



**Republic v Njoroge & 2 others (Criminal Case 13 of 2018)  
[2024] KEHC 3710 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3710 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL CASE 13 OF 2018**

**JM NGUGI, J  
APRIL 5, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**SAMUEL NDUNGU NJOROGE ..... 1<sup>ST</sup> ACCUSED**

**JOYCE NJAMBI MUNGAI ..... 2<sup>ND</sup> ACCUSED**

**WILSON MWANGI MUNYUA ..... 3<sup>RD</sup> ACCUSED**

**Guidelines applied during the extraction of data from raw CCTV footage by third parties in the course of an investigation**

Reported by Robai Nasike Sivikhe and John Ribia

***Evidence Law** – electronic and digital evidence – admissibility of electronic and digital evidence – authenticity of CCTV data produced as evidence – claims that CCTV data produced had been manipulated – what guidelines ought to be applied during the extraction of data from raw footage, by third parties, in the course of an investigation.*

***Evidence Law** – statements by persons who could not be called as witnesses – statements by deceased persons relating to the cause of death – dying declarations – what were the conditions to be met for a dying declaration to support a conviction against an accused person? – Evidence Law (cap 80), section 33(a).*

***Evidence Law** – evidence - circumstantial evidence – what were the requirements for circumstantial evidence to justify an inference of guilt on an accused person?*

***Criminal Law** – offences - murder – what were the elements for the offence of murder? – Penal Code (cap 63), section 206 (d).*

**Brief facts**

The accused persons were charged with murder contrary to section 203 as read with section 204 of the Penal Code. They were jointly accused of the murder of the deceased. They entered a plea of not guilty and the



case proceeded to a full hearing. The prosecution relied on dying declaration evidence as well as circumstantial evidence in its bid to prove the charge of murder against all the accused persons.

Evidence regarding the movement of the 1<sup>st</sup> accused person's motor vehicle was found in the form of the CCTV data. Although the raw data of the CCTV system spanning the entire period was not available in its native format because it had already been overwritten by new data in the course of business, the court allowed the production of the transcoded CCTV evidence over objections of the defence and reasons for the decision was given in a ruling.

The objections by the defence were that since the CCTV data had, of necessity, been manipulated, in the process of transcoding, one could not be sure that it was authentic and faithfully represented what happened on January 24, 2018.

### **Issues**

- i. What guidelines could be applied during the extraction of data from raw footage, by third parties, in the course of an investigation?
- ii. What were the conditions to be met for a dying declaration to support a conviction against an accused person?
- iii. What were the requirements for circumstantial evidence to justify an inference of guilt on an accused person?
- iv. What were the elements for the offence of murder?

### **Held**

1. The decision to extract and transcode the data and present it only in its extracted form was informed by good faith and pragmatic realities. The extracted evidence satisfied the integrity and authenticity tests. That was because a proper chain of custody over the footage was established and the process of transcoding that had occurred was satisfactorily explained. However, when allowing the production of the extracted data, the probative value to be assigned to it would be subject to further weighing to be done contextually as against other available evidence.
2. For purposes of future guidance to law enforcement officers, the following non-comprehensive guidelines on the extraction of data from raw footage provided by third parties in the course of investigations were set out:
  1. When retrieving CCTV evidence from private (third-party) systems, the forensics officer must visit the location where the CCTV system was installed and familiarize themselves with the location where the CCTV system was installed; and the specifications of the system.
  2. The officer who would present the evidence in court should retrieve the evidence from the CCTV system.
  3. The CCTV evidence should be obtained in its native format, and then the officer should proceed to make a master copy of the raw footage; and ultimately, duplicate copies of the raw footage.
  4. The investigations team must disclose the existence of the CCTV evidence to the defence and make available to them a duplicate copy.
  5. The forensics officer must document the chain of custody of the CCTV evidence.
  6. Where the forensics officer transcoded or edited the raw footage to a shorter version containing only relevant data for the case at hand, the officer should only carry out the processing on a working copy of the CCTV evidence, not the master copy. Additionally, the officer was required to make appropriate notes of the transcoding or editing and the process used to do so.
  7. A written report should accompany the final version of the output that would be presented as evidence and played in court.
  8. A copy of that final output which would be produced as evidence must be made available to the defence as well.



3. The investigators adhered to most of the set guidelines except the one requiring them to make a working copy and turn in a duplicate copy to the defence. Ultimately, though, the technical lapses did not prejudice the defence or otherwise taint the trial or undermine the fair trial standards of the accused persons.
4. The prosecution had to prove the three elements of the offence of murder, successfully. They had to prove that: the death of the deceased occurred; the death was caused by an unlawful act or omission on the part of the accused person; and the accused person had malice aforethought in causing the act or omission.
5. The prosecution was required to prove the three elements of murder beyond reasonable doubt. Reasonable doubt was not mere possible doubt. That was because everything related to human affairs, and depended on moral evidence, was open to some possible or imaginary doubt. It was that state of the case which, after the entire comparison and consideration of all the evidence, left the judge's mind in that condition that they could not say that they felt an abiding conviction, to a moral certainty of the truth of the charge. Reasonable doubt was a doubt that would cause a reasonable person to hesitate to act.
6. The fact of the death of the deceased was not in question or doubt. A post-mortem report confirmed that the deceased died as a result of complications from 60% of total chemical burns due to assault. Whoever caused the death of the deceased did so with malice aforethought. That was owing to the nature of the attack and injuries suffered. Evidence showed that the attacker doused her face and whole body with the corrosive liquid and did it so thoroughly that her entire body suffered burns. Additionally, the attacker forced her to imbibe the corrosive liquid causing her even further bodily injury. Since at the very least, the attacker intended the deceased to suffer grievous bodily harm, the element of malice aforethought was easily satisfied under section 206(d) of the Penal Code.
7. Dying declarations were an exception to the hearsay rule. That exception was codified in section 33(a) of the Evidence Act. Statements made by a person who was dead were admissible where the cause of his death was in question and those statements were made by him as to the cause of his death. For a dying declaration to support a conviction, the declaration must meet the basic conditions pithily described as contemplation; cogency; credibility, competency and corroboration:
  1. Contemplation (of certain death): a dying declaration was not only admissible when the declarant believed their death was near and certain by the express terms of section 33(a) of the Evidence Act, as a practical matter, courts assigned a higher probative value to dying declarations that were made *in articulo mortis*. The general principle on which a dying declaration was admitted in evidence was that it was made in extremity when the maker was at a point of death and the mind was induced by the most powerful considerations to tell the truth.
  2. Cogency: the dying declaration must be a clear expression by the declarant as to the cause of their death and not a diffusely ambiguous formulation capable of differing interpretations.
  3. Credibility: the dying declaration must be one which inherently inspired confidence in its truth and accuracy. At the very least, the court must be satisfied that the declarant was in a fit state of mind to make a clear statement.
  4. Corroboration: while not a strict rule, courts were, generally, quite reluctant to convict solely on a dying declaration absent exceptional circumstances. As a general rule, the dying declaration evidence must be corroborated by some other evidence whether direct or circumstantial.
8. The defence sought to discount the dying declarations because the deceased was in pain and agony, however, that was precisely a reason to believe them. The approach of death, even if not certain, produced a state of mind in which the utterances of the dying person were to be taken as free from all ordinary motives to misstate.



9. While the Government Analyst (PW17) detected amphetamines in the liver of the deceased, the witness explained that it was in very small amounts. In any event, all the witnesses – especially the treating doctor – described the deceased as coherent and having a fit state of mind to tell the truth.
10. There was no requirement that dying declarations made to several people be made in the exact same words for them to be considered truthful. Indeed, the narration of events in strikingly similar words might render the dying declarations suspicious. Where there was a plurality of dying declarations to different people, the fact that the words used were not exactly the same was not a reason to reject them. The court was required to test the content of the dying declarations to satisfy itself that they were not the result of tutoring, prompting or imagination.
11. Upon proper consideration of the full panoply of the testimonies of the six witnesses who spoke to the deceased shortly after her attack, she clearly and unambiguously implicated the 1<sup>st</sup> accused person in the attack. The different formulations of the declaration were not an indication of lack of credence, but of the different types of relationships the deceased had with the recipients of the declarations. The differing formulations which had the same core content – that it was the 1<sup>st</sup> accused person who was responsible for perpetrating the attack on the deceased – inspired confidence that they were truthfully made.
12. While not a dogmatic rule of law, it was safe to require corroboration where dying declaration evidence was received. In the instant case, corroboration was presented in the form of circumstantial evidence.
13. A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, pointed to the guilt of the accused person because they would usually exist in such combination only because the accused did what was alleged against him. Such a conclusion had to be established beyond reasonable doubt. It was not sufficient that it was a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there was another conclusion which was also reasonably open from that evidence, and which was consistent with the innocence of the accused, then it was not sufficient to establish the guilt of the accused person. Unlike direct evidence, which proves a material element of a legal action, circumstantial evidence proves other facts from which one could infer the existence of material elements.
14. For circumstantial evidence to justify the inference of guilt, the evidence must irresistibly point to the accused as the person who committed the crime; the incriminating factors must be inconsistent with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt; and the chain of events must be so complete that it established the guilt of the accused and no one else. The circumstances in the instant case were such that they wove a web of guilt around the accused persons from which they could not escape. From those facts and circumstances, the instant court was entitled to draw no other reasonable inference save their guilt beyond a reasonable doubt. That inference corroborated the dying declarations evidenced in the instant case.
15. The prosecution evidence contained some discrepancies. The test that the court utilized on the effects of contradictions or inconsistencies on the prosecution case was a substantive one. It inquired whether the contradictions or inconsistencies in the prosecution evidence were to such an extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), were so material that the trial court ought to have rejected the evidence. Not every inconsistency, however small, introduced a reasonable doubt to the prosecution case. The inconsistencies alleged by the defence did not affect the substance of the prosecution case as amply demonstrated in the dying declarations evidence and circumstantial evidence analyzed.
16. Applying the appropriate principles of circumstantial evidence, the circumstances taken cumulatively formed a chain so complete that there was no escape from the conclusion that within all human probability, the crime was committed by the accused persons. The prosecution proved the case against each of the three accused persons beyond a reasonable doubt.

*Each of the three accused persons was convicted of the murder of the deceased as charged.*



## Citations

### Cases

#### Kenya

1. *Choge v Republic* Criminal Appeal 69 of 1984; [2085] eKLR - (Explained)
2. *Kanga, Peter Kimathi v Republic* Criminal Appeal 80 of 2013; [2015] KECA 103 (KLR) - (Explained)
3. *Ngaira, Moses Wanjala v Republic* Criminal Appeal 87 of 2016; [2019] KECA 955 (KLR) - (Mentioned)
4. *Njuguna, Joseph Githua v Republic* Criminal Appeal 193 of 2013; [2016] KECA 305 (KLR) - (Explained)
5. *Ondeng', Erick Onyango v Republic* Criminal Appeal 5 of 2013; [2014] KECA 523 (KLR) - (Explained)
6. *Republic v Ahmad Abdolfadhi Mohammed & another* Petition 39 of 2018; [2019] eKLR - (Explained)
7. *Sawe v Republic* Criminal Appeal 2 of 2002; [2003] KLR 364 - (Explained)
8. *Watu, Philip Nzaka v Republic* Criminal Appeal 29 of 2015; [2016] KECA 696 (KLR) - (Explained)

#### South Africa

1. *S v Phallo and others* 1999(2) SACR 558 - (Mentioned)
2. *S v Shackell* [2001] ZASCA 72; [2001] 4 All SA 279 (A) - (Mentioned)

#### United Kingdom

*Miller v Minister of Pensions* [1947] 2 All ER 372 - (Explained)

#### United States

1. *Commonwealth v Webster* 59 Mass 295 (1850) - (Explained)
2. *Holland v United States* 348 US ; 75 S Ct 137 - (Mentioned)
3. *Sandoval v California* 4 Cal 4th 155 (1992) - (Explained)
4. *Victor v Nebraska* 114 S Ct 1244 (1994) - (Explained)

### Texts

Jordan, SB., (Ed) (1995), *Raising a Reasonable Doubt: How in the World Is It Defined?* Washington: American University International Law Review

### Statutes

#### Kenya

1. Evidence Act (cap 80) section 33(a) - (Interpreted)
2. Penal Code (cap 63) sections 203, 204, 206(d)- (Interpreted)

### Advocates

*Mr Mutitu* for the 1st Accused

*Mr Mathenge* for the 2nd Accused

*Mr Njuguna* for the 3rd Accused

## JUDGMENT

1. Samuel Ndung'u Njoroge; Joyce Njambi Mungai; and Wilson Mwangi Munyua (collectively, the "accused persons", and, individually, "the 1<sup>st</sup> accused person"; "the 2<sup>nd</sup> accused person"; and "the 3<sup>rd</sup> accused person", respectively) are charged with murder contrary to section 203 as read with section 204 of the [Penal Code](#). They are jointly accused of the murder of Lucy Njambi Nyagiko ("Deceased") on January 24, 2018 at Kiambu sub-county within Kiambu County.
2. Each of the three accused persons entered a plea of not guilty and the case proceeded to full hearing.



