



**Republic v Komen (Criminal Case 35 of 2023)
[2024] KEHC 8884 (KLR) (18 July 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL CASE 35 OF 2023**

**RB NGETICH, J
JULY 18, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JONATHAN KIPKOECH KOMEN ACCUSED

JUDGMENT

1. The accused Jonathan Kipkoech Komen has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of the charge were that the accused person on the night of 7th and 8th day of January, 2016 at Solian Village in Koibatek Sub-county, Baringo County murdered Anita Jelagat. He denied the charge and the matter was set down for full trial with the prosecution availing 8 witnesses in support of the charge preferred against the accused.

Prosecution's Evidence

2. PW1 Gideon Kipchumba Cheburet a brother to the deceased testified that on the 8th January, 2016 at 6: 00a.m, he was at Solian when his father Moses Kiprotich visited his home and informed him that his sister had died and the body was at Mti Bora saw mill which was about 800 meters from his house. He said together they together visited the scene and met one Jonathan Koech the accused herein who is his cousin at the gate as he worked as watchman for the saw mill.
3. He said as he entered the gate, the accused told them "*pole*" meaning "sorry" because Anita had died and on enquiring from him what happened, he told him that they did not kill her but they raped her. He said the scene was an open space a few meters from the gate and he saw the deceased having been covered with a blanket. He uncovered the body and confirmed that it was his sister. He said the body lay facing up and had injury on the right knee and there were blood stains. He said her pant had been removed to the knee level and there was blood coming from her private parts. He stated that on the left



- thigh, there was a small injury, her right arm had injury, the tip of the head had a small cut, the mouth had foam and the nose had mucus coming out.
4. He testified that after confirming that his sister had died, she called the Assistant chief Suge to report the matter who promised to visit the scene. He said he went to the scene with Senior Chief Jacob Kigen and on arrival, they checked the on the body and went to where Jonathan had gone to stand with the Saw mill's caretaker, Eric Baswony who had come in with the chief.
 5. He said after 15 minutes, the senior chief called him and said he was to call people in the saw mill to contribute for a vehicle to transport the body to the mortuary as the deceased died of natural death. PW1 protested the move and insisted that the police should be called to the scene first. He said he called his Aunt Juliana but the chief stood his ground on taking the body without involving police.
 6. He said that the District Officer (D.O) sent police who went to the scene at around 10 a.m and took photographs of the scene then removed the body to Eldama Ravine District Hospital where post mortem was conducted on 13th January, 2016. He said that he was present together with Elijah, Julia and police officers during postmortem.
 7. PW2 John Suge who was the Assistant Chief Solian Sub-location in 2016 and retired on 12th June, 2016 testified that he knew the deceased and, on the 13th January, 2016, he received a call from Gedion (PW1) a brother to the deceased who informed him that his sister had died at a saw mill belonging to Mr. Erick Baswony. He said that he visited the scene and found the accused who worked as a watchman in the saw mill and he later called the owner of the saw mill. He said there were many people at the scene including PW1.
 8. He further stated that he called the area chief Jacob Kigen who went to the scene and checked the body which was covered and asked the accused what had happened and the accused informed the chief that the deceased went to the saw mill at 2:00 a.m. He said he asked the chief to call the police but was reluctant which resulted in the chief disagreeing with the deceased's relatives. He said one of the relatives called the District commissioner and after a few minutes, the police from Eldama Ravine police station arrived and uncovered the body then addressed the crowd of people and took the body.
 9. PW3 Elijah Kiprotich Kimanyim testified that on the 8th January, 2016, he received a call that the deceased had passed on and rushed to the scene accompanied by family members and found the deceased's body covered with a blanket inside the saw mill. He said they interrogated the watchman who was present but he could not tell anything because he was in shock and looked surprised by what had happened to the deceased. He said what happened to the deceased could not have been done to the deceased by the accused alone, if at all he participated. He said that the body lay on her back with the thighs raised, the underplant was half way removed, blood was oozing from the thigh meaning a sharp object had been used to stab her and around the neck there was white stuff like salt that had dried. He said that he did not see any other injury and any weapon at the site.
 10. He said accused denied killing the deceased upon being interrogated and they doubted that he was the one who killed the deceased and they strongly believe he did not kill. He said the accused could not have raped his cousin and that he was arrested because he was guarding the saw mill where the body was found. He said the accused said he found the body in the morning as he was in the house only to find the body had been brought there and he took the blanket to cover his cousin's body.
 11. He said that there were two other boys who were arrested by the police and placed in custody for about one week and released and they have disappeared to date. He confirmed that police visited the scene, took photographs and removed the body to the mortuary. He witnessed the postmortem which was done on 13th January, 2016 by Dr. Kamau at Eldama Ravine District Hospital and the doctor informed



