



**Republic v Mwaniki & 4 others (Murder Case 10 of 2023)  
[2024] KEHC 5118 (KLR) (Crim) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5118 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CRIMINAL  
MURDER CASE 10 OF 2023  
CM KARIUKI, J**

**MAY 3, 2024**

**FORMERLY NAKURU HCRA 30 OF 2015 & NYAHURURU HCRA 03 OF 2017**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ISAAC MBURU MWANIKI ..... 1<sup>ST</sup> ACCUSED**

**BETH WAITHERA MWANGI ..... 2<sup>ND</sup> ACCUSED**

**DAVID NJENGA KAMAU ..... 3<sup>RD</sup> ACCUSED**

**JOHN KARIUKI WANGUI ..... 4<sup>TH</sup> ACCUSED**

**EDWARD GITHINJI MUCHWE ..... 5<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. The Accused persons herein were charged with the offense of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars are that on the night of the 14<sup>th</sup> day of September 2013 at Silanga Village, Passenga Sub-Location in Nyandarua Central District within Nyandarua County, jointly murdered Kenneth Thuita Freshia, the Deceased herein.
2. The Prosecution called 16 witnesses in total. The Deceased disappeared on the night of 14<sup>th</sup> September 2023. Two months later, human bones were recovered close to his home. After DNA examination, it was later concluded that the recovered bones belonged to the Deceased. The Prosecution's case was that the Accused persons kidnapped the Deceased for ransom and then eventually killed him.
3. Consequently, the Accused persons were placed on their defense, and they all gave sworn testimony and did not call any witnesses.



4. PW1 Freshia Warigia Thuita, the Deceased's mother, testified that 14/9/2013, her son had visited his grandmother and returned at about 10 pm. He then told her there was a calf in the shamba, and they went together to remove it. They also saw another cow had gone outside and returned it home. After returning the other cow home, they saw a vehicle parked at the state, and milk was being delivered. The Deceased asked who the car was, but she told him to leave it alone. They took the cows back home and tied them, and then he told her he was going back home, and she was left behind as he went ahead.
5. She testified that the cow shed was about 30 meters from the house. When she returned to the house, she asked her daughter about the Deceased's whereabouts and responded that she had not seen him. PW1 stated that the Deceased was epileptic, and she thought she may have gotten a fit and fallen, so she went and looked for him in the shamba but did not find him. She did not alert anybody about his absence. However, at about 6 am, she started looking for him the following day and alerted the neighbors that he was missing.
6. PW1 stated that she then got a letter from her brother, PW2. The handwritten letter was found on the roadside where the milk is usually delivered on the grass. The contents of the letter were about the Deceased, that people will be told to kidnap Thuita, the Deceased herein, that she should keep quiet, and that the author of the letter was the mother of Thuita. The letter was addressed to her and written in Kikuyu. She then went with the letter to Olkalou Police Station and made a report. After two months, some women who were looking for firewood found Thuita's body.
7. PW2, Timothy Kamau Thuita testified that he learned that Thuita had disappeared on 15/9/2013. That he saw and collected a letter near the center. He read it and passed by PW1's home to give her the letter. The letter author called herself Mama Thuita, who had separated from his brother several years before the incident and said that she had sent people to kidnap Thuita because he was the cause of her divorce. The letter was addressed to PW1, who warned her not to report to the police.
8. It was his testimony that they made a report at Olkalou Police Station and informed them that their suspects were Accused One and Mwangi (not in court). He stated that on 25/10/2013 at 7.25 am, he received a message from someone who said he was with Thuita and demanded Kshs. 40,000/- within 18 hours. The telephone no. that sent the message was 0708602383. The messages were about 20 sent over three days, and some of them stated that if they did not send the money, they would kill him. He reported to the police, and later, the Accused was arrested using the phone that was sending the messages. He also identified his phone, Bird T20, before the court.
9. PW2 asserted that the Deceased was found after two months, and only bones were found. He went to the scene in the forest, where there were skulls, bones, and clothes. It was a blue jumper, shirt, innerwear, trousers, and just rugs, and the body was found to be about 11/2 km- 2 km from PW1's home.
10. PW3 Moses Njoroge Ng'ang'a testified that he found a handwritten letter beside the road on 15/9/2013. He took it, read it, and left it there. The letter was addressed to PW1, and the author was named Mama Thuita. He also identified the letter in court.
11. PW4 Monica Muthoni Githuku testified on 24/10/2013 at about 4:10 pm. She was at home with her small child when her cousin, the 1st Accused, asked her to assist him with her phone because his had gone off. She gave her the phone after removing her SIM card, and he used the phone for about 3 minutes. He then removed his line and gave her back the phone. She asserted that he sent a message and then deleted it.
12. It was her testimony that on 28/10/2013 at about 1 pm, three police officers came to her home and inquired about her phone, which she gave to them. They asked about who had used the phone on



