accused number 0727010675 communicated with the deceased number 715775856 at 3.00pm". That it was an outgoing call made while the caller was at DOD Langata.

126. Based on the afore evidence, the first accused's evidence and submissions that he did not know the deceased and had no communication with her as insincere, not tenable and an afterthought.

127. Consequently, it is the finding of the court that the first accused knew the deceased prior to her demise and was in communication with her before her death.

128. The next question to answer is whether the clothes the first accused is alleged to have worn on 19th September, 2018, implicates him in the commission of the offence.

129. I have analysed the evidence and submissions of the parties on the matter and I find that, among the witnesses who testified as to the clothes the first accused was wearing on the material date is; Pamela Kembo (PW15) the house help of both accused. She testified that when the first accused left the house on the material date, he was wearing a "white shirt with patterns, maroon cap and brown shorts". When she was shown the brown short (Pexh9) and the maroon cap, (Pexh4) she responded by saying "he was in this short (Pexh9) and a maroon cap (Pexh4). That he also left with a bag.

130. In cross examination by the first accused's counsel, she stated that,

> "Jowie then left at 4.00pm in brown short, maroon cap and a small bag. This is not in my statement. This short is the one produced in court".

131. Further evidence on the clothes the first accused wore on 19th September was led by Jennings Olando (PW8). He stated that they met at Road House along Dennis Pritt road, and that the first accused was wearing a T-shirt, a maroon cap and a brown short. The witness was shown the short produced as (Pexh9) and responded that it looked like the one the first accused was wearing and similarly identified the maroon cap, (Pexh4) as similar to the one the first accused was wearing on the material date.

132. (PW8) Jennings further testified that, when they left Road House, the first accused gave him the key to drive his car and went to the co-driver's seat. That he "had a bag which had a coat and a white kanzu" and the white kanzu on top of his clothes before leaving him to go and meet a friend from South Sudan.

133. (PW11) Chelangat Ruto similarly testified that she is known to the first accused having met him with the second accused who is her friend and who introduced him to her as "Jowie". That, on the 19th day of September, 2018, she met the first accused with a friend at Road House. That she was in the company of a friend June Juliet known as "Juju" and due to unavailability of space at the premises, they joined the first accused and his friend on their table and shared meals and drinks.

134. That the first accused was wearing "white shoes, t-shirt with some prints at the front, a brown Khaki short and maroon cap" She identified the brown short produced as (Pexh9) and maroon cap as (Pexh4) as similar to what the first accused was wearing on that day.

135. In cross examination by the first accused's counsel she responded; "I described the short as brownish. There are back pockets. The short had side pockets. At 4040 he was wearing the same short"

136. The guard at Lamuria Gardens Apartment, the protected witness (PW3A) also testified that, the person who was dropped by a taxi and who identified himself as Dominic Bisera Haron was wearing a white Kanzu and a maroon cap and went to the deceased's house.

137. Pw7 Owen testified that the person he met in the deceased house and whom the deceased introduced to him as "Joe" was wearing "a pure Muslim white kanzu, ash grey coat and red/maroon cap". That in fact the deceased made a comment that, usually he did not "wear kanzu and she did not know why he was dressed in one that day".

138. Further evidence on record reveals that other than the white kanzu, the subject person who was in the deceased house was wearing a maroon cap. A maroon cap has been produced as (Pexh4) said to have been recovered in the accused house.

139. PW3A the guard at the Apartment and PW7 Lee Owen who was in the deceased's house also testified that the person identified himself as Haron and introduced to Owen as "Joe" by the deceased was wearing a maroon cap. It suffices to note that the witnesses were not cross examined by first accused's advocate on the maroon cap.

140. At this stage, it noteworthy that, the three witnesses, Jennings (PW8), Chelangat (PW11) and Pamela (PW15) gave corroborative evidence that the first accused was wearing; a brown Khaki short, a white t-shirt and a maroon cap and each one of them identified the short produced as (Pexh9) and maroon cap produced as (Pexh.4) as similar to the ones the first accused was wearing on the material day.

141. Furthermore, the investigating officer testified that the brown short and maroon cap marked as (Pexh9) and (Pexh4) respectively were among the items recovered from both accused's house at Royal Park Estate, Langata.

142. The first accused in his statement of defence admitted that he was wearing among other clothes a brown short and stated that when he was arrested he told the police officers what he "had worn and they found a brown short in the wardrobe". But he maintains that the short produced as (Pexh9) is not the one recovered from his house.

143. Based on the evidence above, it is evident that the witnesses who saw the first accused leave the house at Royal Park Langata and at Road House led corroborative evidence that, on the 19th September 2018, the first accused was wearing a brown short, a t-shirt and a maroon cap.

144. Similarly, the evidence of Jennings (PW8) that the accused wore a white Kanzu was corroborated by Lee Owen that the first accused was wearing a white Kanzu on the material date.

145. Further, Jennings (PW8) stated in his evidence that the first accused had a bag from which he removed the white Kanzu and I find that this evidence was corroborated by the house help Pamela (PW8) that, the first accused left the house carrying a bag.

146. Furthermore, the evidence by Lee Owen (PW7) that the deceased was surprised as why Joe was wearing a white Kanzu is corroborated by the evidence of Pamela (PW15) who testified that she had not seen the first accused wear a white Kanzu before.

147. It suffices to note that witnesses, (PW15) Pamela, (PW11) Chelangat and (PW8) Jennings all identified the short and maroon cap produced in evidence as Pexh9 and Pexh4 respectively and stated to have been recovered from the accused's house as the clothes the first accused was wearing on the material date.

148. The only divergence in the evidence of the witnesses is that whereas (PW15) Pamela and (PW11) Chelangat did not see the first accused in a white Kanzu, (PW 7) Lee Owen and (PW8) Jennings testified that they saw the first accused in a white Kanzu.

149. To address the divergence, the prosecution relied on the evidence of (PW8) Jennings that the first accused wore the white Kanzu after leaving Road House, therefore Pamela (PW15) and Chelangat (PW11) cannot have seen the White Kanzu.

150. Further evidence is that, Jennings (PW8) stated that the first accused left him at a petrol station and took a taxi to where he was going and at this stage it is noteworthy that the protected witness PW3A testified that Haron arrived at Lamuria Gardens in a taxi and wearing a white Kanzu.