3. The trial began before me in February, 2018 when I was a High Court Judge stationed in Kiambu. For various reasons, the trial was not completed before I was transferred to Nakuru High Court as the Presiding Judge. At the option of both the Prosecution and the incoming Presiding Judge at Kiambu High Court, I was requested to complete the trial. Despite several trips to the Kiambu High Court over the next three years, the trial was not completed. It remained so on September 14, 2022 when I was sworn in as a Judge of the Court of Appeal. The parties wrote to the Honourable Chief Justice requesting that I be directed to return to Kiambu High Court to complete the trial owing to the complexity of the trial, the fact that it was at an advanced stage of hearing having already heard 34 witnesses, and in the interests of justice. Consequently, the Honourable Chief Justice directed me to return to Kiambu and complete the trial. At the first hearing conducted after my return to Kiambu High Court on March 15, 2023, both the Prosecution and the Defence confirmed on record that they had requested for me to return to complete the trial; and that they had no jurisdictional objections despite the fact that by then I had taken the oath of office at the Court of Appeal. I, thus, subsequently, took the evidence of the the four remaining Prosecution witnesses and heard the defence case.
4. Ultimately, the prosecution called thirty-eight (38) witnesses. Through them, the following narrative emerged.
5. At approximately 9:15PM on January 24, 2018, Anne Wanjiru Kagunda (“Anne”) was bidding goodbye to a friend at her home in Mugumoini, off Kiambu-Ruiru Road. The friend - Mrs Mwanyura, and her husband, Mr Mwanyura - had brought her some filled-up cooking gas cylinders to exchange with her empty ones. At her gate, as they did the exchange, they heard what seemed to them to be muffled screams for help down the road. With Mr Mwanyura accompanying them, they followed the direction from where the cries were coming from. This led them down the main road and to the opposite side of Anne’s homestead. There, they found a jarring scene: a naked lady who appeared to have been badly burnt. A small crowd was already forming. Anne ran back and forth to her house to bring water in a bucket to cool off the lady; and then some lessos to cover her nakedness. Aided by Mrs Mwanyura, Anne helped the lady to a nearby supermarket where they could see her more clearly with the illumination from the security lights. Noting her precarious status, they resolved to rush her to Kiambu Hospital in Mr Mwanyura’s car. The only answers Anne remembers getting from the lady was her name – Njambi – and her place of origin – Gatundu – which Anne used to register her at the Casualty department. After the Deceased was received at the hospital, Anne and the Mwanyuras returned to their respective homes.
6. It turned out that the lady who Anne rescued in her neighbourhood was Lucy Njambi Nyagiko. She is the deceased (“deceased”) in this case. Unfortunately, she did not survive her ordeal. She died a day later at Kenyatta National Hospital where she had been referred to after receiving initial treatment at Kiambu Hospital.
7. While at Kiambu Hospital, she was able to give details of her grandmother, Margaret Gachambi (“Cucu Gachambi”), to those attending to her. They, mercifully, placed a call to Cucu Gachambi.
8. Upon receiving the alarming call at her home in Gatundu, Cucu Gachambi immediately informed her daughter (and the deceased’s aunt), Esther Nyambura Gitau (“Esther”). She, in turn, activated the rest of the family. Esther, Cucu Gachambi, Jacinta Njeri (another aunt to the Deceased) and Hannah Wanjiku (“Hannah”) – a daughter-in-law to Cucu Gachambi - immediately arranged for means to travel from Gatundu to Kiambu Hospital. They got there around midnight. Other family members, whom they had notified by phone, had arrived before them. Esther’s husband, Peter Ndung’u; Rose Wambui; Matheri Gaitho (“Matheri”) and one, Kamau, were already at the hospital.



9. The relatives were allowed – mostly in turns -- to have short conversations with the Deceased. Thereafter, the Deceased was placed in an ambulance and, accompanied by Esther, Hannah and Rose Wambui, was taken to Kenyatta National Hospital. Despite the valiant efforts by medical personnel there, she succumbed to her injuries the next day.
10. After due investigations, the state became persuaded that the death was a homicide; and that it was authored by the three accused persons acting in concert. To prove its case, the State marshalled thirty-eight (38) witnesses – among them the aforesaid Anne; Cucu Gachambi; Esther; Matheri and Hannah. The prosecution’s theory is straightforward: That the 1<sup>st</sup> accused person, an estranged husband to the deceased but obsessed with her, chose to brutally end her life rather than have her “sleep with uncircumcised men” as he allegedly called younger men who, the prosecution claims, the 1<sup>st</sup> accused Person suspected were having an affair with the deceased.
11. The prosecution theory, further, is that with the help of the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons and another accomplice who was never apprehended because he fled soon thereafter, the 1<sup>st</sup> accused planned what was staged to seem like an abduction where both he (1<sup>st</sup> accused person) and the deceased would appear to be victims but where the sole aim was to lure, capture, humiliate and ultimately murder the deceased while creating what they thought was a perfect defence for the 1<sup>st</sup> accused person. Since the best laid plans of mice and men often go awry, this is how, the prosecution evidence aimed to show, the deceased was discovered by, among others, Anne, in a coffee estate off Kiambu-Ruiru Road: severely burned with acid; horrifyingly-afflicted – but still alive – albeit, it sadly turned out, only ephemerally so.
12. Consequently, the prosecution relied on dying declaration evidence as well as circumstantial evidence in its bid to prove the charge of murder against all three accused persons. The evidence emerging from the thirty-eight (38) witnesses called by the prosecution can be grouped, for purposes of easier comprehension, into seven (7) categories with some witnesses’ testimonies serving more than one purpose:
  - a. Seven (7) witnesses testified to the motive of the murder: a scorned husband in search of the ultimate revenge against a woman he felt had betrayed him after giving her everything. These were PW1; PW3; PW4; PW5; PW6; PW15 and PW24;
  - b. Six (6) witnesses narrated the dying declarations made to them by the deceased: evidence of the deceased pointing a finger at the 1<sup>st</sup> accused person as the prime mover in her impending demise. These were PW3; PW6; PW7; PW15; PW16 and PW22;
  - c. Three (3) witnesses were identifying witnesses: they aimed to link the three accused persons together by placing them within certain localities. The primary evidence in this regard was given by PW2 while the identification parades were conducted by PW27 and PW31;
  - d. Four (4) witnesses traced the movements of the accused persons on the fateful day and aimed to demonstrate opportunity and means to commit the murder: weaving a web which the prosecution says the Accused persons cannot escape from without violating logical rules of reasonable credulity. These included PW2; PW32; PW35; and PW38;
  - e. Two (2) witnesses gave eye witness accounts of the abduction that took place in Thindigua on 24/01/2018. These are PW11 and PW19;
  - f. Ten (10) witnesses were formal witnesses who established auxillary facts which the prosecution hoped tend to close off any reasonable hypothesis other than that the accused persons are guilty of the offence of murdering the deceased. These included PW8; PW9; PW10; PW14; PW17; PW23; PW25; PW26; PW29 and PW33; and,



- g. Finally, seven (7) witnesses testified about their various roles in the investigation of the murder that led to the charging of the three accused persons. These include PW21; PW22; PW28; PW30; PW34; PW36 and PW37.
13. All the five relatives of the deceased who testified spoke of the strained relationship between the 1<sup>st</sup> accused person and the deceased. This, the prosecution says, was the motive for the murder. Esther, who testified as PW3, narrated how, on November 24, 2017 – the eve of the deceased’s dowry ceremony – the deceased confessed to her that she was having issues with the 1<sup>st</sup> accused person. Esther testified that the deceased was pensive the whole day. This was echoed by Cucu Gachambi, who testified as PW5. She told the court that the deceased had told her that the 1<sup>st</sup> accused person had beaten her badly several times and that the deceased even had a scar near her shoulder blade from one such beating. Cucu Gachambi talked of the many times they had sat down as a family to try and resolve the marital issues. Ultimately, she testified, they had advised the 1<sup>st</sup> accused person to give the deceased time to make up her mind if she wanted to get back together with him.
14. Similarly, Fidelis Muthoni Njuguna, another aunt to the deceased, who testified as PW4, testified that on November 27, 2017, the deceased had gone to her house in Kawangware crying hysterically. The deceased reported to her that the 1<sup>st</sup> accused person was endlessly cruel to her and had, among other things accused her of being useless “except in bed” and of “sleeping with uncircumcised men”. On one occasion, Fidelis narrated, the deceased had alarmingly texted to her that should she (the deceased) die, Fidelis should take care of her young son, Emmanuel. On probing, the deceased texted back that: ‘Baba Njoro has beaten me badly on my head and ribs.’ This was on December 9, 2017.
15. Fidelis testified that the deceased told her that she was determined to leave the 1<sup>st</sup> accused person and had even bought salon equipment which Fidelis had stored for her in readiness for her to make her clean break.
16. Similar testimonies in this regard came from Matheri Gaitho (PW6) – an uncle to the deceased and Rose Wambui Chege (PW15) – an aunt to the deceased.
17. However, it was the testimony of Lydia Nduta Kieru (“Lydia”)(PW1) and Sergeant James Mwaura (PW24) which completes the picture of the 1<sup>st</sup> accused person as an angry, insecure and obsessed husband who could not fathom his estranged wife being with any other man despite their marital difficulties. Lydia testified how the 1<sup>st</sup> accused person sent threatening messages to her son, Kieru, after he (the 1<sup>st</sup> accused person) learnt that Kieru was exchanging what seemed to be romantic texts with the deceased. Lydia testified that one of the messages which Kieru received from the 1<sup>st</sup> accused person and which alarmed him read:
- “Hi kaze: unaita bibi ya wenyewe bae. Let’s meet in heaven.”*
18. So serious was the situation that when some anonymous people went to Lydia’s ancestral home in Gatundu looking for Kieru, Lydia and Kieru decided to report the matter to Gatundu Police Station. It was Sgt. Mwaura who led the investigations of the threat to kill reported by Kieru at Gatundu Police Station. He ultimately resolved the matter between Kieru and the 1<sup>st</sup> accused person when Kieru agreed to stop texting the Deceased; and the 1<sup>st</sup> accused person agreed not to threaten him anymore. At the time, Sgt Mwaura concluded that the 1<sup>st</sup> accused person was not serious about harming Kieru. However, Lydia took it seriously enough to organize for Kieru to flee to safety in Dubai in the United Arab Emirates. As an extra layer of security and comfort, Lydia testified that she sought to curry favour with the 1<sup>st</sup> accused person -- in order to keep his son safe – by speaking with the deceased to persuade her to return to the 1<sup>st</sup> accused person; and, when she thought that that was not going too well, by



introducing the 1<sup>st</sup> accused person to another young woman who could become his girlfriend. As fate would have it, the young woman Lydia introduced to the 1<sup>st</sup> accused person is the 2<sup>nd</sup> accused person.