- 24/10/2013 at 4.10 pm, and she told them that she had lent it to the 1<sup>st</sup> Accused, upon which they informed her that he had used the phone to send kidnapping messages. She directed them to the 1<sup>st</sup> Accused home, and they took her to the station. She was later released on 29/10/2013.
13. PW5 Moses Kuria Thuita, the Deceased's nephew, testified that on the material day, he saw the Deceased with their grandmother at about 4 pm. On the next day, he was called by PW2, who gave him a letter and asked him to read it to PW1, which he did. He identified the letter before the court and narrated its contents. They made a report at Ol Kalou Police Station. They informed them that their suspects were Isaac Mburu Mwaniki and Steven Mwangi Ngari. The latter was named because he was a neighbor and was the Deceased's good friend, and at times, the Deceased used to sleep at his home.
  14. He stated that they suspected Accused One because three weeks before, he had been found at the Deceased's home at night, having untied their cows and had been seen by the Deceased and PW1. He pointed out that they announced the Deceased's disappearance on radio and television and that the Deceased's body was found two months later. He identified his clothes before the court.
  15. PW6 David Ngige Mwangi testified that on 25/10/2013, the police visited his home, and he was asked to produce his ID card. They accompanied him to his home in Githunguri, where he gave them the ID, and he was taken to CID Nyahururu. He was also asked for his SIM card, after which he was informed that his line was used to demand money for kidnapping. He denied knowing about it and was placed in the cells. He informed the police that he had lost his ID card in October 2020. He had made a report in Olkalou Police Station. He was issued a police abstract, after which he got another ID card.
  16. It was his testimony that he told the police that he had his line and was using it. However, he was informed that somebody had used his ID to register another cell phone number. He stated that while he was still under arrest, the number was still sending messages demanding ransom to the Deceased's mother.
  17. PW7 Anne Wangui Wachira testified that in August 2013, she sold one of her phones to Charles Njuguna. It was a Samsung, and she sold it for Kshs. 700/-. In October 2013, CID Nyahururu came for her and asked her about the phone, and she told them that she had sold it and taken it to Charles' uncle, who took them to Charles's home. She stated that she used to use her line with that phone and identified the Samsung No. C5312, black in court. She pointed out that she identified the phone because it was never used to close correctly and faded on the edges.
  18. PW8 Pauline Wanjiru Murage testified that she was asked to report to the CID Nyahururu over a Safaricom line demanding money registered in her Mpesa shop. She was asked who had registered the line, but she stated that she did not know because she had employed somebody at the shop.
  19. PW9 Steven Mwangi Njeri testified that he was informed by the Deceased's uncle that the Deceased had been kidnapped and that the uncle went to his home and asked if he had seen the Deceased. However, he denied it; on 16/9/2013, they went to the police station, where he recorded a statement.
  20. PW10 Naomi Wangui Wanjiru testified that on 15/11/2013, when going home with Muthoni, they passed by Silanga Village looking for firewood. They entered a bush looking for herbs and firewood, then they saw clothes and decided to go nearby. It was a trouser, a jumper, and innerwear. They also saw a jaw resembling a human being next to the clothes. They moved it with a stick and noticed it was for a human because there were teeth.
  21. She stated that they went to the village elder and informed him, and they took him to where they had seen the clothes. He called other elders and the land owner where the clothes were found. She stated



- that she had also seen something elsewhere, and that was when they discovered a skull further. PW11 Consolata Nyaguthie corroborated PW10's account.
22. PW12 No. 93937 PC Edward Esanya testified that on 16/11/2013 at about 8.30 am, in the company of CPL Benedict Mwanza of DCI Nyandarua North, went to Silanga Village, Passenga Location to process the Deceased's scene of the murder. He documented the scene and took 28 still photographs that were processed and presented at DCI Nairobi on 14/1/2014. He printed and filed his certificate and prepared a report on 28/9/2015.
  23. He said he accompanied the investigating officer to the Nakuru Municipal Council Mortuary, where the post-mortem was done on 26/11/2013. He also averred that the lower jaw and a clavicle bone were taken to the government chemist for identification alongside the red cloth with knots. He produced the 28 photographs, reports, and certificates as exhibits. He asserted that his role was to document the crime scene and take photographs of the body parts and clothing. It meant that they had not identified who they belonged to.
  24. PW13 John Kimani Mungai, from the Government Chemist testified that acting under the request of No. 63365 CPL Bernard Mwanza of CID Nyandarua North, he was requested to examine some items and generate profiles to determine the biological relationship. The items were:-A lower jaw bone with teeth in an envelope marked a Collar bone in an envelope marked Exhibit b Buccal swabs (mouth swabs) taken from Freshia Warigia Thuita Pieces of cloth and a string in an envelope marked Exhibit d
  25. He examined the items and came up with a report indicating that the DNA profiles generated from the lower jaw and teeth and the buccal swabs were compatible. Based on the findings, there is a 99.99% chance that the lower jaw bone with teeth and collar bone originated from a son of Freshia Warigia Thuita. He produced the government analyst report marked as p. exhibit 3 and the exhibit memo form as p. exhibit 4.
  26. PW14 No. 63365 Sgt. Benedict Mwanza, the investigations officer, testified that on 8/10/2013, after instructions from DCIO Christopher Chesoli, he teamed up with other officers and proceeded to Olkalou where they met with PC Samuel Kankan, the investigating officer who briefed them that a report had been made on 15/9/2013 concerning a missing person. They revisited the scene with the guidance of DCIO and interviewed witnesses again, including the Deceased's mother, Freshia. She narrated the occurrences of the material day and 15/9/2012.
  27. They continued their investigations, and on 25/10/2015, Timothy Kamau, the Deceased's uncle, reported receiving a message on his phone demanding a ransom of Kshs. 40,000/- sent by people who had allegedly kidnapped the Deceased. They requested the full particulars of that number's user. They received details that the number was registered with David Ngige Mwangi's ID card number. When the said David Ngige was arrested and interviewed, he stated that he had lost his ID and reported the same at Olkalou Police Station. He was later issued with another ID.
  28. It was his testimony that they requested the IMEI No. of the phone to which the sim card was used. He gave it to several persons, including Anne Wangui, who was traced and admitted to owning the phone but stated that she sold it to Charles Njuguna, who sold it to Daniel Thiongo and then sold it to Isaac Kaburu – the 1<sup>st</sup> Accused.
  29. They also requested data from Safaricom, and they indicated that the sim card had been used in the handset of Monica Muthoni, who was traced; she indicated that she had given her handset to the 1<sup>st</sup> Accused at the material time, who inserted his sim card and used it. On 29/10/2013, they arrested the 1<sup>st</sup> Accused in his house in Silanga, and on a table beside his bed, they found a Samsung mobile phone