151. The accused did not challenge the evidence of the witnesses that on the material date he wearing a brown short, a t-shirt and a maroon cap. However, he denied having worn the white Kanzu. He also denied that the short produced in court is the one he was wearing on that day.

152. Be that as it may, it is suffices to note that as much as the first accused has heavily challenged the evidence of the white Kanzu, he did not challenge or deny the evidence adduced by all the witnesses who saw him at home, Road House and in the deceased's house that he was wearing a marron cap.

153. Further, it is in evidence that the investigating officers who visited the accused house recovered inter alia a brown short, a maroon cap and burnt debris of white material which was suspected to be remnants of the burnt white Kanzu. That an inventory was made and the first accused signed it.

154. The evidence of burnt material was led by Brain Kasaine Spira (PW17) who testified that on the night of 19th and 20th September 2018, the first accused called him at 1.00 am asking if he had any paraffin to

burn somethings but Brian told him that he did not have any. That when Brian asked him the following day what he wanted to burn and whether he burnt it, he told Brian that he burnt whatever it was using an air conditioner and showed him the place where he burnt the items.

155. It is the prosecution case that, when the accused house was visited during investigation and witnesses interviewed, Brian showed the police officers where the first accused showed him as the burning site, and the officers recovered remnants of the burnt items from a trench next to the first accused residence, which include a white material suspected to be of a kanzu. That the recovered burnt material analysed by Catherine Murambi (PW31) had traces of kerosene.

156. No. 75179 Corporal Jennipher Sirwa who took photos at the scene of burnt debris testified and produced photos marked No. 98 and 99 and stated that, they show the white Kanzu remnants with a button on the neck.

157. Furthermore, the court had the benefit of seeing the white material recovered from the burnt remnants and noted that it is relatively a big piece with stiches, an indication of a material stitched for wearing and therefore a white Kanzu cannot be ruled out.

158. I have considered the evidence of the witnesses on the clothes the first accused was wearing and his defence evidence on the same however, before I make a finding thereon and/or whether that prosecution evidence implicate him in the offence, I shall address some of the issue the first accused raised in his submissions on the clothes he was wearing.

159. The first issue is that, description of the clothes was generic with no unique markings and in particular, the short was described as Khaki which is not a colour. With due respect, it is a matter of general knowledge that clothes are manufactured, they are manufactured in bulk with no specific marks on any individual one. If one wants to distinguish any one out of the bulk, then they have to make a special mark thereon for that purpose.

160. Again, with utmost respect, the short produced in court as (Pexh9) is brown Khaki and nowhere near faded yellow as submitted by the first accused. I therefore find and hold that the submissions in respect to the description of the clothes lacks merit.

161. The other issue raised by the first accused is that Brian Kasaine lied when he testified that the he asked him for paraffin and showed him where he burnt the items he wanted burnt. I have analysed the evidence of cross examination of Brian Kasaine (PW17) by the first accused's counsel and I find that he was not cross examined on that issue of lying.

162. Further, it is in evidence that the first accused and the witness Brian (PW17) were good friend and neighbour and indeed Brian gave him his gun for use and assisted him to go to hospital when he was injured. The question is: why would Brian then lie against him.

163. Further the investigating officer and scene of crime personnel produced photos that show burnt debris and where they were recovered in a trench near the accused house, which supports the evidence of Brian that the items were burnt there.

164. Having considered the afore evidence, it is the finding of the court that the prosecution witnesses referred to herein, have given corroborative evidence of the clothes the first accused was wearing on 19th September, 2019. The question that arises is, whether that evidence on the clothes has linked him to the commission of the offence? I shall revert to that question later.

165. The next issue to consider is whether the first accused was in the deceased's house on the material date and/or was the last person to be seen with the deceased.

166. The first accused denied having gone to the deceased's house and argues that the DNA results exonerates him from blame and lays blame on two unknown males whose DNA was found on the straps used to tie the deceased. He also lays blame on any other person who accessed the house or had a duplicate key to the deceased's house including her Sudanese boyfriend. Further, Kaka (PW16), Owen (PW7), Walid and the deceased's boyfriend might have accessed the deceased's house

167. However, (Pw7) Lee Owen testified that he was with the first accused in the deceased house and identified him on the identification parade. That he could identify the first accused as he stayed with him for over an hour and that he had a beard and brownish eyes. Further, he used coded language and at one point the first accused said: "In reference to another country where they have account of everybody" and he said "not like in Kenya where you can come and do something and just disappear and someone can impersonate sound since we don't have a data base."

168. Further it is the prosecution evidence as led by Chief Inspector Fredrick Ngahu Gichuki (PW25), attached to the Directorate of Integrated Command and Control Centre, that the motor vehicle KCA 031E which the first accused was driving on 19th September, 2018, was captured on IC3 at 16.27.18 at the junction of Ngong Road and Kilimani road towards Yaya Centre and the next time it was captured back was at 23.56.57 along Mbagathi road towards T-Mall roundabout. Therefore, as testified by (PW8) Jennings the vehicle was all along within the vicinity of the scene of crime.

169. It is the finding of the court that the first accused and (PW7) were unknown to each other before the 19th September, 2018 and were unaware that they would meet in the deceased's house and therefore there is no reason why (PW7) would give false evidence that on the material night he was in the deceased house if he wasn't.

170. Furthermore, although the prosecution protected witness (PW3A) testified that he cleared one Haron to go to the deceased's house, he identified the first accused on the parade as the person who went to the deceased's house and left last. The witness testified that, there was adequate light at the sentry house where Haron's particulars were recorded. That when Haron was leaving, he bade the guards farewell by saying "goodbye soldiers".

171. Similarly, the allegation that Kaka (PW16), Owen (PW7), Walid and the deceased's boyfriend might have accessed the deceased's house is unsubstantiated, as Kaka met the deceased in the car park for five (5) minutes as confirmed by Owen (PW7) and the guards confirmed that the deceased's Sudanese boyfriend was not at Lamuria Gardens on 19th September, 2018. In fact, the deceased is supposed to have been travelling to meet him in Dubai.

172. Further Lee Owen (PW7) explained that he went to the deceased's house to collect his documents, a fact confirmed by the deceased's brother.

173. It is therefore the finding of this court that the first accused was among the people who were in the deceased's house on the 19th September, 2018. This is supported by the finding of the court herein that he was indeed known to the deceased prior to her death.