- them that the deceased was hit by a blunt metal on the chest and ribs and as a family they would want the accused to be released as the culprits are at large. He maintained that there is no way the accused would have raped his sister. He said the accused is a slow thinker and he may not be mentally retarded. That he is a total orphan without a father or mother and so is the deceased.
12. PW4 Julio Chebichi Cheptumo an aunt to the deceased testified that on 8th January, 2016 at about 8:00a.m, she was driving to Eldama ravine when she saw a crowd of people at the saw mill. She stopped and inquired what was happening and she was informed that Anita Chelagat had died. She found PW1 there and the accused who was a watchman at the saw mill and a brother to Anita. She said accused appeared shocked. She confirmed the body of the deceased lay facing up as stated by PW1 and PW3 and said two young men were arrested and later released. She said the deceased was an orphan and she did not believe the accused committed the offence. She said the deceased used to live in their grandmother's house at Solian and was aged between 17-18 years old and she had dropped out of school due to lack of school fees. She said the accused was a brother to the deceased and was living at the sawmill where he was employed.
 13. PW5 Jacob Kiprono Kigen testified that he lives in Solian and at the material time, he was a chief and he retired in the year 2019. He stated that on the 8th January,2016, at about 8:00a.m, he received a call from Erick Chepaskwony who owns a sawmill informing him that someone had died in his premises. He said he went to the scene where he found many people including the Assistant Chief, John Suge (PW2). He said he took over the matter and directed members of the public not to interfere with the scene.
 14. He stated that the body was covered with a blanket and that he called the accused Jonathan Kipkoech who was the watchman and interrogated him and he stated that the deceased knocked his house at 2 a.m. and he opened the door for her. That she was not walking well and she was drunk and she fell next to the gate. That the deceased had knocked on the gate of the saw mill. He testified that he reported the incident to the police who arrived at 11:00 a.m and uncovered the body. That he saw the body lying on its back and the head was resting on the side, the right leg was folded, her pants were on her knees and the clothes had blood stains.
 15. He said that the police took the body away and also arrested Jonathan. He later recorded his statement. He said that the accused and the deceased were cousins since their mothers are sisters. That Jonathan Kipkoech was the saw mill watchman and he has known him as a teacher he taught the accused's mother who were his neighbors. He stated that he knew the deceased as she went to stay in her grandmother's house when her mother passed on. He maintained that he interrogated Jonathan and he said that the deceased came at 2:00a.m. That the deceased used to drink a lot and she would sometimes go to the place of the accused if she had nowhere to go.
 16. PW6 No.75xxx Sgt. Cecilia Kithinji currently stationed at Bungoma Police station testified that on the 8th January,2016 while working at Eldama Ravine police station at the crime office the then OCS C.I Orero informed her that he had received a phone call from the chief of Solian location informing him that a dead body had been found within his area and instructed her to go and collect the body. He said at around 13:00Hours together with her colleagues P.C Mark Bitinyu and P.C driver Lotenyali went to the scene which was a few meters from the gate of a saw mill and found a dead body was covered with a blanket and on uncovering they realized that the body belonged to a female. She said the body lay facing upwards and they learnt it belonged to the deceased herein Anita Jelagat aged about 28 years. She confirmed that the deceased's inner wear had been removed half way and it had some blood stains coming from her private parts; and mouth and nose she saw white foam. She said she did not see any other visible injury.