- model C5212 IMEI No. 354763047033958. The battery and SIM card had been removed. He stated that he was living alone in the house. They also found his ID card and elector card.
30. PW14 asserted that they interrogated the 1<sup>st</sup> Accused, and he agreed to have kidnapped the Deceased alongside Ruth Waithera and David Njenga. He also mentioned Githinji and Kariuki as those involved in the kidnapping. They then arrested the 2<sup>nd</sup>-5<sup>th</sup> Accused and recorded their statements denying any involvement. The 1<sup>st</sup> Accused led them to Olkalou Town to a Better Green Farm Agro shop belonging to Monica Nyambura, where he registered the sim using David Njenga's ID. They requested a copy of the registration book, and they were given a certified copy in the name of David Njenga, which was the ID that was stolen.
  31. He averred that he took the handwriting specimens of the Accused persons and forwarded them to the document's examiner for comparison with the letter found next to the Deceased's home. The results from the documents examiner indicated that the 1st Accused authored the document. The exhibit memo was produced as p. exhibit 6, the handwriting specimens as exhibit a1-5 for Isaac Mburu, exhibit b1-5 for David Njenga, exhibit c1-5 for Martha Wambui, exhibit d1-5 for Martha Wambui, exhibit e1-5 for Moses Njoroge, the Samsung phone as p. exhibit 7, the sim card as p. exhibit 8, the 1<sup>st</sup> Accused's id no as p. exhibit no. 9 and 2 voters card in the names of Isaac Mburu as p. exhibit 10 (a) & (b), the letter found next to the Deceased home and its translation as p. exhibit 11 (a) & (b) and exhibit memo form for the sim card as p. exhibit 12.
  32. PW14 testified that he arraigned the Accused in court for the offense of kidnapping with the intent to conjure contrary to Section 258 of the Penal Code.
  33. On 16/11/2013, they were informed that there were remains of a person found in the Silanga area suspected to be the Deceased. They headed to the scene, which they divided into three scenes. In the 1<sup>st</sup> scene, they found a dark blue jumper produced as p. exhibit 13, a torn red inner wear produced as p. exhibit 14, a checked grayish long trousers produced as p. exhibit 15. In the 2<sup>nd</sup> scene, which was 4.1 meters from the 1<sup>st</sup> scene, they found four pieces of vertebrae bones, a red piece of torn cloth with a knot, and they were photographed as exhibit 1. In the 3<sup>rd</sup> scene, which was 5 meters away from scene 2, they found a skull with 15 teeth in the upper jaw. They escorted the recovered exhibits to Nakuru Hospital, after which post-mortem and DNA analysis were done.
  34. He stated that he has Safaricom data showing incoming and outgoing messages from Accused 1's sim card to Timothy Kamau's handset. It also shows the handset users, including Charles Njuguna. The Safaricom data was produced as p. exhibit 16, the handset belonging to Timothy Kamau, which had received the messages as p. exhibit 17, and the specimen handwriting as p. exhibit 18,19,20,21 and 22.
  35. PW15 Dr. Titus Ngulungu produced the post-mortem report. He testified that he examined the remains that Timothy Kamau and John Nganga identified. The remains were human bones. The skull was identified as that of a person of African origin, with a red t-shirt, clothes tied in knots, some noose, trousers, and a blue sweater. The clothes had maggots and pupae of insects.
  36. It was asserted that the bones were utterly skeletonized with no soft tissues or cartilage attached to the bones. He gave the skull measurements and averred that there was one piece of clavicle bone that had disintegrated edges and evidence of chiseling, indicating that savages had attacked the tissues. There were two cervical vertebrae bones, and ordinarily there are 7. Three thoracic bones, while usually there were 11. He stated that other bones could not be anatomically identified because of disintegrations.
  37. It was PW15's testimony that the bones only showed signs of trauma, and the cause of death could not be identified because there was no skin, muscles, or respiratory system. The presence of clothes and a



noose was suggestive of manual strangulation. However, it was not conclusive because the trachea and larynx were missing. The post-mortem report was produced as p. exhibit 23.