174. The next closely related issue is whether the first accused was the last person to be seen with the deceased and therefore the one who murdered her.

175. The doctrine of last seen was discussed in the case of; Kimani vs Republic (Criminal Appeal 41 of 2022) [2023] KECA 1390 (KLR) (24 November 2023) (Judgment) where the Court of Appeal stated that:

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

33. In the Nigerian Case of Achie vs State (1993), the Court relied on the case of Ismeni vs State (2011) Kuktan JSC on the doctrine of 'last seen' and expressed itself as follows:

> "In a case of culpable homicide as in the present one where the doctrine of last seen has been applied, the law presumes that the person last seen with the deceased before the death was responsible for his death and the accused is expected to provide an explanation of what happened."

176. The person last seen doctrine stands as negation or an exception to the doctrine of "presumption of innocence", as it is the law that where the victim was last seen by the accused, and is found dead, it will be presumed that the last person that he was last seen with is responsible for his death.

177. Therefore, if the first accused is the one who was last seen with the deceased as testified by Lee Owen (PW7) and the guard (PW3A), then the presumption will be that he is the one responsible for her death, unless he offers an explanation of what happened, failure of which it will be inferred that, he killed the deceased, as held in the case of Archibong vs The State (2006), LCN/3473 (SC).

178. At this stage I wish to address the first accused submissions that the DNA profile of other two unknown males traced on the straps used to tie the deceased exonerates him. However, it suffices to note that the particulars of the charge read that; the accused and others not before the court committed the offence. Even then, the absence of these others does not exonerate the first accused from blame in view of the finding of the court afore that he was in the deceased house and "felt at home" as testified by the Lee Owen (PW7).

179. Similarly, the court takes judicial notice of the fact that straps are items purchased from departmental stores and therefore the possibility of them being handled by more than one person; from the seller to the purchaser and/or other end user is real. In any event, the DNA of the two men was not found on the body of the deceased, which would connect them to their presence in the deceased's house and commission of the murder.

180. It is therefore the finding of the court that the first accused was the last person seen with the deceased.

181. The next issue to consider is whether the first accused was armed with a gun on the material night and used it to subdue the deceased.

182. The first accused confirmed in his evidence in chief that on 20th September 2018, when the gun incident happened he was in possession of a gun which he got from Brian Kasaine (PW17). It was the evidence of Brian that the first accused borrowed the gun to go for refresher training and was to return it after two days but did not. That by the 19th September, 2018 he was still in possession thereof. PW8 Jennings testified that, when the first accused left him at the petrol station he removed a gun from the dashboard of the vehicle and went with it.

183. It is the finding of this court that the first accused was armed when he went to the deceased's house and since the gun was not used to murder, it is probable that it was used to subdue the deceased as submitted by the prosecution.

184. The next question to consider is whether the first accused was positively identified in the identification parade. The prosecution submitted that the first accused was positively identified in the identification parade by three witnesses, Walid Dahool, Owen Madara (PW7) and Ngui Mwetu, as one of the people

who were in the deceased's house on the material date. That after the parade, the first accused signed the identification parade form and said that he was satisfied with the manner in which the parade was conducted. However, the first accused has submitted that, the parade process was flawed, as the witness had seen him prior to the parade process.

185. I have considered the submissions by the parties on the identification parade and note that the law on the conduct of an identification parade and the admissibility of the evidence of an identification parade is settled.

186. In that regard, the Court of Appeal in David Mwita Wanja & 2 others vs. Republic [2007] eKLR stated as follows: -

> " The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia vs. R [1986] KLR 422 where the court stated at page 424: -
>
> > "It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."
> >
> > Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed."

187. In the instant matter, (PW28), Inspector Araman conducted the identification parade and produced the identification parade form dated 25th September, 2018 as (Pexh31). I have analysed that form and note that first and foremost, the identification parade form lists four witnesses, who include Sgt Joshua Mworia, indicated on the form as Investigating officer but who did not participate in the parade exercise.

188. Furthermore, on the last page of the form, the suspect is supposed to indicate whether, he/she is satisfied with the conduct of the parade and sign against his/her remark. However, although Inspector Araman testified that the first accused indicated that he was satisfied with the conduct of the parade, it is notable that the first accused did not sign the form (Pexh31) to that effect as required. Therefore,

it cannot be ascertained with certainty as to whether he was indeed satisfied with the conduct of the parade or not and the benefit of doubt can only go to the accused.

189. Furthermore, Walid Dahool did not testify and so his evidence on the identity of the first accused was not tested on cross examination. (PW7) Owen Madara, on his part, confirmed in cross examination that on 21st September, 2018, Jimmy had forwarded to him the photo of Joe and he had confirmed that he was the one who was in the deceased's house on 19th September, 2018.

190. It suffices to note that the identification parade took place on 25th September, 2018, therefore (PW7) Lee Owen had already seen the first accused's photo, which may have enabled him to easily identify the accused on the identification parade.

191. Further, whereas the evidence reveals the first accused was in a sling and no other member of the parade was in a sling, PW28, Aramani who conducted the parade stated that he did not see the accused in a sling, which contradiction the evidence of the guard (PW3A) that the accused had a sling on. The benefit of that contradiction goes to the benefit of the accused.

192. Based on the aforesaid, it is the finding of the court that the identification parade conducted did not comply fully with the relevant rules and therefore, the first accused cannot be found guilty on the charge of murder based on that identification on the parade per se.

193. The other question to consider is whether the prosecution has proved beyond reasonable that the first accused murdered the deceased. The prosecution as already stated herein is that the first accused murdered the deceased.

194. The first accused on his part maintains that he did not commit the offence. That it is not possible to commit a murder as the one herein within in ten (10) minutes as the records of the Occurrence Book at Lamuria Gardens apartment indicates that Haron was in the deceased's house for ten (10) minutes only. Further the prosecution witnesses gave contradictory evidence on the time the killer entered and exited the deceased's premises.

195. However, I find that from the evidence Jennings (PW8) testified that they left Road House at about 8.30pm. The distance between Road House and the deceased's premises as observed by the court when it visited the scene is a walking distance of less than fifteen (15) minutes.

196. Lee Owen (PW7) testified that he found the first accused in the deceased's house at 9.00pm when he arrived there. Therefore, if the first accused went straight to the deceased's house at 8.30 pm in a taxi then it took him a few minutes to get there. That corroborates the evidence of Lee Owen (PW7) that he arrived there before 9pm.