19. The Prosecution states that when the 1<sup>st</sup> accused person was unable to resolutely win back the deceased despite the efforts of Lydia and his niece, identified variously as Ciku or Wanjiku by different witnesses, he became enraged and narcissistically decided to kill the deceased. The evidence led by the Prosecution is that he was introduced to the 3<sup>rd</sup> accused person and another man by the name Njugush, who remains at large, by the 2<sup>nd</sup> accused person. The four of them, then, conspired to kill the deceased using sulfuric acid.
20. The prosecution first sought to prove that it is the 1<sup>st</sup> accused person who planned and executed the murder of the deceased through dying declarations. As aforesaid, the deceased was found badly burned in a coffee estate in Magumoini off Kiambu-Ruiru Road. When she was taken to the hospital, she told at least six people that it was the 1<sup>st</sup> accused person who was responsible for her predicament. The six witnesses who testified on the dying declaration evidence are as follows:
  - a. According to Esther (PW3), when she went to the Kiambu Hospital and saw the deceased as she lay in anguish at the Casualty Department, she told Esther: “*Haki Nyambu, ni Baba Njoro.*” The Deceased repeated the statement later when they got to Kenyatta National Hospital. “Baba Njoro” is a nickname for the 1<sup>st</sup> accused person referring to him being the father of Emmanuel Njoroge, his son with the deceased.
  - b. Matheri Gaitho (PW6) – an uncle to the deceased - narrated that as soon as the deceased recognized his voice at Kiambu Hospital, she said: “I got a problem but it is Ndungu who did this to me.” At the time, the deceased was in the Casualty Department at Kiambu Hospital. According to Matheri, the Deceased proceeded to tell him, in great detail what had transpired that day – from when she took food down to the 1<sup>st</sup> accused person; to being bundled in the car by two men; to the 1<sup>st</sup> accused person confronting her accusing her of infidelity and ominously warning her that she was about to sleep with the last man in her life; to one of the assailants raping her then pouring the acid on her and then leaving her for the dead; to her crawling to the road whence she received help. Through it all, Matheri testified that the deceased was categorical that it was her husband, the 1<sup>st</sup> accused person, who orchestrated the plan.
  - c. Similarly, the doctor who first treated the deceased at Kiambu Hospital and prepared her to be referred to Kenyatta National Hospital, Dr Jackline Rigii (PW7), testified about her encounter with the deceased. The doctor said that the deceased told her that “her husband was trying to kill her.” The deceased also narrated to her what had happened to her and in all material particulars, it matched what Matheri (PW6) told the court the deceased had told him.
  - d. On her part, Rose Wambui, PW15, who, also, had an opportunity to speak with the deceased at Kiambu Hospital testified that: “I asked her what had happened and she told me Ndungu had caused all the damage.”
  - e. Hannah (PW16), also, testified that she spoke to the deceased at the hospital. The deceased told her that it was “baba Njoroge who did this to her”.
  - f. Finally, Sergeant Linus Mugambi went to Kiambu Hospital with Inspector Lemura and spoke with the deceased. The deceased gave her the same version of events as she had given to Esther; Matheri; Dr. Rigii and Rose and told him that her husband was “behind all the things that happened to her.”



21. Having presented the evidence on dying declarations, the prosecution sought to present evidence which it hoped tended to demonstrate, by inference, that the three accused persons were responsible for the attack and murder of the deceased. The structural scaffolding of that evidence is largely anchored on the narrative of the driver of the 1<sup>st</sup> accused person, Francis Mumira Mwangi (“Mumira”)(PW2).
22. Mumira was hired as a driver by the 1<sup>st</sup> accused person on January 4, 2018 on a “casual” basis. He would drive him in his vehicle, Toyota Harrier Registration No KBY 767S. He would usually meet him at Thindigua and then drive him to wherever he was instructed. In court, Mumira recalled that on January 15, 2018 the 1<sup>st</sup> accused person sent him to Mwiki to pick up a certain woman and take her to Homeland Inn along Thika Highway (hereinafter, “Homeland”). Later, the 1<sup>st</sup> accused person would tell him that the woman was his second wife but that she had “given him a lot of trouble” because “she is never satisfied with anything.” He later learnt that her name is Njambi – the deceased in this case.
23. The following day – that is on January 16, 2018– the 1<sup>st</sup> accused person instructed Mumira to drive him to Kihunguro. There, they picked two ladies; one of whom had a small child. He did not know the two women. He drove all of them to 1.7 Lounge, Bar & Grill in Kamakis, Ruiru. He was left in the car as the 1<sup>st</sup> accused person and the two women went inside. Later, one of the ladies – the one with a small child – told Mumira that he had introduced the 1<sup>st</sup> accused person to the other lady and that she wanted the two of them “to know each other well.” The other lady – the one who was being introduced to the 1<sup>st</sup> accused person for possible blossoming of a romantic friendship - Mumira testified, was the 2<sup>nd</sup> accused person. He identified her on the dock; and he had earlier identified her in an Identification Parade. The Identification Parade was conducted by Inspector Stanley Muthui on February 27, 2018. Inspector Muthui testified as PW27.
24. The following day – January 17, 2018– Mumira was instructed by the 1<sup>st</sup> accused person to pick up the Deceased and a niece to the 1<sup>st</sup> accused person and take them to Kihunguro. They, then, picked up the woman he had seen the previous day – the one with a small child – and drove all three women to Greenspot Restaurant at Kamakis on the Eastern Bypass. The 1<sup>st</sup> accused person then dismissed Mumira to go home as the meeting was going to take long.
25. On January 22, 2018, the 1<sup>st</sup> accused person instructed him to report to work earlier than usual. He did. He drove the 1<sup>st</sup> accused person to Karen in a vehicle belonging to a Mr Njaramba – husband to the 1<sup>st</sup> accused person’s niece. They spent sometime at a restaurant in Karen. Thereafter, they returned to Thindigua and, eventually, to Sagas Restaurant and Homeland along Thika Road where he left the 1<sup>st</sup> accused person and Mr Njaramba.
26. On January 24, 2018, in the morning, Mumira drove the 1<sup>st</sup> accused person to the deceased’s apartment. The 1<sup>st</sup> accused person chatted with the the deceased for more than an hour. It seemed to Mumira to be a friendly conversation. At the tailend of the conversation, the 1<sup>st</sup> accused person wrote a cheque and gave it to the deceased. Thereafter, Mumira drove the 1<sup>st</sup> accused person to Ridgeways. He left him there and was instructed to take some bank statements to a Mr Munene of Car Bazaar in Lavington. When he returned, the 1<sup>st</sup> accused person asked him to take him, first to Homeland; and then to Kihunguro. At Kihunguro, they met the 2<sup>nd</sup> accused person, who was well known to him by then. The 1<sup>st</sup> accused person spoke with her and two other men. Mumira had never seen the two men before. The 1<sup>st</sup> accused person met with the 2<sup>nd</sup> accused person and the two men for about 45 minutes. Mumira could not hear their conversation and does not know exactly what was said in the meeting.
27. They left the two men at Kihunguro and Mumira was instructed to drive the 1<sup>st</sup> and 2<sup>nd</sup> accused persons to the 1<sup>st</sup> accused person’s house in Kawangware. At the 1<sup>st</sup> accused person’s residence, Mumira was left



- inside the vehicle as the two went in. Twenty (20) minutes later, the 1<sup>st</sup> accused person emerged from the house carrying a box. Mumira was tasked to pack it in the vehicle. As he did so, he could tell that inside the box was a container with some liquid in it. He estimated that the container was probably a five-litre jerrycan. The 2<sup>nd</sup> accused person, at the instance of the 1<sup>st</sup> accused person, gratuitously explained that the container contained a liquid for cleaning rust from iron. Since Mumira knew that the 1<sup>st</sup> accused person dealt with scrap metal, that information did not appear alarming or perturbing to him.
28. On their way from Kawangware, the 1<sup>st</sup> accused person asked Mumira if he knew anyone who could get him a car hire. Mumira responded in the negative. The 1<sup>st</sup> accused person, then, made a few calls. Mumira drove the 1<sup>st</sup> and 2<sup>nd</sup> accused persons to Homeland as instructed. There, he noticed that the two men the 1<sup>st</sup> and 2<sup>nd</sup> accused persons had earlier met with at Kihunguro were already there. He saw one clearly when he approached the vehicle to speak with the 2<sup>nd</sup> accused person: that man is the 3<sup>rd</sup> accused person. The 1<sup>st</sup> and 2<sup>nd</sup> accused persons went into another meeting with the two men.
29. At around 8:00pm, a car hire was delivered at Homeland. It was a Toyota Premio. Mumira could not recall its registration number on the witness dock. However, this aspect of the testimony is corroborated by the testimony of Mark Muthii Mbogo (PW9), the car hirer. Both the 1<sup>st</sup> and 2<sup>nd</sup> accused persons confirm as much in their defence.
30. The 1<sup>st</sup> accused person drove the car hire while Mumira was instructed to drive the 1<sup>st</sup> accused person's car – the Toyota Harrier - to his apartment in Thindigua. On the way, the 1<sup>st</sup> accused person called Mumira on the phone and gave him new instructions to drive the Toyota Harrier to the Quickmart on Kiambu Road and not to his apartment. Mumira did as instructed. At the QuickMart parking lot, Mumira found the 1<sup>st</sup> accused, three men and the 2<sup>nd</sup> accused person. They were in the Toyota Premio. He immediately recognized one of the men as the man who had approached the motor vehicle at Homeland; and whom he had seen earlier at Kihunguro. It is the 3<sup>rd</sup> accused person. He recognized him not only from his facial features; but, also, from the clothes he had on: a checked shirt and a black pair of trousers. Mumira identified the 3<sup>rd</sup> accused person on the dock; and had earlier identified him at an Identification Parade. The Identification Parade was conducted by Inspector Johnson Lemuna on January 28, 2018. Inspector Lemuna testified as PW31 during the trial.
31. The place was illuminated by florescent bulbs which were very bright, Mumira recalled. It was now inching towards 9:00PM. The 1<sup>st</sup> accused person, upon reflection and assessment, concluded that the Toyota Premio (car hire) could not get him to where he was going. He, thus, decided that they were going to use the Toyota Harrier instead. He, together with the three men and the 2<sup>nd</sup> accused person got into the Toyota Harrier. Mumira was instructed to take the Toyota Premio to the 1<sup>st</sup> accused person's apartment in Thindigua. Mumira recalled that he heard the other men referring to the 3<sup>rd</sup> accused person as "Mwangi". Mumira also recalled that at the point at which the 1<sup>st</sup> accused person was directing him to take the car hire home as he boarded the Toyota Harrier, the 1<sup>st</sup> accused person caustically stated that his (the 1<sup>st</sup> accused's) wife "was not going to be sleeping with uncircumcised men." According to Mumira, the 1<sup>st</sup> accused person seemed very upset. He told Mumira to take the vehicle to his apartment but not to leave until he called him back.
32. Mumira did as directed. On getting to Morning Star Apartments, where the 1<sup>st</sup> accused person lived, he parked the vehicle and slept in it awaiting the call. The call never came. He slept through to the morning. When he awoke, he took a stroll to a nearby kiosk and bought some tea. Then he locked the motor vehicle and left for his home. On the way home, Mumira got a call from Ciku, the niece to the 1<sup>st</sup> accused person, who told him not to go to the 1<sup>st</sup> accused person's house because "things were not ok there". Ciku told him to go to her house instead. He did that. He went to her house in Zimmerman