17. She said they took the body and rearrested the accused who worked as a watchman in the saw mill. She said while on the way, P.C Mark Bitinyu who was sitting at the back with the accused called her and informed her that the accused had confessed having raped the deceased but did not kill her.
18. She said on reaching police station PC Mark Bitinye explained to her what accused told him and she directed that he be taken to hospital for samples to be taken from him. She said she was not present when postmortem was done and she did not talk to accused. She said that the samples were to be taken to the Government chemist and the OCS informed her that the matter had been taken over by the DCI Kabarnet.
19. PW7 Doctor Philip Kamau attached at Eldama ravine sub-County Hospital performed postmortem on the body of the deceased Anita Chelagat on 13th January,2016 at Eldama Ravine Sub-County Hospital after being identified to him by PW1 Gideon Kipchumba Cheburet and Elijah. On examination of the body, he found that there were multiple lacerations on the body, on the face, 7 by 2 cm on the right cheek/mandible that extended to the upper neck, lacerations on the chest, two on the right and repeated on the whole body more on the arm right and left and the back. That on the legs, there was lacerations measurements and the total number of lacerations were 21. That there was bloody foam from the mouth extending to the right ear.
20. On internal examination, the doctor found whitish fluid from the stomach, whitish discharge from genitalia system otherwise normal. On the spinal system and head, there was no abnormality. The doctor formed opinion that the cause of death was homicide but the mechanism was not clear and was probably strangulation or smothering (applying force to cut away breathing). He produced the same as exhibit before court.
21. PW8 No. xxx73 Principal investigator working with IPOA as an investigator and crime intelligent detector testified that in the year 2016, he was working with DCI as the investigator and intelligent collector at Koibatek Police division and on 8th January, 2016 at around 1400Hours, he was in the office when the DCIO CIP Leonard Atunga informed him that he had received a report of murder at Solian Area within Koibatek Division inside a saw mill. He instructed him together with police to prepare to respond and conduct investigations and in his preparations, he realized that his colleagues from Eldama Ravine had proceeded to the scene with police officers and documented the scene and taken the body to Eldama Ravine mortuary for preservation.
22. He further testified that when he reported back to the station, they handed him several exhibits collected from the scene and from the deceased which included one blanket, innerwear, petticoat and skirt. He said he also learnt that his colleagues Cpl Githinji and Bitinyu had arrested a suspect Jonathan Kipkoech and he had been booked in custody at Eldama Ravine. He said on 13th January,2016, he visited the scene at Solian where he established that the incident occurred within a saw mill which was fenced all round with a lockable gate.
23. He testified that on the 11th January,2016, he went to Eldama Ravine court to obtain custodial orders to detain the suspect for 7 days and the orders were issued. He said that he recorded witness statements and he established that the suspect was a guard at the saw mill where the incident occurred and the saw mill was owned by Erick Baskwony. He established that on 8th January,2016, at around 1a.m, the deceased went to the sawmill and found the suspect and requested the suspect to allow her to spent night there and go home the following day.
24. He said he further established that the deceased was allowed in and after walking for a few meters (2-3metres), the deceased fell down since she was very drunk and it was reported that after she fell down, the suspect who was alone raped the deceased then went to his house to collect a blanket and



covered the deceased since the place was very cold. That the suspect continued working up to 6 a.m when he went to where the deceased lay and upon attempting to wake her up, he realized that the deceased was unresponsive. He raised alarm and other people went to the scene. They called the police who responded led by Corporal Cecilia Githinji.

25. He testified that together with his colleague, he attended autopsy of the body of the deceased Anita Chelagat on 13th January,2016 at Eldama Ravine Hospital performed by Doctor Kamau and that he extracted DNA samples which he handed over to him for onward transmission to the Government chemist for analysis and later compiled investigation file and recommended a charge of murder
26. Upon the closure of the prosecution case, by ruling delivered on 21st February,2024, this court found that the prosecution had established prima facie case to warrant accused be placed on his defence and on being called upon to defend himself under section 306(2) of the *Criminal Procedure Code*, the accused chose to remain silent and closed his case.

Accused's Submissions

27. The accused filed written submissions on the 20th May,2024 and identified the following issues: -
 - i. Whether the death was caused by unlawful act or omission.
 - ii. Whether the accused person caused the death of the deceased.
 - iii. Whether the evidence was sufficient.
 - iv. Whether the prosecution's evidence was marred by inconsistencies.
 - v. Whether the accused choice of keeping quiet should be construed to mean that he is guilty.
28. On whether the death was caused by an unlawful act or omission, the defence counsel Mr.Mwaita submit that PW7 testified that upon carrying out postmortem examination, he come up with unconvincing conclusion on the cause of death. That PW7 termed the cause of death as probably strangulation or smothering and such a documentary exhibit that is of a forensic nature and contains expert opinion should be devoid of any error, contradiction and should corroborate the evidence on record and prosecution failed to establish whether the death was caused by unlawful act or omission. That further from PW8's evidence, the deceased was drunk and PW5 confirmed that deceased was an habitual drunkard and submit that the deceased could have died of excessive drinking or any alcohol related complications.
29. The accused further submit that DNA samples were not examined nor presented in evidence hence, the whitish foam from the mouth as well as the blood noticed in her genitalia were not tested so as to ascertain whether the deceased had consumed poisonous substances or the nature and cause of the injuries in her genitalia; and submit that a reasonable doubt arise as to cause of death. Further that there was no eye witness in the murder of the deceased Anita Jelagat and the evidence that she fell down after entering the saw mill and slept outside the whole night gives many scenarios that could have arisen in that setting; and prosecution failed to prove that the deceased died due to an unlawful act or omission, which they have failed to prove.
30. The accused further submit that the Investigating Officer, alluded that, he charged the accused on the basis of circumstantial evidence but prosecution have failed to meet its threshold as set out by the Court of Appeal in the case of *Abanga Alias Onyango vs= R* (Cr. App.No. 32 of 1990).
31. And submit that the circumstances that comes out in this case are far short of the standards set above and submit that the accused was not the only one residing inside the sawmill compound and PW8