197. (PW8) Jennings stated that it took the first accused two hours to return to the car arriving at after 11.00pm. That evidence was corroborated by the evidence of the guard in the Occurrence Book that Haron identified as the first accused left the deceased's house after 11.00pm and by (PW7) Lee Owen that he left the first accused in the deceased's house at 10.40pm.

198. Therefore, if the accused was in the deceased's house for ten (10) minutes where was he all this while? It is therefore probable as submitted by prosecution evidence and testified by the guard that the entry in the occurrence book, of 23.21 as the entry time is erroneous. As such the issue of ten (10) minutes does not arise.

199. The other evidence relied on by the prosecution to connect the first accused to the offence is the forensic evidence of the Government analyst. It is the prosecution case that the deceased's blood was found

on the short the first accused was wearing which clearly indicates that the first accused was involved in the murder.

200. I have analysed the evidence of Dr Joseph Kagunda the Government analyst and note he testified that he analysed over 73 items which included the car and other items recovered from the first accused's house. That in particular he analysed the short marked No. 41 JK2(a), and found that DNA generated from stains on the short matched the DNA Profile generated from the blood sample labelled MNK, Monica Nyawira Kimani with a random probability of match 1 in 8.43x10/22. All other items gave negative results.

201. In cross examination by the first accused he stated that the exhibits were kept in high security cabinet marked "JKZA". That the blood stain on the short was a small spot and on the front. That screening on the back of the short did not reveal any blood stain.

202. As already stated herein the first accused denied that the subject short was his and maintained that his short did not have blood stains. However, that argument is moot and is water under the bridge in the light of the finding of this court that several witnesses who saw him with short on the material date have positively identified it. This is the same short that was recovered from his residence by the investigating officers from his house, subjected to forensic examination and found to have the deceased's blood.

203. In the given circumstances the argument by the first accused that the investigators officers produced a different short from the one recovered from his house is not tenable. There is no reason advanced on why the investigating officers would plant the short on him.

204. It is therefore the finding of this court that the evidence of PW9 supports the prosecution case that the deceased's blood was found on the short the first accused was wearing on 19th September, 2018.

205. However, before I conclude as to whether the prosecution has proved the charges against the first accused beyond reasonable doubt, I shall now turn to the evidence adduced in relation to the second accused.

206. It is the prosecution's case that, the second accused aided the first accused person by allowing him to use her motor vehicle to commit the murder. That she was also within the vicinity of the crime. That although she alleges that during the material night she went to club 4040 in Westlands with other persons she named, none of the persons she mentioned were called as defence witnesses to establish the facts or substantiate her version of events as they lack credibility.

207. Further, she never denied being in the house on the material night as confirmed by their house help when the first accused person called Kasaine (PW17) asking for paraffin and later when the first accused burnt the clothes including the Kanzu.

208. Additionally, she gave the police investigating the gun shooting incident false testimony trying to conceal the suspicion towards the offence of murder. Further, both accused attempted to conceal the hole in the bedroom where the firearm damaged.

209. As such, her conduct dictates the abetment and concealment of material evidence and intentionally attempting to set up an alibi defence, which illustrates the lengths both accused persons went to and should be treated as a principal offenders.

210. The prosecution relied on the provisions of Section 20 and 21 of the Penal Code and the case of; Republic vs Jeremy Kiogora Mbae (2019) eKLR and John Ouma Awino & Another v Republic (2014) eKLR where the Court of Appeal stated as follows;

> " Aiding and abetting generally means somehow to assist in the commission of a crime or to be an accomplice. The lements of the offence have been variously expressed in different jurisdictions of the world, but they encompass proof that the person knew that his acts would assist the commission ofthe crime by theperpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. It is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed."

211. The prosecution further submitted that, if this Honourable Court finds that the prosecution has not proved their case beyond reasonable doubt on the charge herein as it relates to the 2nd accused person, being a principal offender, then she should be found guilty of the offence of accessory after the fact to murder contrary to Section 222 of the Penal Code Laws of Kenya.

212. That, according to the Cambridge Dictionary, accessory after the fact means someone who helps someone after that person has committed a crime. Further according to Wex-Law (Legal Information Institute) an accessory after the fact is someone who assists a) someone who has committed a crime, b) after the person has committed the crime, c) with knowledge that the person committed the crime, and d) with the intent to help the person avoid arrest or punishment.

213. The victim's family associated themselves with prosecution submissions and reiterated that, the 2nd accused is guilty of murder because she availed her motor vehicle KCA 031E to be used by the first accused to access a place at Lenana road from where he took the taxi to the deceased's house on the fateful night. Furthermore, she allowed the first accused to hide in her house the firearm which he used to subdue the deceased before the gruesome murder.

214. Similarly, the brown short the first accused wore on the fateful night which had blood stains matching the deceased's DNA profile, was recovered from her house.

215. That she made misleading statements to Langata Police Station in what was clearly a "diversionary tactic" to divert attention of the investigators from the first accused and later retracted the statements on 29th September, 2018 confirming that she had earlier misled the investigators. In addition, she sealed the bullet hole on the wall.

216. However, the second accused submitted that the sum total evidence adduced by the witnesses through either oral evidence or documents does not show that she was involved in any way with the murder. That there are no eye witnesses, no forensic evidence produced to connect her with the murder.

217. Further, no confession contested or otherwise and nothing exists to suggest she was in in Lamuria Gardens or vicinity of the alleged murder or deceased's house during the night of 19th September, 2018.

218. That (PW35) Chief Inspector Maxwell Otieno confirmed in his evidence that he did not trace her at the deceased's house in Lamuria Gardens at the material time and/or at all. Further, there is no evidence in the gate book record, C.C.T.V footage, telephone data and pictures and videos that place her at Lamuria Gardens.

219. Furthermore, the evidence adduced by (PW16) Mr. Anthony Kariuki Kaka, (PW7) Lee Owen Omondi Madara and Investigating Officer (PW35) Chief Inspector Maxwell Otieno confirmed that there was

no female visitor in the house of the deceased on the material date. That no evidence has been adduced to show that she knew the deceased.

220. She submitted that (PW34) No 90597 PC Peter Mbatha Mutinda confirmed from the mobile data report that she was not in communication with the deceased Monica Kimani, and she had no malice aforethought or motive to kill the deceased person. That the suspicion by the prosecution that she might have killed the deceased is unsubstantiated.