- and, together, they drove to Kiambu Police Station in Ciku's car. Ciku told him that the 1<sup>st</sup> accused person had been abducted the night before.
33. This testimony of Mumira is important for at least three reasons: First, he traced in great detail the movement of the 1<sup>st</sup> accused person on the fateful day – January 24, 2018. Second, the testimony is important because it directly links the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons to the 1<sup>st</sup> accused person and aimed to demonstrate that they were together shortly before and at roughly the time when the attack on the deceased happened. Third, the testimony seems to shed light on the identities of the two men and a woman who abducted the deceased at her apartment. Two eyewitnesses – PW11 and PW19 – would later testify that they saw two men and one woman during the abduction. In particular, the testimony suggests an inference that the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were present during the abduction.
  34. Regarding the first point – the general movements of the 1<sup>st</sup> accused person's motor vehicle on January 24, 2018 – it is crucial to point out that the general testimony of Mumira is borne out by that of ASP Kennedy Kirandi Mwadime. ASP Mwadime testified as PW38.
  35. ASP Mwadime is based at the Integrated Communication Command & Control Center (IC3) at Jogoo Road. At the request of the Investigating Officer in the case, he harvested the data for motor vehicle registration number KBY 767S, - the Toyota Harrier owned by the 1<sup>st</sup> Accused Person. He was able to extract ANPR data – Automatic Number Plate Recognition System – (ANPR) for the vehicle. After extracting it from the server, he produced the data on a computer and recorded the data on an optical media (DVD). He produced the DVD, the letter requesting for his action, and the certificate as evidence in the case. He took the court through the DVD he produced during his testimony.
  36. Using the court's screen, ASP Mwadime took the court through the template showing the ANPR data that is stored at an ANPR station when a motor vehicle passes i.e. locations, ANPR stations on the sounds; the directions the motor vehicle is travelling to and from; the number plate; the passing time; it also shows the lanes the motor vehicle is passing on as it passes the ANPR station; and the time upto a second.
  37. The data runs from January 17, 2018 to January 24, 2018. The last time capture is on January 24, 2018 at 20:11:59. As aforesaid, the date is for motor vehicle registration number KBY 767S. ASP Mwadime explained that the last capture for 23/01/2018 was at 21:15:28 location is Kiambu road at St Mary's Girls High School driving towards Kiambu town. The first capture on 24/01/2018 was picked at 10:12:11 location is along Kiambu road near St Mary's Girls High School driving from Kiambu town towards Northern Bypass. This is the same place the last capture on January 23, 2018. He explained that there is no other camera, beyond St Mary's towards Kiambu.
  38. Zooming into the DVD, ASP Mwadime explained that the first capture of 24/01/2018 shows that there is a gentleman on the passenger's seat. He seemed to be in a printed T-shirt with patterns on the front.
  39. The second capture of 24/01/2018 is at 11:18:39 at St. Mary's High School again. The motor vehicle is now heading back to Kiambu. The image still picked a passenger on the passenger's seat. ASP Mwadime extrapolated that the passenger seems to be the same person inferred from the dressing – white T-shirt with front patterns. ASP Mwadime took the court through the following other data captures for that day for the 1<sup>st</sup> accused person's motor vehicle:
  40. The next capture for January 24, 2018 is at 12:52:52. It is the same camera near St Mary's School - but the vehicle is now driving from Kiambu. The driver is in a bluish short sleeved shirt and the same passenger in a T-shirt with patterns can be seen.



41. The next capture is at Northern Bypass road near Kiambu road junction. The driving direction is Kiambu road junction towards Kigwa road junction. This is at 12:53:41.
42. The next capture is at 13:03:56 captured at Githurai 44 near Kamiti road Northern bypass driving from Kiambu junction towards Thika superhighway. The passenger is the same person in the other captures.
43. The next capture is at 13:38:42 at Forest road near Kolubot road junction driving from Forest road towards Museum Hill. The motor vehicle seems to have only the driver. There is no front seat passenger.
44. The next capture is at 13:43:06 at Waiyaki way opposite Westlands Bus terminal direction is from Westlands roundabout towards ABC Place. There is no passenger on the front passenger seat.
45. At 13:52:34, the motor vehicle is captured at Ole Nguruone roundabout along James Gichuru road. Direction is Mzima Springs towards James Gichuru/Ole Nguruone roundabout. The motor vehicle still has no front seat passenger.
46. The next captures on the ANPR are as follows:
  - a. At 13:58:23 along Kingara Road near Mbaazi Avenue driving from James Gichuru towards Kingara Road. The driver is in a blue short sleeved shirt. There is still no front seat passenger.
  - b. At 14:27:27 at Kingara Road near Mbaazi Avenue driving towards James Gichuru/Gitanga road junction.
  - c. At 14:43:46 at Chiromo road near Villa Rosa Hotel driving towards Museum Hill flyover. The driver was alone in a blue shirt.
  - d. At 14:46:00 at Parklands road near UON School of Law driving towards Limuru/Forest Road flyover.
  - e. At 16:47:09 at Chiromo road near Villa Rosa Hotel driving towards Westlands roundabout. The vehicle could now be seen heading in the opposite direction. The image is not clear enough to pick up passengers on that photo.
  - f. At 16:50:04 at Waiyaki Way opposite Westlands Bus Terminus driving from Westlands roundabout. The zoomed motor vehicle shows a passenger who is light skinned in a dark attire with white spots – on the front passenger seat. The data is not clear enough to indicate the gender of the passenger.
  - g. At 17:06:49 at Ole Nguruone roundabout along James Gichuru driving from Mzima Springs towards James Gichuru/Ole Nguruone roundabout.
  - h. At 17:51:40 at Kingara Road near Mbazi driving towards James Gichuru/Gitanga road junction.
  - i. At 18:22:36 at Chiromo road near Villa Rosa Hotel driving from Westlands towards Museum Hill/Flyover. When zoomed one can see a driver in a blue shirt or T-shirt while the passenger in the front seat is a lady who is light-skinned. There appears a passenger in the back set with a white shirt with patterns who, according to ASP Mwadime, is the passenger seen in earlier data captures as a front seat passenger.
  - j. The next slide was captured at 18:26:11 at Forest road near Swamirayan Temple. The vehicle is driving from Museum Hill towards Narayan Road. When zoomed, the same three occupants



as in the previous slide can be seen. That road takes one to Pangani junction and then proceeds to Muthaiga and onto Thika Super Highway.

- k. Next, the vehicle is picked at 18:28:21 at Parklands Road near UON School of Law driving from Forest road/Narayan Junction towards Forest Road/Limuru Road junction.
  - l. The next slide is at 20:11:59. The location is at St Mary's Girls High School driving from Northern bypass towards Kiambu town.
  - m. The slide at 18:24:21 shows the motor vehicle at Parklands road near UON School of Law driving towards Forest road/Limuru road junction. That road takes you to Pangani junction and then proceeds to Muthaiga.
47. Finally, ASP Mwadime explained that the nearest camera after Pangani is at Kenyatta University towards Nairobi CBD and that the nearest camera from there is near Pangani Police Station. This, ASP Mwadime, explains why when the 1<sup>st</sup> accused person's motor vehicle was not captured after Pangani while heading to Homeland while using Thika Road.
48. Additional corroborative evidence to that of Mumira regarding the movement of the 1<sup>st</sup> accused person's motor vehicle is found in the form of the CCTV data which was produced as Exhibit 32 by Corporal James Mutie. Although the raw data of the CCTV system spanning the entire period was not available in its native format because it had already been overwritten by new data in the course of business, I allowed the production of the transcoded CCTV evidence over objections of the defence and gave reasons for my decision in a ruling dated March 27, 2023. In that ruling, I indicated that the view that I take on the "weightiness" to assign to the CCTV footage would depend on the totality of other evidence adduced. I indicated that I would explain my reasoning further in this final judgment. I hereby do so now.
49. The objections by the defence, validly taken, were that since the CCTV data had, of necessity, been manipulated, in the process of transcoding, one could not be sure that it was authentic and faithfully represented what happened on January 24, 2018. Corporal Mutie testified – and swore an affidavit – to the effect that he received the entire raw footage spanning several hours from Homeland. He went through the raw footage in its native form and extracted the parts of the data that he thought were important and of probative value to the court in order to save the court's time; and, also, to appropriately direct the court as to the relevant portions of the evidence.
50. I became persuaded that the decision to extract and transcode the data and present it only in its extracted form was informed by good faith and pragmatic realities and that the extracted evidence satisfied the integrity and authenticity tests. This is because I formed the opinion that a proper chain of custody over the footage was established and Corporal Mutie satisfactorily explained the process of transcoding that had occurred. However, in allowing the production of the extracted data, I indicated that the probative value to be assigned to it will be subject to the further weighing to be done contextually as against other available evidence.
51. For purposes of future guidance to law enforcement officers, however, I wish to provide the following non-comprehensive guidelines on the extraction of data from raw footage provided by third parties in the course of investigations:
- a. When retrieving CCTV evidence from private (third party) systems, the Forensics Officer must visit the location where the CCTV system was installed and familiarize herself with the location where the CCTV system was installed; and the specifications of the system.



- b. The officer who will present the evidence in court should herself retrieve the evidence from the CCTV system.
  - c. The CCTV evidence should be obtained in its native format; and then the Officer proceeds to make a master copy of the raw footage; and ultimately, duplicate copies of the raw footage.
  - d. The investigations' team must disclose the existence of the CCTV evidence to the Defence and make available to them a duplicate copy.
  - e. The Forensics Officer must document the chain of custody of the CCTV evidence.
  - f. Where the Forensics Officer transcodes or edits the raw footage to a shorter version containing only relevant data for the case at hand, the Officer should only carry out the processing on a working copy of the CCTV evidence not the Master Copy. Additionally, the Officer to make appropriate notes of the transcoding or editing and the process used to do so.
  - g. A written report should accompany the final version of the output that will be presented as evidence and played in court.
  - h. A copy of that final output which will be produced as evidence must be made available to the defence as well.
52. In the present case, the investigators adhered to most of these guidelines except the one requiring them to make a working copy and turn a duplicate copy thereof to the defence. Ultimately, though, I formed the opinion that the technical lapses did not prejudice the defence or otherwise taint the trial or undermine the fair trial standards of the accused persons.
53. The crux of Corporal Mutie's evidence was that the CCTV evidence tended to corroborate the testimony of Mumira regarding the movements of the 1<sup>st</sup> and 2<sup>nd</sup> accused persons on January 24, 2018 particularly his presence at Homeland at precisely the times Mumira claimed that they were there meeting the 3<sup>rd</sup> accused person and one other person.
54. Corporal Mutie explained that the footage was captured by camera I of Homeland on Thika Road. He explained that at time frame from 15:24:03 hrs to 15:24:30 on 24/01/2018, the footage shows motor vehicle Reg No KBY 767S entering through the main gate. The footage, then, shows a man and a woman walking through the main gate. The man is wearing a blue-coloured cap and a short-sleeved shirt with dark stripes on the chest. The woman had a phone on the right hand and had worn a pair of jeans trousers and a netted blouse.
55. The next timeframe is for the period between 19:05:57 hrs and 19:06:03 hrs. At precisely 19:06:22 to 19:06:26 the footage shows motor vehicle Reg No KBY 767S entering the main gate with the driver wearing a blue top. At time frame between 19:25:25 hrs to 19:25:46 hrs the footage shows a man and woman leaving the hotel on foot while heading towards the right. It is the same man and woman as in the previous time frame. At timeframe between 19:48:55 hrs to 19:49:12 hrs the same man and woman emerged from the right of the parking and entered through the same gate into the hotel compound.
56. Corporal Mutie produced his report as Exhibit 31A and the Exhibit Memo form as Exhibit 31B. He also produced a bundle of still-image photos extracted from the footage showing the key timeframes relevant to the case as Exhibit 31E and the output of the DVD evidence as Exhibit 32.
57. The key importance of the CCTV evidence, like that of the ANPR presented by ASP Mwadime, is that it tallies with the testimony of Mumira about the movements of the 1<sup>st</sup> and 2<sup>nd</sup> accused persons. In particular, it shows that the 1<sup>st</sup> accused person's motor vehicle did, in fact, drop the 1<sup>st</sup> accused person