38. Defence Hearing
39. DW1 Isaac Mburu Mwaniki denied the charges and testified that he was arrested on 28/10/2013. He was informed that he was involved in the murder. He was first charged with abduction and then with murder. He stated that he had no relationship with the Deceased but knew Timothy Kamau further, that he heard of the Deceased's disappearance from the media and people talking.
40. He asserted that the day after the victim disappeared, his uncle Timothy came to ask him whether he knew about the victim's whereabouts. He responded that he had no information on the victim. Then, Mwangi was arrested in connection with the victim's disappearance. He denied that he authorized the letter produced as p. exhibit 11. He also denied that the sim card sending messages to Timothy was his and averred that he has no grudge against the victim's mother or Timothy and that he had no connection with the Deceased's death.
41. DW2 Beth Waithera Mwangi denied the charges and gave sworn testimony that she had known the Deceased since childhood. That she knew of his disappearance from his aunt. She was later informed by Accused 3, her taxi driver, that he was arrested over allegations that he had used her car in carrying the Deceased during his disappearance. The CID summoned her, asking whether she knew the Accused one, as he had named her. She was then arrested alongside the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Accused and later charged with murder.
42. DW3 David Njenga testified that he never killed the Deceased and that he came to know of his disappearance from his neighbor. He called Timothy and asked him, and he confirmed the kidnapping. The police asked him to go with the car that he was using. He asserted that they asked him about the child's whereabouts, and he denied knowing where he was; then, he was locked up for three days.
43. It was his testimony that after a month, CID Nyahururu called him and bonded him to attend their office. He was informed that the Accused had mentioned them for involvement with the murder of the victim. He stated that he knew the Accused one as they had schooled together in primary school.
44. DW4 John Kariuki denied the charges and testified that he heard of his disappearance after one month in November 2013. He was arrested after two weeks and told that Isaac Mburu had mentioned them for being involved with murder. They were released, then arrested again and charged with murder. He stated that he knew the Accused one as they were in the same school and denied the allegations.
45. DW5 Edward Githinji testified that he came to know of the Deceased's disappearance in 2016 when he was arrested and taken to CID Nyahururu and then released. Later, he was called, detained, and charged. He was said to have been involved in the murder, and Accused One has named him as one of the murderers. He stated that he did not know the Accused and that he did not participate in the murder.
46. Prosecution's Submissions
47. The Prosecution asserted that the fact of the death of the Deceased was proved by the fact that he disappeared from their home on 14/9/2013. Two months later, some bones were recovered not very far from their home, and upon DNA examination of the lower jaw and teeth, collar bone, buccal swabs, and in comparison with PW1, who was his mother, the same confirmed that the bones belonged to the Deceased.



48. Further, the post-mortem results indicated that the cause of death was as follows, "Not automatically ascertained soft tissue and injuries may be the cause of death. The presence of a noosed piece of cloth may suggest manual strangulation."
49. On whether the said death was caused by an unlawful act or omission on the part of the Accused persons, the Prosecution asserted that relying on circumstantial and direct evidence and confession of the 1<sup>st</sup> Accused, the same was proved. The evidence of PW1, PW2, PW4, PW6, PW7, and PW14 tied the 1<sup>st</sup> Accused to the Deceased's murder, who then identified the other Accused persons as his accomplices, which led to their arrest. The Accused persons kidnapped the Deceased, demanded ransom, and later killed the Deceased by possibly strangling him.
50. It was contended that though no formal confession was recorded, the forensic evidence put the 1<sup>st</sup> Accused into the picture, and his confession to the police led to the others' arrest. He had informed the police that the 2<sup>nd</sup> and 3<sup>rd</sup> Accused sent him. The 2<sup>nd</sup> Accused is the owner of a taxi driven by the 3<sup>rd</sup> Accused when the kidnap ordeal took place.
51. The Prosecution stated that the Accused, during the investigations, led the police to Olkalou Town to a shop known as Better Green Farm Agro belonging to Monica Nyambura, where they found Pauline Wanjiku, where he registered the name using the ID card of David Njenga which had been stolen. The line number 0708602383 is reflected in the records. This proved the Accused as the person who was sending text messages demanding a ransom, and after the same was not sent, the Deceased was found murdered.
52. It was averred that when placed on their defense, all Accused persons, including Accused 1, denied ever being involved in the murder of the Deceased. However, as PW1 mentioned, they saw a white taxi parked about 200 meters from their house. PW4 had also indicated to the court that the 1<sup>st</sup> Accused informed him of a taxi when the 2<sup>nd</sup> Accused contracted them and that the same belonged to her.
53. Her testimony stated that Accused 2 confirmed that she owns a white taxi and that Accused 3 is employed as her driver. Accused one denied knowing all the other Accused persons; however, it came out that they had been schooling in the same school, and they knew each other well even before the kidnap and murder incident.
54. The Prosecution argued that the Accused defense, though sworn, did not entirely displace the Prosecution's case. The 2<sup>nd</sup>-5<sup>th</sup> Accused persons indicated that the Deceased was epileptic and may have fallen and died, leading to the body being consumed by wild animals and dogs. However, the doctor who conducted the post-mortem indicated that epilepsy is only life-threatening in some circumstances, e.g., near a deep well or water mass. An epileptic episode lasts for 5 minutes and disappears; hence, the 2<sup>nd</sup>-5<sup>th</sup> Accused person's submissions ought not to be considered, and they urged the court to find it misplaced.
55. The Prosecution pointed out that the chronology of events indicates that it is the Accused persons who committed the offense of murder by kidnapping the Deceased on instructions from the 2<sup>nd</sup> Accused and demanding ransom and, when the same was not sent, strangling the Deceased and leaving his body to decay until the bones were recovered.
56. Lastly, it was the Prosecution's submission that they had made a case against the Accused to warrant the court to convict them accordingly.
57. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused Persons' Submissions



58. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Accused Persons averred that none of the Prosecution's witnesses linked them to the Deceased's death. They gave sworn statements and denied killing the Deceased. They stated that the police told them that they were arrested because the 1<sup>st</sup> Accused had confessed and said that they had killed the Deceased. However, the alleged confession was never produced into evidence. Moreover, when the 1<sup>st</sup> Accused was put on his defense, he denied confessing or implicating the other Accused persons.
59. It was contended that in a case of murder, the Prosecution must not only prove the death of the Deceased but also that the Accused caused the death. The Prosecution called PW13 Dr. Titus Ngulungu, who performed the autopsy and produced the post-mortem report. He stated that he examined some bones and found evidence of a scavenger attack, which he described as chiseling on the bones, probably caused by carnivores such as dogs. However, he could not ascertain the cause of death from the limited samples provided by the police.
60. It was stated that PW1 said that the Deceased suffered from epilepsy. It is possible that the Deceased had an epileptic fit, which caused him to faint, and afterward, he was attacked by dogs.
61. In conclusion, the 2<sup>nd</sup>-5<sup>th</sup> Accused persons urged the court to acquit them because there is not even an iota of evidence that link them to the death of the Deceased.
62. Analysis and Determination
63. Considering all the evidence set out in this case by the Prosecution, the defense herein, and both parties written submissions, the issue in question is whether the Prosecution proved beyond a reasonable doubt all the elements of murder against the Accused persons herein.
64. The Accused persons were charged with the offense of murder. The elements of murder referred to above are: -The fact of the death of the Deceased;the cause of that death, that an unlawful act or omission occasioned the death;the Accused had Malice aforethought when he unlawfully killed the Deceased.
65. Moreover, Sections 203 and 204 of the Penal Code under which the Accused persons are charged provide for the offense of murder and the punishment for it. They state as follows: -
- “ 203. Any person who, of Malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder.
204. Any person who is convicted of murder shall be sentenced to death.”
66. Furthermore, in Anthony Ndegwa Ngarius vs. Republic [2014] eKLR, the elements of the offense of murder were established as follows: -the death of the Deceased occurred;that the Accused committed the unlawful act which caused the death of the Deceased; andthat the Accused had Malice aforethought.
67. The Death of the Deceased
68. It is not in doubt that Kenneth Thuita Freshia, the Deceased herein, had died after disappearing for two months from his mother's house. His remains were discovered by PW10 and PW11, who had gone to a bush in Silanga Village looking for herbs and firewood when they stumbled upon some clothes and what looked like a human jaw with teeth. The remains of the Deceased, i.e., four pieces of vertebrae bones and a skull, were discovered in a forested area alongside his clothes. The human bones were later forensically tested and found to be belonging to the Deceased.



69. The investigation officer testified that they headed to the plot where the bones had been discovered and divided it into three scenes. In the 1<sup>st</sup> scene, they found a dark blue jumper produced as p. exhibit 13, a torn red inner wear produced as p. exhibit 14, a checked grayish long trousers produced as p. exhibit 15. At the 2<sup>nd</sup> scene, which was 4.1 meters from the 1st scene, they found four pieces of vertebrae bones and a red piece of torn cloth with a knot, and they were photographed as exhibit 1. In the 3<sup>rd</sup> scene, which was 5 meters away from scene 2, they found a skull with 15 teeth in the upper jaw. They escorted the recovered exhibits to Nakuru Hospital, after which post-mortem and DNA analysis were done.
70. In my view, the Prosecution presented sufficient evidence to demonstrate the Deceased's death. PW15, Dr. Ngulungu, who performed the post-mortem and later produced the post-mortem report (p. exhibit 23), testified that the bones were skeletonized entirely and that no soft tissues or cartilage attached to the bones. He gave the skull measurements and averred that there was one piece of clavicle bone that had disintegrated edges and evidence of chiseling – savages attacking the tissues. There were two cervical vertebrae bones, and ordinarily, there are 7. Three thoracic bones, while usually there were 11. He stated that other bones could not be anatomically identified because of disintegration.
71. It was PW15's testimony that the bones only showed signs of trauma and that the cause of death could not be identified because there was no skin, muscles, or respiratory system. The presence of clothes and noose was suggestive of manual strangulation. However, it was not conclusive because the trachea and larynx were missing.
72. In cross-examination by Mr. Mbugua, the doctor stated that the bone had been chiseled, indicating savages' attacks and that savages do not kill; they scourge and are fresh-eating animals. He also asserted that savages do not tie knots. He also asserted that epilepsy is life-threatening only in some circumstances, e.g., near a deep well and water mass, etc., and an epileptic episode lasts for 5 minutes and disappears.
73. Accordingly, the cause of the Deceased's death was not anatomically ascertained. However, it was indicated that the presence of a noose could suggest manual strangulation. That being the case, there are a set of circumstances that lead me to believe that the deceased's cause of death was neither lawful nor was it accidental, as the Accused persons would like this court to believe. The Deceased's bones were found about 11/2kms away from his mother's home, who had been fervently looking for him alongside the neighbors who were well aware that he was missing. It is my considered opinion that if he had suffered an epileptic episode, his mother, a family member, a neighbor, or a passerby would have found him and assisted him. In any case, just as stated by Dr. Ngulungu, an epileptic episode lasts 5 minutes and is only life-threatening if it occurs next to a river or water mass. The scene where the Deceased's remains were found was a flat field, which I opine not hazardous to the extent of causing the Deceased's death. I therefore reject the averment that the Deceased's death was due to an epileptic episode he suffered.
74. I am further convinced that the Deceased was murdered due to the presence of the noose at the scene where the bones were found and additional surrounding circumstances that will be discussed in this judgment. I agree with PW15 that the same could indicate that the Deceased was manually strangled, and in my view, the same is the possible cause of death. It is unfortunate that the remaining parts of his body were not recovered to aid in establishing the cause of his death, and even what was available had sadly been attacked by savages. Further, I am afraid I have to disagree with the assertion put forth by the 2<sup>nd</sup>-5<sup>th</sup> Accused that it is possible that the Deceased had an epileptic fit, which caused him to faint. Afterward, dogs attacked him for the reasons that shall be advanced below. In my opinion, there is overwhelming evidence pointing towards the kidnapping and eventual murder of the Deceased.