221. That she was not aware of any plan to kill the deceased by anyone and if she was aware, a pang of conscience would have instructed her to report the scheme or more actively thwarted it.

222. Furthermore, the IC3 clips produced by Chief Inspector Fredrick Gichuki (PW 25) shows there was no footage capturing her motor vehicle along Dennis Pritt Road and the occupants of the motor vehicle on the night of 19th September, 2018, have not be identified.

223. That she gave an alibi on her movements from 8:00am on 19th September 2018 to morning, 4:00am, of 20th September 2018 and it was collaborated by Chelangat (PW11) and Pamela (PW 15). As such, the prosecution was availed a chance to investigate and discredit the alibi, but the Investigating officer, Chief Inspector Otieno (PW 35) admitted that he did not investigate the alibi, and so nothing has been produced to show the alibi is false.

224. Further still, there is no proof from the Investigating officer that her phone was intentionally switched of and there is no known crime for someone's mobile to be off and even if it was switched off, it does not automatically show someone has committed murder.

225. She argued that the gun issues relate to 20th September, 2018, not the date of murder 19th September, 2018 and that alleged contradiction relate to the injury of first accused on 20th September, 2018 at Royal Park Lang'ata area and not 19th September, 2018, at Lamuria Gardens. Further the weapon used to kill was not a fire arm but sharp objects as concluded by professional opinion of PW1.

226. The 2nd accused testified that she did not witness the burning of any clothes on the night of the incidence. Further, the burning was in a public tenancy area, and in someone else's plot. Yet the Investigating officer did not consider that there are many other people dumping waste in the area and/or burning waste from the area. Furthermore, there is no evidence adduced in court showing the time and date of the alleged burning.

227. That, the charge of accessory after the fact to murder contrary to section 222 is unsubstantiated and unfounded as the prosecution has failed to establish the three elements of the crime. That as stated at in the case of; R vs Mohammed D. Kokane 7 others 2014 eKLR a joint enterprise is where two or more parties embark upon the commission of a criminal offence with a common purpose, which has not been proved herein.

228. The second accused further submitted that she did not play any role of aiding and abetting for her to be a principal offender under Section 21 (1) (c) of the Penal Code. That she was and still remains to be a journalist of national recognition as a profession in which she derives legitimate income.

229. Further, the connection to the first accused is that they were in a relationship then and therefore she cannot be held accountable for murder on the premise of that relationship or cohabitation or even aiding him to secure medical assistance which in anyway is a constitutional right under Article 43 as a necessity to access to immediate healthcare and a bullet wound is something that cannot be taken lightly by any stretch of imagination.

230. Finally, the second accused submitted that, the doctrine of the "last seen" places a statutory burden under sections 111 (1) and 119 of the *Evidence Act* on (Pw6) John Okech Otieno, (Pw16) Mr Anthony Kariuki Kaka, first Accused and Mr. Walid to discharge a rebuttable presumption that having been the last people to be seen with the deceased before she died, they should explain how the deceased died.

231. Based on the afore evidence and submissions of the parties, it evident the defence raised by the 2nd accused to the charge is one of alibi.

232. It is trite law that when an accused person pleads an alibi, the burden of proving the falsity, if at all, lies with the prosecution. In the case of Kiarie v R (1984) KLR the Court of Appeal laid down the following principle in relation to alibi and stated:

> " An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons."

233. However, it suffices to note in relying on an alibi defence, the entirety of the prosecution evidence, direct or circumstantial evidence must be appraised to establish whether the accused person was elsewhere and not at the scene of the crime. Further the conduct of the accused and the decision to raise an alibi defence during the defence hearing stage of the proceedings should not escape scrutiny of the court.

234. In addition, the court in Adedeji vs. The State (1971)] 1 All N.L.R 75 held that; "failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."

PARA 235.

Similarly, in the South African case of; Ricky Ganda vs. The State, [2012] ZAFSHC 59, the Free State High Court, Bloemfontein held:

> " The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

236. At this point, the question is whether there is direct evidence that the second accused was involved in the murder of the deceased and/or whether she is a principal offender or an accessory after the fact. I shall revert to these questions later.

237. The next issue I shall deal with relate to the gun incident. I have considered the evidence and submissions by the parties herein and I find that there is evidence through a report vide OB No. 79 of 21st September 2018, produced as (Pexh33) made at Langata Police Station by the first accused that

a shooting incident took place on the night of 20th September, 2018, in which the first accused was injured.

238. The prosecution case is that both accused lied to the police as to how the incident occurred. That they reported that the first accused was shot by thugs at the main gate to Royal Park Estate and yet the shooting took place in the accused's house.

239. I have analysed the evidence on the gun shooting incident and find that PW15 Pamela testified that she found a gun on the floor of the accused house next to the gun. Pw17 Mr. Kasaine told the court that the first accused told him he shot himself and had blood all over the chest and when he went to secure the gun, he found blood on the floor.

240. That when he asked the first accused whether he had reported the incident, the first accused told him that, he had taken care of the whole incident and would not be a problem. That he would report it as a robbery.

241. It is in evidence of Mr. Kasaine that the report by the first accused that the incident was within the estate is not factually correct as the same would have been circulated on the Estate Community Association WhatsApp platform.

242. Similarly, (PW27) Yunis Mohamed the caretaker at Royal Park Estate denied knowledge of such incident within the estate. Further evidence was led by (PW20) Dr Lawrence Obonyo that the first accused reported an assault case as a result of being shot by thugs.

243. Further analysis of the prosecution case reveals the second accused wrote two statements on 28th and 29th September 2018, (Pexh 109) and (Pexh110) respectively relating to the shooting incident. That in the first statement of 28th she stated that the first accused was shot by thugs and on 29th she retracted the same and stated that the shooting took place in her house.

244. The first accused on his part admitted in his evidence in chief that he lied to the police and stated that it is Brian who gave him the narrative to lie. He also recorded a statement to the effect that he was followed and shot by thugs.

245. Based on the aforesaid, it is clear that the report and statement made by the accused regarding the shooting incident were false.

246. In the case of Kinuthia vs Republic (2003) e KLR the Court of Appeal held that

> " where the court doubts the integrity of a witness then the court cannot accept the evidence of that witness.