- at Homeland in the afternoon of January 24, 2018; and then again at around 7:00PM before finally leaving at around 8:00PM. In all material particulars, this tallies with Mumira's evidence.
58. The prosecution sought to close the guilt-loop for the accused persons through the testimonies of three other expert witnesses:
- a. Benjamin Mburu Kiriba, a laboratory technician, who testified as PW14,
  - b. Esther Wamuyu Njogu, a Government Analyst, who testified as PW26; and
  - c. Jonathan Limo, a Safaricom Liason Officer, who testified as PW32.
59. Benjamin Mburu Kiriba (PW14) is a laboratory technician by profession. He testified that he used to work in that role at Nduteri Secondary School in the early naughts. The 2<sup>nd</sup> accused person was a student in that school. He recalled that he reconnected with her in 2014 in a matatu and they shared phone numbers. On January 22, 2018, the 2<sup>nd</sup> accused person called him to inquire about something and they agreed to talk the following day. When the 2<sup>nd</sup> accused person called the next day, it was to ask how she could get sulfuric acid. Kiriba was slightly alarmed because the acid is very corrosive but she re-assured him that it was for cleaning rust from metals. She asked where she could buy the acid – but her phone went off. A man called a minute later. He explained where they could buy the sulfuric acid.
60. Kiriba explained that he remembers that the phone number had the digits “94” at the end. He explained to the caller where to buy the acid at Science Lab on Accra Road. He received another call from the same number and the man confirmed that they found the acid. Two hours later, the 2<sup>nd</sup> accused person called to say that the acid was not working well and Kiriba explained to her how to use the acid. He jokingly told them that he would charge them consultation fees. Immediately after, he received Kshs 1,500 by Mpesa. It was from the same number that had called him earlier. It was received on his phone No 0720887230. The number is registered in the name of Kiriba as the subscriber. A Safaricom printout showing the receipt of the money from +25472865xxx in the name of Samuel Njoroge – the 1<sup>st</sup> Accused Person was produced as Exhibit 11A. The receipt was also confirmed by PW32, Jonathan Limo, a Liasons Officer at Safaricom who produced Exhibit 11A.
61. Eunice Wamuyu Njogu, a government analyst, testified as PW26. She received a sample of a clear liquid and several other items namely: faded jeans trousers; surgical gloves and 2 carrier bags; a piece of used cellotape; sample of soil collected from the scene; a pair of white socks reportedly worn by the Deceased; and a blouse reportedly worn by the Deceased. She was requested to identify the clear liquid and test all the other items for its presence. Upon analysis using DR Spectrophotometry techniques, she concluded that the clear liquid sample was sulfuric acid; and sulfuric acid was detected in all the items received and tested. All these items, in addition to Ms Njogu's report, were received in evidence.
62. As per the evidence of Corporal Catherine Gatheca (PW28), the clear liquid whose sample was forwarded to Ms Njogu for testing was retrieved from the 1<sup>st</sup> accused person's vehicle, registration number KBY767S, a Toyota Harrier. Corporal Gatheca retrieved the vehicle with the bottle containing the liquid at Mugutha Police Post on January 25, 2018. This is where the 1<sup>st</sup> Accused Person's motor vehicle was taken in the night of January 24, 2018 after it was found nearby with the 1<sup>st</sup> accused person allegedly reporting that he had been abducted and abandoned there.
63. The items of clothing, gloves and soil samples were, on the other hand, retrieved by Scenes of Crime personnel in the company of Inspector Charles Juma. Inspector Juma testified as PW21. He testified how he was led to the scene by Anne (PW10) and David Mukuria Karanja (PW8)(“David”). As aforesaid, Anne was part of the group that had rescued the Deceased on January 24, 2018 at Magumoini. David, on the other hand, had found the 1<sup>st</sup> Accused Person seemingly hysterical near



- Mugutha Police Station where he claimed that he had been abducted and abandoned. Serendipitously, David and Anne met together at a church function on January 25, 2018 whereupon exchanging narratives, they realized that they two incidences they had been part of were related. They, then, reported to the Police and, afterwards, led the investigations team led by Inspector Juma to the scene where the items were retrieved. Chief Inspector Abel Onyapidi, a Scenes of Crime Officer, visited the scene and took photographs which were also produced in evidence. His conclusion was that the scene depicted a trail of torture – and not simply an instantaneous attack on the victim. Chief Inspector Onyapidi testified as PW34.
64. On his part, Jonathan Limo (PW32) testified that he received requests to retrieve call log data from the following numbers: 0722294xxx; 0728659xxx; 0726697xxx; and 0718781xxx. He proceeded to do the same. Upon retrieval, he extracted the data and produced them before the court as exhibits as follows:
- a. Call data record for 0722294xxx – produced as Exhibit 30B – registered in the name of the 1<sup>st</sup> Accused Person.
  - b. Call data record for 0728659xxx – produced as Exhibit 30C – registered in the name of the 1<sup>st</sup> Accused Person.
  - c. Call data record for 0729281xxx – produced as Exhibit 30E – registered in the name of Constant Majimbo. It was confirmed that this was the phone number that was being used by the Deceased.
  - d. Call data record for 0726697xxx – produced as Exhibit 30G - registered in the name of Francis Mwangi – the 3<sup>rd</sup> Accused Person.
  - e. Call data record for 0718781xxx – produced as Exhibit 30H – registered in the name of Joyce Njambi Mungai – the 2<sup>nd</sup> Accused Person.
65. In his analysis, as plainly shown in the data records, Limo confirmed that the phone number for the 3<sup>rd</sup> accused person (Exhibit 30G) communicated with that of the 1<sup>st</sup> accused person (Exhibit 30C) on January 24, 2018 at 12:43 hrs. This is crucial because in their defence, both the 1<sup>st</sup> and 3<sup>rd</sup> accused persons maintained that they do not know each other; and have never met.
66. The data also showed that on January 24, 2018, the phone whose call log data was produced as Exh.30C (1<sup>st</sup> accused person's phone) was at Dagoretti Corner at around 17.34Hrs. At around 19.03Hrs and 19.37Hrs, the person was within Thome area. After Thome, the number moved to Roysambu at around 19.43 Hrs. At around 20.14 Hrs, the number was at Thindigua Kasarini. At around 20.32Hrs, it was at Thindigua upper estate. The carrier of that mobile phone number 0728659xxx (Exh.30C) was together with the operator of the phone number 0718781xxx (Exh.30H – the 2<sup>nd</sup> accused person) according to the movements. According to Limo's analysis, the movement of the phone whose call log is represented in Exh. 30H is exactly the same as that of the phone represented by call log data produced as Exh.30C. That movement is also the same as that of the phone represented with the call log data produced for phone number 0726697xxx – whose call log was produced as Exh.30G (3<sup>rd</sup> accused person). The subscriber of 0726697xxx (Exh. 30H – the 2<sup>nd</sup> accused person) was at Thome at around 15.06 hrs to 19.41 hrs. The phone represented by call log produced as Exh. 30C belongs to Samuel Njoroge, while Exh. 30H belongs to Joyce Mungai and Exh. 30G belongs to Francis Mwangi.
67. Limo also confirmed that the person who had phone number 0729281xxx (Exh 30E – which was the phone operated by the Deceased) was at Thindigua estate the whole of 24/01/2018. Mr Limo concluded his testimony by highlighting that the operators of the four phone numbers 0728659xxx (Exh 30C – the 1<sup>st</sup> accused person); 0718781xxx (Exh 30H – the 2<sup>nd</sup> Accused Person); 0726697xxx (Exh



30G – the 3<sup>rd</sup> accused person) and 0729281xxx (Exh 30E – operated by the Deceased) all converged at Thindigua shortly after 8:00PM on January 24, 2018.

68. Finally, the Prosecution presented the evidence of two people who witnessed the “abduction” incident outside the deceased’s apartment in Thindigua. These are Patrick Kahuro Karanja (PW11)(“Patrick”), who was a neighbour to the deceased; and John Gachigi Wairia (PW19)(“Gachigi”). They both gave a somewhat similar narrative of how the incident unfolded.
69. Patrick testified that he had gone out for a smoke shortly after 8:00pm when the incident happened. The driver was on the driver’s seat in the Motor Vehicle but he did not see clearly who the driver was. He assumed it was the 1<sup>st</sup> accused person since he had earlier seen him in the same vehicle. The deceased was on the front passenger’s seat. Patrick, then, saw two men come - one from the front and the other from behind. After about 2-3 minutes the car was started. The man on the right-hand side closed the door. Then, the man on the other side came out and closed the front passenger’s door. The car was, then, driven off at high speed towards the main road.
70. On his part, Gachigi testified that at around 9:00pm on January 24, 2018, he saw the 1<sup>st</sup> accused person’s motor vehicle pull up at the parking lot of the apartment building. He, then, saw the deceased inside the vehicle. She was on the front passenger’s seat and she seemed to be writing something. Gachigi remembers seeing the 1<sup>st</sup> accused person standing near the vehicle. The 1<sup>st</sup> accused person and the deceased chatted for a while. He went back to his house only to be called by Patrick with the news that he (Patrick) suspected that robbers were getting into the car. He rushed out in time to see two men in front of the vehicle. He also distinctly saw a woman. He saw the trio approaching the vehicle. He remembers seeing one man enter the front of the vehicle while the other one went to where the 1<sup>st</sup> accused person was standing. The second man grabbed the 1<sup>st</sup> accused person and shoved him into the car. They then closed the vehicle’s doors and sped off towards the main road. The deceased was inside the vehicle. Gachigi was left with Patrick puzzling over what could have happened. However, they neither followed the vehicle nor report the matter to the Police.
71. The prosecution believes that the totality of this evidence, tied together with the testimonies of the Investigating Officers – PC Simon Katana (PW30); Inspector Simon Mwangi Chege (PW36); and the lead investigator, SSP Paul Wambugu (PW37) – proves beyond any shadow of doubt that the three accused persons jointly planned and executed the murder of the deceased while staging it to look like an abduction.
72. On its part, the defence, in sum, rejects the prosecution narrative and theory. They insist that the Prosecution narrative is false; and that both the theory of an insecure husband out to decimate his estranged wife as well as the theory of how the murder was planned and executed is implausible.
73. When placed on his defence, the 1<sup>st</sup> accused person elected to give a sworn testimony and called one witness – DW4. In his defence, he flatly denied that he killed his wife or in any way participated in her murder. He insisted that he was in a healthy and loving relationship with the deceased – despite minor disagreements like all marriages – and that, therefore, he absolutely had no reason to kill her. He directly addressed the Prosecution narrative that he was a scorned, insecure husband calling it false and one that has been curated by the deceased’s relatives who were opposed to their marriage.
74. The 1<sup>st</sup> accused person conceded that he had hired Mumira (PW2) as a driver on January 14, 2018. Mumira was only a driver; and never a confidant, however. He wondered how Mumira would claim to know the things he said he knew. He never talked to him about his relationship with his wife. Mumira, the 1<sup>st</sup> accused person said, lied about him meeting two people at Kahunguro. Instead, they were at Githurai 44 at that time. He claimed that if one believed the ANPR evidence, then Mumira cannot be