75. Proof that the Accused committed the unlawful act which caused the Death of the Deceased
76. On the question of whether it was the Accused persons who caused the Deceased's unlawful death, none of the prosecution witnesses saw any of the Accused persons killing the Deceased; therefore, there is no direct evidence. In essence, the Prosecution's case is primarily based on circumstantial evidence. Before such evidence forms the basis of a conviction, it must satisfy several conditions to ensure that it unerringly points to the Accused person and no other as the perpetrator of the offense.
77. In *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:-

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a solid basis for proving an Accused person's guilt just as direct evidence. In 1928, Lord Heward, CJ stated the following on circumstantial evidence in *R v Taylor, Weaver, and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So, it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances that, by intensified examination, can prove a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

.....

“Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions designed to ensure that it unerringly points to the Subject person, and no other person, as the perpetrator of the offense. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;
- iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.”

78. In the case of *Neema Mwando Nduzya v R* [2008] eKLR, it was held that circumstantial evidence must be examined very closely before forming a basis for conviction. Similarly, in cases of *R v Richard Itweka* [2020] eKLR, *Regina v Exall and Others* [1886] 176 ER 850, and *Mwangi and Another v Republic* [2004] 2KLR 32 stressed that each link in the circumstantial evidence chain must be closely and separately examined before the whole chain is put together and a conclusion drawn on the guilt of the Accused.



79. Further, in the case of *Sawe v Republic* [2003] eKLR, the court reiterated the above-stated conditions and added that the Prosecution must also establish that no other coexisting circumstances could weaken or destroy the inference of guilt.
80. Accordingly, the case laid out by the Prosecution is that the Deceased was kidnapped for ransom on the night of 14<sup>th</sup> September 2013 by the Accused persons, who then killed him. Later his remains were then found about two months later. The evidence indicates that the 1<sup>st</sup> Accused person was at the epicenter of the foul plot that led to the Deceased's death. It was his alleged 'confession' that led to the arrest of the other Accused persons whom he is alleged to have confessed hired and assisted him in kidnapping and killing the Deceased.
81. PW1 narrated that, together with the Deceased, they had taken the cows back to the cattle boma, where she left her son behind, closing the door to the boma. However, he never found his way back to the house. She stated that she saw a white car beside the road about 200 meters from their home on their way to the boma. When her son failed to return, she reported the matter to the police. PW2 testified that he collected a letter near PW1's home. The same was corroborated by PW3, who testified that he had seen the letter addressed to PW1 beside the road and that although he had taken it and read it, he had left it there. He also identified the letter in court. PW2 averred that he had read the letter and passed by PW1's home, where the letter was addressed. It was said to be authored by the Deceased's mother and written in Kikuyu.
82. I have analyzed the letter, p. exhibit 11a, and the translated copy of the letter produced as p. exhibit 11b. The letter was addressed to PW1 and indicated that Thuita's mother wrote it and that she would send young men and pay them money to come and kidnap her son, among other threats to both PW1 and the Deceased. It also warned PW1 not to report to the police station; otherwise, she would not know who the author was.
83. PW2 testified that they made a report about the letter at Olkalou Police Station. He went on to assert that on 25/10/2013 at 7.25 am, he received a message from someone who said he was with Thuita and demanded Kshs. 40,000/- within 18 hours. The telephone no. that sent the message was 0708602383. The messages were about 20 sent over three days, and some of them stated that if they did not send the money, they would kill him. He also reported the same to the police.
84. PW4 testified that on 24/10/2013, she lent her phone to her cousin, the 1st Accused, who had asked her to assist him with her phone because his phone had gone off. The 1<sup>st</sup> Accused removed his sim card, inserted his used phone for about 3 minutes, and returned it to her, having deleted the message he had sent. She later learned from the police that the phone had been used to send kidnapping messages. Accordingly, her testimony began weaving the web that tied the 1<sup>st</sup> Accused to the Deceased's disappearance.
85. PW6 was caught up in the instant case because his ID card was found to have registered the sim card phone number 0708602283 that was sending the ransom messages to the Deceased's family. However, he confirmed to the police that he had lost his ID in October 2022. He had made a report at Olkalou Police Station and was later reissued with another ID card. He denied any involvement with the Deceased's disappearance. Following the police investigations, it was established that somebody else had used his ID to register the line because even as he was under arrest, the number was still sending messages demanding ransom.
86. According to the investigation officer, the police then requested the IMEI No. of the phone on which the sim card was being used, and it was traced to a phone belonging to PW7 who was traced, and she admitted to having owned the phone, but she stated that she had sold it to Charles Njuguna who sold



it to Daniel Thiongo and who then sold it to Isaac Kaburu – the 1<sup>st</sup> Accused. They also discovered that the sim card had been used on another phone, hence PW4's testimony.