The court further stated that:

> " in a criminal case a witness should not create an impression in the mind of the court that he is not straight forward. That if a witness raises suspicion about his trustworthy or does or says something which indicates that he is of doubtful integrity, he will be deemed unreliable, which makes it unsafe to accept his evidence (see also Ndungú Kimanyi vs Republic (1979) eKLR Criminal Appeal No. 22 of (1979), MTG vs Republic Court of Appeal No. Eo67 of 2021 (2022) KEHC 189 KLR).

247. The analysis and finding of the court in the instant matter is that the accused were insincere in their evidence on several matters, the first accused denied have known or communicated with the deceased the evidence of call data revealed the contrary. According to Lee Owen he lied that he comes from Emali

and similarly the reasons he gave to (PW7) Lee Owen as to why he was wearing the white Kanzu was false and also lied to Kasaine why he wanted the gun.

248. The other issue I wish to address before I deal with the last ingredient of murder being malice aforethought is the issue raised by the first accused on contradiction in the evidence of the prosecution witnesses.

249. The first accused submitted that, there were contradictions on the timing Haron entered and exited the deceased's house, the clothes he was wearing before and at the deceased's house, the bag he is said to have been carrying on the fateful day.

250. The law on contradiction in evidence is well settled through various court decisions. In the case of, John Nyaga Njuki & 4 Others v. Republic, [2002] eKLR, the Court of Appeal stated; "in certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable".

251. Similarly, in the case of, Philip Nzaka Watu v Republic [2016] eKLR the Court of appeal stated that: -

> " However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way."

252. From the decisions of the court, it is settled that the court will not disregard the evidence of a witness on the ground of contradiction unless the contradictions go to the root of the case and create doubt as to the guilty of an accused person. In Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993, the court held that:

> " In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the warding of section 382 of the Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence." (see also Uganda Court of Appeal case of Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA).

253. Having considered the nature of the alleged contradiction in the light of the entire evidence in this matter I find that they do not go to the root of the matter and are not prejudicial to the accused.

254. I will now delve into the last ingredient of the offence of murder namely malice aforethought.

255. The provisions of section 206 of the Penal Code states as follows in relation to malice aforethought: -

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances —
>
> a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. an intent to commit a felony; or

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.

256. In this case, the prosecution submitted that, it has proved beyond reasonable doubt premeditation being the action of planning something (especially a crime) beforehand. That, the first accused person's action prior, during and after the murder clearly indicates he premeditated the murder.

257. The prosecution posed questions as to: why the first carried the clothes especially the Kanzu in the car, changed his clothes in the vehicle, lied to his friend that he was going to see his girlfriend, stole and later used the false identity card when entering the Lamuria Gardens, attempted to destroy the evidence by burning the clothing he wore, shot himself and then lied to the various investigating officers that he was injured by robbers.

258. The victim's family submitted that the severity of the injuries inflicted upon the deceased and the manner in which she was murdered shows that whoever caused her death had malice aforethought and the necessary mens rea to wilfully cause her death.

259. In support of their submissions, the victim's family relied on the case of; Republic vs Richard Itweka Wahiti (2020) eKLR where the court stated that:

> " Secondly, from the severity of the injuries documented in the post mortem form, it is evident that whoever inflicted these injuries on the deceased intended to cause death or grievous harm. Thus malice afterthought as defined in Section 206 of the Penal code is self- evident."

260. Further reference was made to the Court of Appeal decision in John Mutuma Gatobu v Republic [2015] eKLR where the court held that motive does not have to be established in order to prove the existence of malice aforethought which is the necessary mens rea component of the offence of murder. Instead, malice aforethought only needs to be established in the technical sense of section 206 of the Penal Code and the nature of injuries inflicted on the deceased would suffice to prove malice aforethought.

261. To the contrary, the first accused reiterated and maintained that he did not know the deceased, had no knowledge that she was travelling from South Sudan, never went to her house on the material night and therefore had no motive to murder her as properly acknowledged by Chief Inspector Otieno (PW35).

262. In the same vein, the second accused person denied having known the deceased or having any motive to kill her.

263. I have considered the arguments aforesaid on the issue of malice aforethought and note that the definition of malice was discuss by the Chief Justice Massaof Massachusetts and Connecticut as follows:

> " Malice in this definition is used in a technical sense including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will toward one or more individuals, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief, and therefore malice is implied from any deliberate or cruel act against another, however sudden".

264. Be that as it may, as correctly submitted by the victim's family, it is not necessary to prove motive in the case of murder. That was so held in the Court of Appeal in the case of; Anne Waithera Machar ia & 5 others v Republic (2019) eKLR where the court stated that: -

> " It is not necessary under our law to prove motive for murder since malice aforethought is defined in Section 206 of the Penal Code in broad terms that do not include motive. Where it is proved to exist, however, especially in a case dependent on circumstantial evidence, it assumes great significance. as this Court aptly put it in LIBAMBULA vs. REPUBLIC [2003] KLR 683 cited by the learned Judge;
>
> > "Motive is an important element in the chain on presumptive proof and where a case rests purely on circumstantial evidence and may be drawn from facts though proof of it is not essential to prove a crime."

265. Furthermore, in the case of; Tubere s/o Ochen {1945} 12 EACA 63 the court stated that in considering whether there was malice aforethought, the court will look out for characteristics such as; the nature of the weapons used, the manner it was used to inflict the injuries, the parts of the body targeted whether vulnerable or not, the nature and gravity of the injuries, and the conduct of the accused before, during and after the incident. (See also Dafasi-Magayi v Uganda {1965} 1 EA 667).

266. From the analysis of the aforesaid decisions, the definition of malice aforethought in murder cases is as wide as it can be. Whatever the case, malice aforethought describes the mens rea or the mental element required for a conviction for the offence of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If malice aforethought is lacking the unlawful homicide will not be murder but manslaughter.

267. To revert back to the matter herein, it is the prosecution's case that the first accused stole the identity card of Dominic Bisera Haron to disguise his identity and access the deceased's house on the material day.

268. Dominic (PW26) testified that he lost his identity card at Royal Park Estate Langata on 17th September, 2018, where he was doing casual work. Apparently, the first accused was staying in the same Royal Park Estate.