- telling the truth that he met with the two strange men at Kihunguro for more than 45 minutes since, according to the ANPR evidence, by that time he was around Forest Road. The 1<sup>st</sup> accused person hypothesized that Mumira lied to buy his freedom because he had been tortured in custody.
75. The 1<sup>st</sup> accused person further conceded that he met with the 2<sup>nd</sup> accused person on January 24, 2018 and that they went to sign a document at Car Bazaar. He had met the 2<sup>nd</sup> accused person at Sagas Restaurant and Mumira went and picked them up at Homeland, which is next door, and drove them to Dagoretti Corner. Mumira then came back at around 3:00 pm and he took him alone to Car Bazaar at Dagoretti Corner. He left the 2<sup>nd</sup> accused at Homeland. He reiterated that he did not have any meeting to plan to kill the Deceased while at Homeland.
76. He also denied that Mumira took him to Kawangware and that while there they picked up a box which had a container inside. He insisted that on January 24, 2018 he never went to Kawangware; and that Mumira was deliberately lying on oath. As for his dealings with Kiriba (PW14), the 1<sup>st</sup> Accused Person conceded that he had talked with him about Phosphoric Acid – and not sulfuric acid. The phosphoric acid, he said, was needed by an industrial client which had withheld more than Kshs 30 million of his money because it could not find phosphoric acid to process the scrap metal he had supplied them. He agreed that he sent Kshs 1,500 to Kiriba but explained that it was for his fuel because he had said he had no money to fuel his vehicle from Kajiado and he needed him to come and show them where to buy the phosphoric acid. Eventually, they did not purchase the phosphoric acid anyway.
77. Regarding the events of the evening of January 24, 2018, the 1<sup>st</sup> accused person vehemently denied that he met with the 2<sup>nd</sup> and 3<sup>rd</sup> Accused Persons and one other person to plan how to execute the abduction and murder of the Deceased. He conceded that he was at Homeland that evening where he met the 2<sup>nd</sup> Accused Person as he waited for the car hire he had called for to arrive. He needed the car hire, he explained, because he needed to send his manager to Nakuru to check on some potential clients. When the car hire arrived, he insisted that he drove it to Quickmart and he instructed Mumira to drive his car there. He also said goodbye to the 2<sup>nd</sup> accused person, who took a matatu to her home; and then he drove, first to Quickmart to buy a food container – and then to the deceased's apartment. While at Quickmart, they exchanged vehicles with Mumira: Mumira drove the car hire to the 1<sup>st</sup> accused person's apartment while the 1<sup>st</sup> accused person drove his own motor vehicle to the deceased's apartment.
78. While at the deceased's apartment, the 1<sup>st</sup> accused person narrated, the deceased brought him the food after which he gave the deceased the cheque book to write a cheque to replace the one he had given earlier. Before she could finish writing the cheque, two men suddenly appeared. The 1<sup>st</sup> accused person says that they forced him into the car at gunpoint. They ordered him to lie down and not make any noise. A certain woman then appeared. The deceased was on the front passenger's seat at that time writing a cheque. The woman pulled Njambi from the front passenger seat through the space in the car and threw her unto the back-passenger seat. The deceased was as slim as the woman as strong, the 1<sup>st</sup> accused person explained.
79. One of the men went and took control of the car. They drove off. He did not know where they were taking them. They covered his mouth with cello tape and they tied him up. They drove for a while and then the motor vehicle stopped. One of the abductors made a phone call and said: "tuko na yeye". Then the car started again.
80. After some distance, the car stopped. They pulled the deceased out. They went with her. After a few minutes, they came back without her. The 1<sup>st</sup> accused person says that the abductors had tied a blindfold on him so he could not see. They came back without the deceased and the car started moving



again. He could not hear, feel or see the deceased. This is how the 1<sup>st</sup> accused person explains what happened next in his own words:

"The car was driven for about 30 minutes then they opened the doors of the cars. Then all went silent. I waited for about 30 minutes inside the motor vehicle. I was not sure if there was any one else in the car so I cautiously lifted my head and did not see anyone in the car. The dashboard lights were on. I waited for a bit and then decided to get outside the car to get help.

During the whole ordeal, they had stepped on my neck. But they did not beat me.

I pushed the door of the motor vehicle open using my legs. It opened and I rolled onto the road. I could hear people coming. The motor vehicle had its hazard lights on. Boda boda people came around and one of them asked me what had happened. I explained that I had been abducted together with my wife and that they had dropped me there. They called Mukuria, (PW18) to help. By that time the bodaboda people had untied me and removed the cello tape. Only my hands were tied. My legs were not tied.

The boda boda people came and asked me what was wrong. I told them what had happened. Then they untied me."

81. I have reproduced in extenso the 1<sup>st</sup> accused person's own words because they are telling, for reasons that will become obvious shortly.
82. In any event, the 1<sup>st</sup> accused person's narrative is that that is how he was rescued at a place called Kwa Kairu and taken to Ruiru Hospital and then to Mugutha Police Post; and ultimately how Shem Kiburi Wang'ombe (PW18) picked him up at Mugutha Police Post. He was taken to Kiambu Hospital whence he was arrested and later on charged with the offence of murder.
83. The 1<sup>st</sup> accused person insisted that he did not plan or commit the murder and that he is merely framed by the deceased's family because of their bitterness. He asked the court to note the many discrepancies in the testimonies of the deceased's family members as evidence that they had made up their stories – including the dying declarations.
84. The 2<sup>nd</sup> accused person gave an unsworn statement and did not call any witnesses. She told the court that it is true that Lydia introduced her to the 1<sup>st</sup> accused person. They started communicating with each other and a romance blossomed. The 1<sup>st</sup> accused person, would occasionally visit her house.
85. She denied that she had called Kiriba (PW14) to ask about sulfuric acid. She could not hazard a guess why Kiriba would lie but the truth, she said, was that they called about phosphoric acid and not sulfuric acid. The 1<sup>st</sup> accused person had been told, she said, that this was the item needed to clean some metals by his client which would release the Kshs 30Million the client owed him. She conceded that the 1<sup>st</sup> accused person told him that he had sent Kiriba Kshs 1,500 for "consultation".
86. On January 24, 2018, the 2<sup>nd</sup> accused person said she was at her business in bypass when the 1<sup>st</sup> accused person called her and told her to pass by Homeland. She did. She found the 1<sup>st</sup> accused person alone. Shortly thereafter, Mumira (PW2) went to Homeland. He drove them to Dagoretti Corner. They then headed back to Homeland. They alighted outside the gate, went in, found an empty table and ordered tea. When the car hire arrived, the 1<sup>st</sup> accused person signed the necessary papers for it and the 2<sup>nd</sup> accused person went to the 1<sup>st</sup> accused person's car and picked up her handbag. The 1<sup>st</sup> accused person, then, escorted her to Thika Highway where she boarded a matatu to her home.



87. The 2<sup>nd</sup> accused person said that it was not until the following day that she learnt that the 1<sup>st</sup> accused person had been abducted. She learnt this from Lydia, she said. She visited the 1<sup>st</sup> accused person at Kiambu Police Station severally. Then, on February 25, 2018, Lydia, using a different phone number than her usual one, called her and asked her to meet at Greenspot. She agreed. On getting there, the 2<sup>nd</sup> accused person says that she was arrested and her two phones confiscated. The Police, she said, asked her about a person known as Gikuyu who sells ballast. She knew the person from her work and she took the Police to Bypass to look for him. They did not find him. She was later charged in court for an offence, she insists, she knows nothing about. She further insists that she does not know the 3<sup>rd</sup> accused person “beyond business” and that she never introduced him to the 1<sup>st</sup> accused person. She concedes, however, that the 3<sup>rd</sup> accused person is the man whose alias is “Gikuyu” that she had taken the Police to look for at Bypass.
88. The 3<sup>rd</sup> accused person similarly gave an unsworn statement and called no witnesses. He told the court that he is a truck driver by profession and that he specializes in delivering building materials like ballast and sand. Since 2003 he has been based around Ruiru Kimbo area and bypass junction and, at the time of his arrest, the truck he was employed to drive had developed mechanical problems and was in the garage. He said that when he went to collect the truck, five people pounced on him. They beat him savagely. They took him to an office within a plantation and tried to suffocate him using a belt and polythene bag. Then the men beat him some more before finally taking him to Kiambu Police Station. All along, they kept asking him for a phone which he did not have, he said. At the Police Station, he was beaten some more and then kept in the cells for four days. On the fourth day, he was given some documents to sign “after a gentleman identified [him].”
89. The 3<sup>rd</sup> accused person insisted that he knows nothing about the crime he is accused of. He conceded that it is possible that Mumira (PW2) could have seen him at Kihunguro – but that would not be exceptional because that is his place of business. Likewise, he conceded that the 2<sup>nd</sup> accused person was known to him but only as business associates.
90. This, then, is all the evidence adduced in the trial. The overriding question for determination is whether the prosecution has been successful in proving, beyond reasonable doubt, that the three accused persons, jointly murdered the deceased.
91. To be successful, the prosecution must prove the three elements of the offence of murder: First, that the death of the deceased occurred, secondly, that the death was caused by unlawful act or omission on the part of the accused person and thirdly, that the accused person had malice aforethought in causing the act or omission. In *Joseph Gitbua Njuguna v R* [2016] eKLR, the Court of Appeal stated the elements thus:

[Section 204 states that] 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 the death;
- b. That the accused committed the unlawful act which caused the death of the deceased; and
- c. That the appellant had harboured malice aforethought.



92. The fact of the death of the deceased is not in question or doubt. The pathologist, Dr Bernard Midia, who testified as PW29 produced a post-mortem report which confirmed that the deceased died “as a result of complications from 60% total chemical burns due to assault.” The body was identified to the doctor by the deceased’s father, George Kimani Bahai (PW23) and PC Simon Katana (PW30), among others. None of the three Accused Persons contests both the fact and cause of death.
93. In my view, none of the parties, also, seriously contests that whoever caused the death of the deceased did so with malice aforethought. This is owing to the nature of the attack and injuries suffered. Evidence from both Dr Midia (PW29), who performed the autopsy, and Dr Rigii (PW7), who treated the deceased at Kiambu Hospital is quite graphic that the person who attacked the deceased with a toxic and corrosive chemical did so with an intention to, at least, cause grievous bodily harm. This is because evidence showed that the attacker doused her face and whole body with the corrosive liquid; and did it so thoroughly that her entire body suffered burns. Additionally, the attacker forced her to imbibe the corrosive liquid causing her even further bodily injury. Since at the very least the attacker intended the deceased to suffer grievous bodily harm, the element of malice aforethought is easily satisfied under section 206(d) of the [Penal Code](#).
94. The singular question for determination, then, remains who caused the death of the deceased. As aforesaid, the prosecution has relied on dying declarations evidence as well as evidence of other circumstantial evidence to prove its case. The accused persons, on the other hand, in addition to protesting their innocence have attempted to poke holes at the two sets of evidential proof relied on by the prosecution.
95. I will look at the two sets of evidence in seriatim. In doing so, I must recall that the prosecution is required to prove the three elements of murder beyond reasonable doubt.
96. Proof beyond a reasonable doubt is the highest standard of proof possible. Because a person’s liberty is at stake, this high standard is required by our judicial system. This standard was described by Lord Denning in [Miller v Minister of Pensions](#) [1947] 2 All ER 372 (King’s Bench) thus:
- ... the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. 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 a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence ‘of course it’s possible but not in the least probable’, the case is proved beyond reasonable doubt, but nothing short of that will suffice.
97. Or as was described by Chief Justice Shaw over a century ago in quoting *Commonwealth v Webster*, 59 Mass 295, 320 (1850), a formulation recently approved by the US Supreme Court in *Victor v Nebraska*, 114 S Ct, at 1244 (1994) (quoting *Commonwealth v Webster*, 59 Mass 295, 320 (1850) and discussing the court’s use of the Webster charge in *Sandoval v California*, 4 Cal 4th 155 (1992)) citing the famous Webster Jury Instructions thus:
- For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those



who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt.