87. At this point, the 1<sup>st</sup> Accused was arrested. He was found with a Samsung mobile phone model C5212 IMEI No. 354763047033958. The battery and SIM card had been removed. He stated that he was living alone in the house. They also found his ID card and elector card. Upon interrogation, he was said to have confessed to kidnapping the Deceased. He implicated the 2<sup>nd</sup>-5<sup>th</sup> Accused persons, leading to their arrest. The 1<sup>st</sup> Accused also led the police to Better Green Farm Agro, belonging to Monica Nyambura, where he had registered the sim using David Njenga's ID. They requested a copy of the registration book, and they were given a certified copy in the name of David Njenga, which was the ID that was stolen.
88. PW14 testified that he took the handwriting specimens of the Accused persons and forwarded them to the document's examiner for comparison with the letter found next to the Deceased's home. The results from the documents examiner indicated that the 1<sup>st</sup> Accused authored the document.
89. Consequently, upon learning that there were remains of a person found in the Silanga area suspected to be the Deceased. They headed to the scene, which they divided into three scenes. In the 1<sup>st</sup> scene, they found a dark blue jumper produced as p. exhibit 13, a torn red innerwear produced as p. exhibit 14, and a checked grayish long trouser produced as p. exhibit 15. In the 2<sup>nd</sup> scene, which was 4.1 meters from the 1<sup>st</sup> scene, they found four pieces of vertebrae bones, a red piece of torn cloth with a knot, and they were photographed as exhibit 1. In the 3<sup>rd</sup> scene, which was 5 meters away from scene 2, they found a skull with 15 teeth in the upper jaw. They escorted the recovered exhibits to Nakuru Hospital, after which post-mortem and DNA analysis were done.
90. The remains were confirmed to belong to the Deceased as indicated in the DNA report, p. exhibit 4, produced by PW13, John Kimani Mungai, a Government Analyst at the laboratory of the Government Chemists Department who analyzed buccal swabs obtained from PW1 and the human bones collected. The findings were that there were 99.99% more chances that the lower jaw bone with teeth and collar bone originated from a son of Freshia Wangari Thuita. It was at this point that the Accused persons were charged with murder.
91. PW14 also confirmed that they had Safaricom data produced as p. exhibit 16 showing incoming and outgoing messages from Accused 1's sim card to the handset of Timothy Kamau produced as p. exhibit 17. The Safaricom data was produced as p. exhibit 16.
92. In the circumstances, I believe that the Prosecution's evidence squarely places the Accused no one at the core of the instant case. The Deceased herein went missing on the night of 14<sup>th</sup> September 2013, after which his mother received a letter threatening her and alluding to kidnapping the Deceased, which was later determined to have been written by the 1<sup>st</sup> Accused.
93. The investigation officer also investigated the letter that was discovered close to PW1's home. The handwriting on the letter was compared to the Accused person's handwriting, and by way of exhibit 16, which is the Forensic Document Examiner's Report where it was stated that having examined and compared the disputed handwriting on exhibit marked K (the anonymous threatening letter) with specimen on exhibit marked A1-A5, i.e., the 1<sup>st</sup> Accused's handwriting specimen. In his opinion, the handwriting was written by the same author. Further, on B1-B5, C1-C5, D1-D5, and E1-E5, which are handwriting specimens belonging to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused, respectively, it was stated that the same author did not make the handwritings. It was proven that the 1<sup>st</sup> Accused person wrote the letter collected by PW2 and addressed to PW1.



94. I believe that the 1<sup>st</sup> Accused wrote the letter as a red herring to distract the family and the police from the fact that he was the one who had kidnapped the Deceased person. The 1<sup>st</sup> Accused then went on to send ransom messages from PW4's phone and his Samsung phone to the Deceased's family, particularly PW2. He demanded for Kshs. 40,000 later reduced to Kshs. 30,000 in order to release the Deceased.
95. PW4 confirmed that she had given her phone to the 1<sup>st</sup> Accused, her cousin, to use, and he sent the ransom messages. Her evidence was persuasive; she had no reason to lie about her cousin. The mobile forensic examiners also report on Samsung C5212 IMEI 324763763047033985 and sim card s/no. 89254029851002076420 established that they could retrieve several messages that threatened the Deceased's family and asked them to send money, failure to which they will never see the Deceased or know anything about him. A message even stated that the ransom money had been reduced to Kshs. 30,000/-
96. At this point, I would like to dispense with the question of whether the alleged confession by the 1<sup>st</sup> Accused person is admissible as direct evidence in the instant case. The 1<sup>st</sup> Accused denied the fact that the confession was given and if at all it was. From my analysis, it is evident that the rules of confession were never adhered to.
97. It is clear to me that the chain of events discussed above points to 1<sup>st</sup> Accused as the one responsible for kidnapping the Deceased. Upon his arrest, the investigation officer testified that he confessed and implicated the 2<sup>nd</sup>-5<sup>th</sup> Accused as participants in the kidnap and eventual murder of the Deceased. The 1<sup>st</sup> Accused denied having made any such confession. The investigation officer did not formally record the alleged confession, which I attribute to being a failure on the investigators' part.
98. Section 26 of the [Evidence Act](#) provides thus:
- “A confession or any admission of a fact tending to the proof of guilt made by an Accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the Accused person, proceeding from a person in authority and sufficient in the opinion of the court, to give the Accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature about the proceedings against him.”
99. According to the law, a voluntary statement that does not meet the rigid threshold of the confession rules will not aid the Prosecution's case. I reiterate that the rules are a measure by which statements alleged to be confessions are gauged and should be strictly applied. I am also guided by the holding of the court in Republic v Wambua Mbithi [2020] eKLR: -
- “It is not the details in the alleged confession that determines and dictates its admissibility but the process and the circumstances under which the same was recorded.”
100. Further, I associate myself with the sentiments of Mutuku, J in Republic vs. Elly Waga Omondi [2015] eKLR that:
- “It seems that the police, who are the investigators in all criminal trials, have not fully acquainted themselves with the law governing confessions, especially after the Confessions Rules and [the Constitution](#) of Kenya 2010 came into effect. Because of this, many criminal trials where police wish to rely on statements made by Accused persons may suffer the consequences of such limitations. This may be so, especially where there is no other evidence to corroborate retracted and repudiated statements. My view is that the voluntariness of the



statement in question is questionable. All that the Accused needs to do is to raise doubts in the court's mind about the voluntariness of such a statement, which, in my view, has been done in this case."