269. The evidence of the loss of the identity card was corroborated by the protected witness (PW4) who was a guard at Royal Park and the contact details of Haron entered in the occurrence book at Royal Park to contact him once the identity card was traced. (PW24) Job Mugo Maina testified that Dominic Bisera was issued with a duplicate Identity delivered on 7th November 2019.

270. The first accused denied stealing the identity card. It is the prosecution case that the stolen identity card was used on 19th September, 2018 by the person who identified himself as Haron and who was wearing a white kanzu and maroon cap.

271. The question that arises whether the first accused stole the identity card or it is by coincidence that the identity card was stolen from the estate where he was staying was later used at Lamuria Gardens Apartments by a person wearing the same clothes inter alia; a maroon cap, and a white kanzu which witnesses testify were the same clothes the first accused was wearing?

272. If the accused stole the identity card as stated in evidence two days prior to the date of the murder, was that part of planning and preparation to commit the murder? Based on the broad definition and legal authorities herein I find that the theft of the identity card and subsequent use thereof to disguise identity constitutes mens rea and/or malice aforethought.

273. The prosecution's further case is that, the first accused carried extra clothes in particular, a white Kanzu which he wore before going to the deceased's house and changed immediately he returned therefrom. It suffices to note that the Kanzu was not recovered from the accused house. Is it therefore not farfetched or illogical to conclude that, it is the one that was burnt leaving a white piece thereof.

274. Further if the first accused carried the Kanzu and changed before going to the deceased's house and removed it again immediately he returned from her house, it is clear that he carried it for the purpose of committing the offence.

275. It is also in evidence of PW8, Jennings that when the first accused returned from wherever he had gone to, he looked disturbed and remarked that he had quarrelled with the girlfriend he had gone to see. That they did not advance the discussion they had on establishing a security company.

276. In cross examination Jennings (PW8) stated when referred to his statement that: "I noticed that Jowie's mood had changed and looked distracted and said that he had quarrelled with the girlfriend he had gone to see".

277. It is in (PW8) Jennings evidence that the first accused told him that, "he was expecting a friend who was coming from Southern Sudan." However, he did not tell him where he was going to meet her neither did he tell him whether she was joining them.

278. I find the aforesaid said conduct of the first accused implicates him in the offence.

279. Furthermore, the first accused did not refute the evidence of (PW8) Jennings that he had a gun on the 19th September, 2018 and prosecution submissions that he used it to intimidate, coerce, exert undue pressure to the deceased to surrender, to subdue and/or suppress her.

280. Similarly, the severity and nature of injuries inflicted on the deceased clearly indicate that the first accused had malice aforethought.

281. According to the evidence of Dr. Peter Ndegwa, the deceased's air wave had been shot through and through and the right carotid and jugular vein had been severed, that is cut through and through.

282. That I checked out on the functionality of the various organs severed and established that the carotid arteries are major blood vessels that provide one's brain's blood supply. A person has two carotid arteries, one on either side of the neck.

283. That Carotid artery disease causes up to one-third of all strokes. A stroke occurs when something blocks blood flow to your brain, causing brain injury. Therefore, they are an important part of one's circulatory system that send oxygen-rich blood to organs and tissues in the head and neck, including the brain.

284. Similarly, jugular veins are major blood vessels that stretch from the head to upper chest. Typically, there are three pairs of jugular veins; six in total, each of which directs blood from different areas of the head toward the heart.

285. From the aforesaid, when the subject arteries and veins are severed and the brain is not supplied with oxygen, then the victim cannot survive even for a minute. It does appear that the person who killed the deceased was well aware of these and that is why the neck where these arteries and veins are were targeted. In my considered opinion, the target of the neck clearly indicates that the perpetrator of the crime fully intended and ensured the deceased died and had no chance of survival. Does this support malice aforethought?

286. Further, when one looks at the photographs produced showing how the deceased's neck or throat was slit, they are not worth a second look. In fact, the slitting was not just done on the front part of the neck but all round. It is no wonder the counsel for the first accused kept on cross examining the witnesses as to whether they have ever slaughtered a cow or a goat. When a cow, a goat or even a hen are slaughtered, what is the intention, of course to kill it instantly. That is what happened to the deceased and it is not surprising that nobody including the neighbours heard her scream or struggle. She died a very painful and cruel death. It was a grisly death.

287. According to (PW35) C.I. Otieno, the slit on the deceased's neck was definitely done by someone with training in military work. In re-examination Mr Otieno said that, for a "person with basic military background, if the person intended to kill, it would take him a very short time. It depends on the executor".

288. The question is; did the first accused have military training? While testifying and despite several witnesses speaking to what he told them was his job or career from which he earned a living, the accused did not testify to the same in his evidence in chief.

289. However, he stated that he met Jennings (PW8), during VIP protection as they were on the same project with him when the USA President was in Kenya. He further testified that, their discussion centred on forming a security company.

290. However, when cross examined by the State Counsel he stated that; "I was working abroad in UAE. I was a Security Consultant at UAE" and that he was allowed to have and handle guns.

291. According to Pamela (PW15), she asked the second accused what the first accused was doing in life and she was told he was "a soldier in Dubai", and according to Owen he was introduced by the deceased as "a friend who works as a security in Interpol and Office of the President". That the first accused spoke over security matters and offered to help him get a firearm.

292. It also suffices to note that despite the deceased clearing the said Haron to access her house, when she introduced him to (PW7), Owen she introduced him as Joe and not Haron. Furthermore, (PW8) Jennings told the court that the first accused told him that he had been working in Dubai with a security company and was currently on leave. That he was offering VIP protection to State officials while on leave.

293. Brian Kasaine (PW17) told the court that, he knew the first accused was "working as a private Military Officer, who covered several politicians as an under-cover so to "speak". That he worked as a private military contractor in Dubai and was guarding a former Senator, Joyce Ray.

294. From the evidence above, it is clear that, for the first accused to offer VIP protection, he definitely must have gone through security training and therefore was not an amateur in matters of security and possessed basic knowledge in military operation.

295. It is the finding of the court that the training the first accused had, aided him in the murder of the decease.

296. The conduct of the first accused after the murder has also been called into issue. It is in evidence that, when the brother of the deceased sought for his assistance to get the media coverage of the murder, he allegedly said that the media will not help much and offered to help through his private security firm. Was the statement about the media factually correct and what was it intended to achieve? Suppress the matter?

297. There is also another issue of whether a person by the name of Haron was known to the deceased and why she allowed the 1st accused into her apartment under the name of Haron.