98. And what is “reasonable doubt”? Again Chief Justice Shaw in *Commonwealth v Webster*, 59 Mass 295, 320 (1850) has provided a pragmatic working definition:

What is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of the law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proven guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal.

99. As the cases have suggested, “reasonable doubt” is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is, as an author (Susan B Jordan, *Raising a Reasonable Doubt*, 1995 NYL 462124) described, that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the Judge in that condition that s/he cannot say s/he feels an abiding conviction, to a moral certainty, of the truth of the charge. Or, as the US Supreme Court has variously pithily described it, “reasonable doubt” is a doubt that would cause a reasonable person to hesitate to act. See, for example, *Holland v United States*, 348 US, at 140, 75 SCt at 137.

100. These are the standards I will deploy in assessing the evidence in this case.

101. As outlined earlier in this judgment, six (6) different witnesses testified that the Deceased told them that it was the 1<sup>st</sup> accused person (with others) who had arranged for the attack upon her, and that he was present during the attack. These were: Esther (PW3); Matheri (PW6); Dr Rigii (PW7); Rose Wambui (PW15); Hannah (PW16); and Sgt Mugambi (PW22). The question is whether cumulatively considered these declarations meet the tests of contemplation, cogency, credibility, and corroboration to be accepted as strong dying declaration evidence.

102. Dying declarations are an exception to the hearsay rule. In Kenya, this exception is codified in section 33(a) of the *Evidence Act*. Under this provision, statements relating to the cause of death are admissible though hearsay:

“when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

103. The Court of Appeal has been clear that under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Statements made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death. See *Philip Nzaka Watu v Republic* [2016] eKLR.



104. In *Peter Kimathi Kanga v Republic* [2015] eKLR, the Court of Appeal gave guidance on how to handle dying declarations as follows:

“Courts have on their part formulated rules to guide the reception and weight to be attached to dying declarations and it is sensible that one made when death is imminent will be accorded a high degree of credit since in the extremity of life’s ebbing away, it is expected that one has a strong motive to be truthful. In the interests of fairness to an accused person, a rule has also developed that a court should approach a dying declaration with caution and act on it only if satisfied as to its veracity and if there is corroboration, but only as a cautionary rule of practice, not a legal requirement.”

105. It may, therefore, be stated, following a scan of our decisions interpreting section 33(a) of the *Evidence Act* that for a dying declaration to support a conviction, the declaration must meet the five basic conditions pithily described as contemplation; cogency; credibility, competency and corroboration:

a. Contemplation (of certain death): while in Kenya, dying declaration is not only admissible when the declarant believed their death was near and certain by the express terms of section 33(a) of the *Evidence Act*, as a practical matter, courts assign a higher probative value to dying declarations that are made in articulo mortis. See, for example, *Choge v Republic*, where the Court of Appeal stated that while in Kenya the admissibility of a dying declaration need not depend upon the declarant being at the time of making the declaration in a hopeless expectation of death:

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind induced by the most powerful considerations to tell the truth.”

b. Cogency: the dying declaration must be a clear expression by the declarant as to the cause of his or her death and not a diffusely Delphic formulation capable of differing interpretations.

c. Credibility: the dying declaration must be one which inherently inspires confidence in its truth. The court must be satisfied that the dying declaration imparts complete confidence in its accuracy. At the very least, the court must be satisfied that the declarant was in a “fit state of mind” to make a clear statement. See, for example, *Moses Wanjala Ngaira v R* [2019] eKLR.

d. Corroboration: while not a strict rule, courts are, generally, quite reluctant to convict solely on a dying declaration absent exceptional circumstances. As a general rule, courts require that the dying declaration evidence be corroborated by some other evidence whether direct or circumstantial. See, for example, *Peter Kimathi Kanga v R* (*supra*) and *Philip Nzaka Watu v R* (*supra*).

1. In the present case, the defence urges the court to disregard the dying declaration evidence or to seriously discount its probative value for the following reasons:

- a. That the dying declarations do not appear to have been made in contemplation of death especially given the evidence of Dr. Rigii.
- b. That even when the deceased appeared to speak of the incident, the investigating team, who were actually at the hospital, did not bother to take a statement;



- c. That the deceased gave materially different versions to different people which raises doubt as to their truthfulness and credence;
  - d. That the deceased had very extensive burns and could even have not been in a state of mind capable of what had been said; and,
  - e. That, according to the testimony of PW17, the toxicology tests showed that the deceased had ingested amphetamine which is a narcotic drug which is a central stimulant which, though not in a dose high enough to cause death, was capable of affecting the mind.
2. I have carefully considered these objections by the defence which urge the court to ignore the dying declaration evidence upon the application of the proper considerations suggested by our case law. Objection (a) goes to the contemplation consideration while objections (b); (c); (d) and (e) go to the cogency and credibility considerations.
  3. I begin by citing the testimony of Dr. Rigii, the doctor who treated the deceased at Kiambu Hospital, and who was one of the recipients of the dying declaration. This is a rare case where a dying declaration is actually made to a person with medical training. She stated the following in cross-examination:

I was the doctor on call on 24/1/18. The patient was in a bad shape. Her cornea were blue. That is indicative of severe burns. She appreciated my presence and talked to me. I would say she was very sick. But when she started talking she was very coherent. I could understand everything she was saying. She said she had recently moved to Thindigua. Her ability to speak assured me she was alive.

109. The answer Dr Rigii gives is important because she simultaneously communicates that the deceased was very sick and probably in contemplation of death and that even then, she remained very coherent. She was both in pain and agony but was in a strikingly conscious state of mind.
110. Consequently, while the defence seeks to discount the dying declarations because the deceased was in pain and agony, this is precisely a reason to believe them because the approach of death, even if not certain, “produce[d] a state of mind in which the utterances of the dying person are to be taken as free from all ordinary motives to mis-state.” (J Wigmore, Evidence, § 1438.)
111. While it is true that the Government Analyst, Stephen Mutinda Joel Weibe (PW17) detected amphetamines in the liver of the deceased, the witness explained that it was in very small amounts. In any event, all the witnesses – especially the treating doctor – described the deceased as coherent and having a fit state of mind to tell the truth.
112. Finally, what should we make of the fact that the deceased stated her dying declaration in different terms to the different witnesses? There is no requirement that dying declarations made to several people be made in the exact same words for them to be considered truthful. Indeed, the narration of events in strikingly similar words might render the dying declarations suspicious. Differently put, where there is a plurality of dying declarations to different people, the fact that the words used are not exactly the same is not a reason to reject them. Like in all cases, the court is required to test the content of the dying declarations to satisfy itself that they are not the result of tutoring, prompting or imagination.



113. Upon proper consideration of the full panoply of the testimonies of the six witnesses who spoke to the deceased shortly after her attack, she clearly and unambiguously implicated the 1<sup>st</sup> accused person in the attack. The different formulations of the declaration were, in my view, not an indication of lack of credence, but of the different types of relationships the deceased had with the recipients of the declarations. For example, the deceased said to Esther (PW3), a beloved aunt: “*Haki Nyambu ni Baba Njoro.*” She was slightly more formal with her uncle, Matheri (PW6): “I got a problem but it is Ndungu who did this to me.” Finally, she was more formal with the doctor, a stranger: “my husband is trying to kill me.”
114. In my view, these differing formulations which have the same core content – that it is the 1<sup>st</sup> accused person who was responsible for perpetrating the attack on the deceased – inspire confidence that they were truthfully made.
115. Even then, as our case law counsels, while not a dogmatic rule of law, it is safe to require corroboration where dying declaration evidence is received. In this case, corroboration was presented in the form of circumstantial evidence. The question that, then, arises next is whether the circumstantial evidence presented by the Prosecution in this case meets the threshold enunciated in our caselaw.
116. A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in such combination only because the accused did what is alleged against him. Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, then it is not sufficient to establish the guilt of the accused person.
117. Put differently, unlike direct evidence, which proves a material element of a legal action, circumstantial evidence proves other facts from which one may infer the existence of material elements.
118. In Kenya, the Supreme Court has comprehensively restated the principles applicable in considering circumstantial evidence in criminal cases in *Republic vs Ahmad Abdolfadhi Mohammed & Anor* (2019) eKLR as follows:

“(55) The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is “indirect [or] oblique evidence ... that is not given by eyewitness testimony.” It is “[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact.” It is also said to be “[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence....”

(56) On its application, circumstantial evidence is like any other evidence. Though, it finds its probative value in reasonable, and not speculative, inferences to be drawn from the facts of a case, and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding disputed questions of fact, circumstantial evidence should never be given a derogatory tag. Jowitt’s Dictionary of English Law, 4th Edition, states thus of circumstantial evidence:

“... with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to



overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, ... a fingerprint recovered from the window forced open by the burglar matches the accused's fingerprints, ... [or where there is] a ... DNA match between the accused's control sample and genetic material recovered from the scene of the crime ....”

- (57) This is why, way back in 1928, the English Court of Appeal asserted that circumstantial evidence “is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.”
- (58) However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The court “should proceed with circumspection when drawing firm inferences from circumstantial evidence.” The court should also consider circumstantial evidence in its totality and not in piece-meal. As the Privy Council stated in *Teper v R* [1952] AC at p. 489 “Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.”
- (59) To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative, but also, in the words of the Indian Supreme Court, “the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established....” As was stated in the case of *Kipkering Arap Koskei & another v R* (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the “...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, ...”
- (60) As was further stated in the case of *Musili v Republic* CR A No 30 of 2013 (UR) “to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt.” The chain must never be broken at any stage. In other words, there “must be no other co-existing circumstances weakening the chain of circumstances relied on” and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. “Suspicion however strong, cannot provide a basis for inferring guilt.”

119. The principles to be gleaned from the above, in short, are that for circumstantial evidence to justify the inference of guilt, the evidence must irresistibly point to the accused as the person who committed the crime; the incriminating factors must be inconsistent with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt; and the chain of events must be so complete that it establishes the guilt of the accused and no one else.