101. I believe there was no evidence that the 1<sup>st</sup> accused had confessed. It was erroneous for the Prosecution to rely on any such confession by the 1<sup>st</sup> Accused and especially for the police to arrest the 2<sup>nd</sup>-4<sup>th</sup> Accused persons based on such confession without conducting any independent investigations on their link to the Deceased's kidnap and murder.
102. I have critically analyzed the Prosecution's case, and I find that no evidence links the 2<sup>nd</sup>- 5<sup>th</sup> Accused persons to the Deceased's kidnap and murder. PW1 alluded to the fact that she saw a white car on the road on the material night. However, no further details were given about the car to conclude that it was the car belonging to the 2<sup>nd</sup> Accused and driven by the 3<sup>rd</sup> Accused. The 2<sup>nd</sup> Accused car was not even investigated in order to establish whether it was the same car PW1 saw or whether it was indeed the one that was used to kidnap the Deceased. Further, there is no forensic evidence linking the 2<sup>nd</sup>-5<sup>th</sup> Accused to the 1<sup>st</sup> Accused and the Deceased's kidnap and murder. To make it worse, I do not understand why the 4<sup>th</sup> and 5<sup>th</sup> Accused were even charged with the offense herein or how they were linked to the 1<sup>st</sup> Accused or the Deceased's murder. The police and Prosecution dropped the ball in arresting and further charging the 2<sup>nd</sup> to 5<sup>th</sup> Accused persons with the Deceased's murder without availing any evidence whatsoever as to how they were involved in the plot to kidnap and murder the Deceased.
103. Notwithstanding, it is clear that the 1<sup>st</sup> Accused was involved in the Deceased's kidnapping, and he later turned up dead. It is my considered view that after reviewing the available evidence, it was proven that the 1<sup>st</sup> Accused person was responsible for kidnapping the Deceased for ransom and was responsible for the Deceased's death, perhaps frustrated after the ransom was not sent. It is indicative that the Deceased was found dead after the 1<sup>st</sup> Accused had threatened to kill the Deceased if the ransom money was not sent. He also threatened the family that they would never see or hear about him if they did not send the money. Having closely and separately examined each link in the circumstantial evidence chain in the instant matter, I conclude that the whole chain, put together, proves the guilt of the 1<sup>st</sup> Accused.
104. Accordingly, it is my finding that given this chain of events, I am satisfied that the evidence points irresistibly to the culpability of the 1<sup>st</sup> Accused. In the circumstances, I do not see any other coexisting circumstances that could weaken the inference of guilt on the part of the 1<sup>st</sup> Accused. I also find that the Prosecution has failed to prove its case against the 2<sup>nd</sup> – 5<sup>th</sup> Accused persons to the desired threshold.
105. On the question of whether there was Malice aforethought on the part of the subject, Section 206 of the Penal Code defines Malice aforethought as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person killed or not;
- b. the knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;



- c. an intent to commit a felony;
- d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

106. The case of *Rex v Tubere s/o Ochen* 1945 12 EACA 63 lays down the guidelines for trial judges in consideration of Malice aforethought where the court held that:

"To determine whether malice aforethought has been established to consider the weapon used, how it is used, the part of the body targeted, the nature of injuries inflicted, the Accused's conduct before, during and after the incident."

107. In addition, the Court of Appeal in the case of *Joseph Kimani Njau v R* [2014] eKLR held as follows:

"Before an act can be murder, it must be aimed at someone, and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the Accused knows that there is a severe risk that death or grievous bodily harm will ensue from his acts and commits those acts deliberately and without lawful excuse to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the Accused desires those consequences to ensue. None of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed....."

108. In this case, I am persuaded beyond reasonable doubt that the Prosecution proved that Malice aforethought was present in committing this heinous crime. It is my considered view that there was a clear manifestation of Malice aforethought on the part of the 1st Accused person, as the evidence on record indicates that he had threatened to kill the Accused if the ransom money was not sent. Indeed, the Deceased turned up dead after the 1<sup>st</sup> Accused did not receive the money demanded. Accordingly, I find that Malice aforethought was proved beyond reasonable doubt.

109. In the end, I find that the Prosecution discharged the burden to prove that it is Isaac Mburu Mwaniki, the 1st Accused person herein, who caused the death of the Deceased with Malice aforethought. I, therefore, find him guilty as charged and convict him accordingly. I also find that the Prosecution has failed to prove its case against Beth Waithera Mwangi, the 2<sup>nd</sup> Accused person, and David Njenga Kamau, the 3<sup>rd</sup> Accused person. John Kariuki Wangui, the 4<sup>th</sup> Accused person, and Edward Githinji Muchwe, the 5<sup>th</sup> Accused person, to the desired threshold. Thus, the court makes the orders;

- i. The 2<sup>nd</sup> -5<sup>th</sup> Accused persons are, as a result of this, found not guilty of the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. They are, as a result of this, acquitted of the offense of murder under Section 306(2) of the Criminal Procedure Code and are, as a result of this, set at liberty forthwith unless otherwise lawfully held.



- ii. I find Isaac Mburu Mwaniki, the 1st accused person, guilty as charged and convicted him accordingly.

**DATED, SIGNED, AND DELIVERED AT NYANDARUA ON THIS 3<sup>RD</sup> DAY OF MAY 2024**

.....

**CHARLES KARIUKI**

**JUDGE**