298. It is not difficult to understand why the deceased allowed him into the apartment despite introducing himself as Haron because, it is in evidence as aforesaid that several witnesses testified that the first accused introduced his career in various ways. It is also possible the deceased did not want to contradict what the 1st accused person had told the guards bearing in mind that he was "security or undercover personnel who understatedly keep changing their identity for security reasons.

299. The last issue I wish to address is the defence submissions that this case is based purely on circumstantial evidence and that, the prosecution has not met the threshold of such evidence.

300. The law on circumstantial evidence is settled. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, the Court of Appeal stated as follows:-

> " 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 irect 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: -
>
> > "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." (emphasis mine)

301. Furthermore, the court in Republic v Jumaa Kaviha Kalama Ndolo [2020] eKLR citing the case of DPP Kiborne 1973 AC 729, stated as follows on circumstantial evidence: -

> " Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the s ame conclusion. It works by cumulatively, in geometrical progression, against other possibilities and has been likened to a rope composed of several cords:
>
> One strand of the cord might be insufficient to sustain the weight but three stranded together may be quite of sufficient strength. There may be a combination of circumstances no one of which would raise a reasonable suspicion but the three taken together may create a strong conclusion of guilty with as much certainty as human affairs can require or admits of."(emphasis added). See also Ndurya versus Republic [2008] KLR 135

302. The parameters for admission of circumstantial evidence were well settled in Rex vs. Kipkerring Arap Koske & 2 others [1949] EACA 135 as follows;

> " In order to justify a conviction 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 and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

See also Sawe versus Republic [2003] KLR 354, Musili versus Republic CRA No.30 of 2013 (UR) and Abanga Alias Onyango versus Republic CRA. No. 32 of 1990 (UR)).

303. In the instant case, there is evidence that on 17th September 2018, the first accused stole the identity card of Dominic Bisera Haron, from the guard house within the estate where he was staying. That on 19th September 2018 he armed himself with a gun, carried a bag containing a white kanzu and changed his clothes by wearing the Kanzu over his other clothes before going to the deceased's house.

304. That, he left his vehicle with (PW8) Jennings at a petrol station and took a taxi to Lamuria Gardens where the deceased was staying, used the stolen identity to disguise his and gained access to the deceased apartment and was the last person to be seen with the deceased. Further, after the murder he set out to destroy the evidence by burning the clothes used in commission of the offence.

305. It is the finding of the court that the afore facts taken cumulatively, constitute adequate strands which leads to a strong conclusion that the first accused person is guilty of the offence of murder of the deceased.

306. It is also the finding of the court that, the case against the accused is based on circumstantial evidence but the prosecution has met the threshold thereof.

307. Even then as stated in the decision cited herein, absolute certainty is impossible in any human adventure, including the administration of criminal justice. (seeBakare vs State (1985) 2 NWLR supra).

308. Further although circumstantial evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. (see United States vs Smith, (supra))

309. Furthermore, proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protectthe community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour it is possible, but not in the least probable, the case is proved beyond reasonable doubt. (see Nyanjui vs Republic (supra))

310. The upshot of the aforesaid is that, it is the finding of the court that all the ingredients of the offence of murder as they relate to the first accused have been proved that, the death of the deceased occurred and the doctor confirmed that the cause of death was "exsanguination due to severe neck injuries due to sharp force trauma". It is further the finding of the court that the deceased did not die of a natural or accidental death. It is not a case of homicide and neither does it fall under the circumstances of excusable homicide and therefore it was unlawful and was committed by the first accused with malice aforethought.

311. As regards the second accused I find that, the prosecution did not adduce any direct evidence to connect her to the offence of murder. Similarly, her defence of alibi was not displaced by the prosecution

312. As regards the offence of aiding and abetting and/or an accessory after the fact, Section 222 of the Penal Code defines such a person in the following terms:

> " Any person who becomes and accessory after the fact to murder is guilty of a felony and is liable to imprisonment for life."

313. Section 396 (1) of the Penal Code defines accessories after the fact as follows:

> " A person who receives or assist another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence."

314. In the case of Republic vs Wycliff Mwilu Mutinda [2006] eKLR, the court noted that

> "The law terms a person who assists another person who has committed a crime as an accessory after the fact."

315. The ingredients of accessory after the fact require that the accused have knowledge that the person he/she is assisting has committed an offence and helps that perpetrator with intent to help him/her avoid prosecution.

316. The prosecution did not prove that the second accused had knowledge that the first accused had committed the murder herein. The aiding referred to involves events related to the shooting incident and which occurred at a different place and date from the date of murder and scene.

317. However, two statements have been produced in this court written by the second accused in which, through her second statement she has recanted her first statement and she had not objected to the production thereof. Therefore, they form part of the record.

318. In the second accused statement dated the 28th September, 2018, the second accused informed the police officer who recorded her statement that the first accused had been attacked by thugs as they were returning home. She then changed through her statement of 29th September, 2018 and stated that the first accused shot himself in their residential house.

319. The provisions of section 129 of the Penal Code creates the offence of giving information to person employed in the public service

> " Whoever gives to any person employed in the public service any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, the person employed in the public service—
>
> a. to do or omit anything which the person employed in the public service ought not to do or omit if the true state of facts respecting which such information is given were known to him; or
>
> b. to use the lawful power of the person employed in the public service to the injury or annoyance of any person, is guilty of a misdemeanour and is liable to imprisonment for three years.

320. At most the prosecution should have charged the second accused with offence under section 129 of the Penal Code (Cap 63) Laws of Kenya. There is no limitation of action in criminal law and a charge can be preferred at any time. However, under Article I57 of *the Constitution* of Kenya, 2010, the mandate to institute proceeding in criminal offence lies with the office of the Director of Public Prosecution and I say no more.

321. In conclusion I find the prosecution has proved the case against the first accused beyond reasonable doubt, and find him guilty as charged and accordingly convict him. I find the evidence adduced against the second accused insufficient to prove the offence against her and acquit her accordingly.

322. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 9TH DAY OF FEBRUARY, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Ngweno and Ms Parklea for the State

Prof. Hassan Nandwa and Mr. Ayua for the first accused

Mr. Katwa, Miss Nicholas and Mr. Njuguna for the second accused

Mr. Musembi for the victim's family

Mr. Ombuna: Court Assistant