120. To apply these principles to the present case, the question is whether the facts and circumstances are so closely interwoven and connected that the finger of guilt is pointed unerringly at the accused persons and the Accused Persons alone.
121. After keenly and conscientiously scrutinizing the evidence adduced in the case by both the prosecution and the defence, and after considering the submissions of all the parties, I have come to the conclusion that the circumstances here are such they weave a web of guilt around the accused persons from which they cannot escape and from which facts and circumstances the court is entitled to draw no other reasonable inference save their guilt beyond a reasonable doubt. This inference, then, corroborates the dying declarations evidence in the case. I say so for the following reasons which are plain from my rehashing of the evidence adduced in the case:
- a. First, despite the 1<sup>st</sup> accused person's valiant efforts to demonstrate otherwise, the evidence is plain that he was an excessively jealous and insecure husband who had previously physically assaulted the deceased and confronted, with documented menaces, at least one person he thought was romantically linked to the deceased. I accept as cogent the evidence of motive presented by the prosecution as outlined earlier on in this judgment. The evidence of Lydia (PW1) and Sgt Mwaura (PW24) are consequential in this regard.
  - b. Second, I also accept as cogent the evidence that the difficulties the 1<sup>st</sup> accused person was having in his marriage with the deceased drove him to consider her decimation. While those difficulties were amply demonstrated in the testimonies of Esther (PW3); Fidelis (PW4); Cucu Gachambi (PW5); Matheri (PW6); and Rose Wambui (PW15), they were concretized by the chilling warning by the 1<sup>st</sup> accused person uttered on two occasions that his wife was not going to "sleep with uncircumcised men."
  - c. Third, I accept as proven that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons bought sulfuric acid which was eventually used in the attack on the deceased. I do so based on the straightforward evidence of Kiriba (PW14) on his interactions with the 1<sup>st</sup> and 2<sup>nd</sup> accused person (who confirmed to him that they had bought the acid at Science Lab on Accra Road following his guide) in addition to the fact that sulfuric acid was, in fact, found in the 1<sup>st</sup> accused person's motor vehicle as per the evidence of the Government Analyst, Eunice Wamuyu Njogu (PW26) and Corporal Catherine Gachecha (PW28) who recovered the bottle with the acid when she went for the 1<sup>st</sup> accused person's motor vehicle at Mugutha Police Post. Additionally, there is the evidence of Mumira (PW2) who testified that he saw (and "felt") a liquid substance being put in the 1<sup>st</sup> accused person's motor vehicle on the fateful night. I do not accept the explanations given by the 1<sup>st</sup> and 2<sup>nd</sup> accused persons that they were, in fact, conversing with Kiriba (PW14) about Phosphoric Acid and not Sulfuric Acid. First, I find it implausible that Kiriba (PW14), a trained Laboratory Technician with 23 years experience would confuse the two. Second, Kiriba (PW14) was quite detailed in his recall of the interactions with the 1<sup>st</sup> and 2<sup>nd</sup> accused persons – even issuing a warning about how corrosive Sulfuric acid is. Third, again, the explanation by the 1<sup>st</sup> and 2<sup>nd</sup> accused persons is belied by the grim finding in the 1<sup>st</sup> accused person's motor vehicle by Corporal Gachecha: a bottle of sulfuric acid.
  - d. Fourth, the 1<sup>st</sup> and 2<sup>nd</sup> accused persons were seen in the company of the 3<sup>rd</sup> accused person and another man who remains at large both at Kihunguro and, then, shortly before the attack on the Deceased. This evidence is provided through the testimony of Mumira (PW2), who, I found to be a truthful and credible witness, and was backed up the ANPR data and CCTV footage data. It is further backed up by the fact that Mumira (PW2) was able to identify both the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons in Identification Parades. I note that Mumira's



evidence remained intact and unshaken through very robust cross-examination by three Defence lawyers. I simply did not accept the Defence theory that Mumira lied under oath and created a false narrative to avoid prosecution. Finally, I noted that the circumstances were quite favourable for positive identification of the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons by Mumira: he saw the 2<sup>nd</sup> accused person a few times and the 3<sup>rd</sup> accused person at least twice; most of the sightings were during the day; when he saw them at night – as in at the QuickMart parking lot – there was plenty of light; the sightings were for long periods not fleeting glances; and he had an opportunity to speak with each.

- e. Fifth, and most crucially, is the fact that the convergence of the three Accused Persons in Thindigua on 24/01/2018 is mutually corroborated by four pieces of evidence: First, there is the compelling and believable narrative given by Mumira. Second, there is the ANPR data evidence given by ASP Mwadime (PW34) which I have outlined at length earlier on in this judgment. Third, there is the CCTV footage evidence presented by Corporal Mutie (PW35) which I have also analyzed above. And, fourth, there is the call logs data presented by Jonathan Limo (PW32) which places all the accused persons at Thindigua at around the time of the attack. Taken together, these accounts present a compelling narrative of the movements of the 1<sup>st</sup> and 2<sup>nd</sup> accused persons on 24/01/2018, and that they were acting in concert with the 3<sup>rd</sup> accused person.
- f. Sixth, despite the protestations of the 1<sup>st</sup> accused person that he does not know the 3<sup>rd</sup> accused person and has never met him, two pieces of evidence disprove his protestations. First, there is the testimony of Mumira (PW2), which I have earlier found to be truthful and credible. Second, there is the evidence of the calls log data presented by Jonathan Limo (PW32). The latter established both that the two spoke on the phone at least once; and that they were in the same locality at around the time of the attack on the deceased on January 24, 2018.
- g. Seventh, the 1<sup>st</sup> accused gave conflicting accounts about why he needed a car hire. In court, he said that he needed an extra car because he had wanted Mumira to drive his manager to Nakuru on business. However, the 1<sup>st</sup> accused person told the proprietor of the car hire, Mark Muthii Mbogo (PW9), that he needed a car hire because his (the 1<sup>st</sup> accused person's) car had broken down and that he needed the car hire to run errands around Nairobi. Indeed, the pricing of the car hire was based on that he was going to be around Nairobi. The truth of the matter, as it emerged from the evidence, is that, of course, the 1<sup>st</sup> accused person's car had not broken down. It was in very good mechanical conditions on the fateful day.
- h. Eighth, I found the 1<sup>st</sup> accused person's narrative about how the attack unfolded on the night in question which he gave in his defence to be so implausible that it has no inherent reasonable possibility that it is true. I say so for three cumulative reasons. First, his explanation why he had to give the deceased a second cheque after giving her the first one in the morning of January 24, 2018 raises eyebrows. Second, his narration of what exactly happened contains several aspects which point to inexactitudes. One, his narrative relies on the virtual impossibility that one of the assailants – a woman – got into the motor vehicle where the deceased was seated writing a cheque and that the female assailant had such Amazonian strength that she was able to fling the deceased into the space between the driver's seat and the front-passenger seat to the back of the car in one fell swoop. Two, the 1<sup>st</sup> accused person's narrative relies, for its credibility, on the allegation that the attackers tied his hands and put a blindfold on him. He, therefore, could not see; and could not use his hands. However, as can be seen in the excerpted part of his defence reproduced earlier in this judgment, this narrative breaks down in three ways: First, the 1<sup>st</sup> accused person stated that when the car stopped and all had been still for a while, he lifted his



head and saw the dashboard lights on. Yet, he was blindfolded. Second, the 1<sup>st</sup> accused person stated that, with his hands tied, he was able to kick the door to the car open. This appears implausible if the car door was, in fact, closed. If a car door is closed, the latch will prevent it from opening if it is kicked from the inside – unless the latch breaks. There was no evidence that the latch, in fact, broke. Third, as noted by the court during the 1<sup>st</sup> accused person's narration, he claimed that he explained to the boda boda riders what had happened to him then they removed the cello tape on his mouth and untied his hands. The impossibility is obvious: one cannot speak with their mouth sealed with a duct tape. Of course, the 1<sup>st</sup> accused person tried to re-tell his story upon questioning by the court – but reasonable seeds of doubts remain in that narrative. It is also noted that nowhere in his narration does the 1<sup>st</sup> accused person say what happened to his blindfold.

- i. Ninth, the narrative given by Mwangi (DW4) seemed doubtful. His narrative was that he got two unexpected calls on the night of 24/01/2018. The first one was from an unnamed uncle to the deceased who informed him that the deceased had been involved in an incident and was now at Kiambu Hospital. The second one was from an unknown number – which turned out to be the 1<sup>st</sup> Accused Person – who was using the phone of Shem Kiburi Wang'ombe (PW18). This evidence is curious because, first, the deceased's uncle who called the witness remains unnamed. Second, it is unclear why the Deceased's uncle would gratuitously call this witness to inform him about what happened to the Deceased especially so in the circumstances: evidence showed that after learning about the mishap, the Deceased's relatives were activated to frantically rush to Kiambu Hospital. The doubts that an unnamed uncle of the Deceased made a call to DW4 ripens to incredulity when one considers that the Deceased's relatives at the hospital had already received the Deceased's dying declarations and suspected that it was the 1<sup>st</sup> Accused Person who had organized the attack on the Deceased. Gratuitously placing that call to a friend of the 1<sup>st</sup> Accused Person in those circumstances would seem quite implausible. Finally, this witness testified that after he briefly spoke with the 1<sup>st</sup> Accused Person, the phone got disconnected and he did not bother to call back. Instead, he went to sleep and tried to trace the 1<sup>st</sup> Accused Person the following morning. This, also, seems implausible given the news he says he had just heard from the Deceased's uncle and the 1<sup>st</sup> Accused Person himself.
- j. Tenth, given the state of Prosecution case as demonstrated above, the bald denials by the 2<sup>nd</sup> and 3<sup>rd</sup> Accused Persons in their unsworn statements do not to raise reasonable doubt as defined above. While the Accused Persons are not required to demonstrate that their versions of events are probable; only that their versions of events are reasonably possibly true, when their statements are viewed against the evidence marshalled by the Prosecution, their defences do not meet the test whether there is any reasonable possibility that their versions may be true. See, for example, *S v Phallo and Others* 1999(2) SACR 558 (SCA). After due and conscientious assessment of the totality of evidence presented in the trial, I have come to the ultimate conclusion that the versions of defence presented by the Accused Persons are so improbable that they cannot reasonably possibly be true. (See *S v Shackell* (4) SA 1 (SCA)). In my view, it is not possible to say that the Accused Persons' versions of events have any reasonable inherent probability that they are true.

122. Before concluding, it is important to point out that it is true that the Prosecution evidence contained some discrepancies. In particular, there was some discrepancies between the testimonies of Patrick (PW11) and Gachigi (PW19) about exactly how the attack at the Deceased's apartment on 24/01/2018 unfolded. One said that the Deceased was outside the vehicle; the other that she was on the front passenger seat. One said that the 1<sup>st</sup> Accused Person drove the motor vehicle; the other said that one of



the other men did. I have keenly considered these and other minor contradictions which the Defence has made heavy weather of.

123. The test that the court utilizes on the effects of contradictions or inconsistencies on the prosecution case is a substantive one: it inquires whether the contradictions or inconsistencies in the prosecution evidence are to such an extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial court ought to have rejected the evidence. Differently put, not every inconsistency, however small, introduces reasonable doubt to the Prosecution case. See *Erick Onyango Ondeng' vs. Republic* [2014] eKLR, Criminal Appeal No 5 of 2013. In the present case, the alleged inconsistencies do not affect the substance of the prosecution case as amply demonstrated in the dying declarations evidence and circumstantial evidence analyzed above.
124. The upshot is that applying the appropriate principles of circumstantial evidence to the present case, this Court can truly say that the “circumstances taken cumulatively... form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused Person(s)” committed the heinous crime. See *Joan Chebichi Sawe versus Republic* [2003] eKLR. As this Court had earlier pointed out, the evidence of circumstantial evidence merely corroborates that of dying declarations evidence as analyzed earlier in this judgment.
125. The conclusion is that I find that the Prosecution has proved the case against each of the three Accused Persons beyond reasonable doubt and I hereby convict each of the three Accused Persons of the murder of Lucy Njambi Nyagiko as charged.

**DATED AND DELIVERED AT KIAMBU THIS 5<sup>TH</sup> DAY OF APRIL, 2024.**

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**JOEL NGUGI**

**JUDGE**

In the presence of:-

Julie Court Assistant

Mr. Gacharia for the State

Mr. Mutitu for the 1<sup>st</sup> Accused

Mr. Mathenge for the 2<sup>nd</sup> Accused

Mr. Njuguna for the 3<sup>rd</sup> Accused