- confirmed there was another person called David who was not interrogated, called as a witness nor made a suspect. Further that there were two young men who were initially suspected, arrested and remanded in custody for at least one week but released by the police on unclear circumstances and there were other men who were chasing the deceased that night and upon noticing that she had taken refuge inside the sawmill, they attempted to force their way but the accused prevented them.
32. The accused further submit DNA samples being gastric fluid from the stomach and the vaginal discharge from the deceased and that of the accused were extracted at Koibatek Sub County Hospital by PW7 and forwarded to the Government Chemist by PW8 but the results were not presented in court and PW3 and PW4 exonerated the accused from this offence and they clearly stated they have a strong belief that the accused did not murder the deceased and should be released.
 33. Further that the deceased was a habitual drunkard, of loose morals and had no fixed abode. That the opinion of the doctor as to the cause of the death is opaque and the behavior or character exhibited by the accused is totally inconsistent with that of guilty mind for example he did not disappear from the scene until when the police arrived and did not fail to attend court from 22nd November, 2021 when he was released on a free bond of Kshs.200,000 with one surety to date.
 34. Further that there is no confession statement presented to this court to support the allegations of rape alluded by PW 6 and PW 8 and the accused is a cousin brother to the deceased and that was not her first time to seek shelter in the saw mill and it is the accused person who covered her with his blanket because of the cold conditions of that night.
 35. The accused submit that the circumstances set out above negates the investigations officer's theory that, he had strong circumstantial evidence to warrant him to be charged with the offence of murder; that the circumstances alluded by the investigating officer are marred with many inconsistencies as stated above and relied on the case of Sawe vs Republic (2003) eKLR which set out the parameters on how to justify the circumstantial evidence.
 36. That on several occasions, the prosecution sought for adjournments and summons for the Government Chemist to come and produce the report and in the end, they did not bring that witness to court hence the results of the tests were never presented. It is their submission that, the results were not supporting prosecution's case hence the reason they were not produced and urged this court to make the same inference and relied on the case of Bukenya v. Uganda (1972) 1EA 549 CAK and In Republic vs Cheruiyot Serem & Another (2014) eKLR.
 37. The accused further submit that the prosecution failed to prove that the accused person had malice aforethought to commit the murder. That PW3 and PW4 who are deceased's family members do not believe the accused killed the deceased and PW5 the area chief said the deceased used to go to accused's house when she had nowhere to go and talked well of accused which raise doubt as to whether the accused had malice to kill the deceased. Further PW8 the investigating officer established that the deceased is the one who sought accommodation from the accused and he readily and willingly welcomed her but due to the drunk state of the deceased, she fell down shortly after entering the sawmill gate and the accused covered her with a blanket to shield her from the cold of the night.
 38. And accused continued working up to 6:00 a.m when he checked on the deceased and tried to wake her up but found she was unresponsive and raised alarm; and submit that accused's actions do not indicate any element of malice; that he is the one who raised alarm and did not leave the scene; that he would have run away if he had committed the offence.
 39. Counsel further submit that there is no evidence on record that shows that the accused had prior intention (aforethought) to inflict harm on the deceased and there existed no reasons whatsoever



that could have made the accused to cause harm to the deceased; that there is no proof of malice aforethought which is a core ingredient in the charge of murder.

40. Counsel further submit that prosecution's evidence was marred by inconsistencies. That PW6 who was a police officer stated that she observed blood oozing from the deceased's vagina which was inconsistent with the doctor's evidence that there was no blood coming out of her vagina but just a discharge while PW3 stated that blood was oozing from the thigh an indication of being pierced by a sharp object. Further that PW6 said she did not see any other injuries on the deceased except for the foam from her mouth which is also inconsistent with PW1's evidence who testified that he saw multiple injuries on the deceased including a small cut on the head.
41. On the other hand, PW5 who was the chief was of the view that the deceased died a natural death and there was no need of involving the police and PW6 the Investigating Officer confirmed that the OCS had informed them that a natural death report had been made at the station but PW8 concluded that it was a case of homicide.
42. The defence counsel submit that the accused's choice not adduce evidence in his defence should not be construed to mean he is guilty as keeping quiet is one of the rights of the accused under section 211 of the *Criminal procedure Code*. He relied on the case of *Okeno vs Republic* 1972 EA 32 where the court relied on the case of *Nasir Hussein v. Republic* (2016) eKLR and submit that the accused's election to keep quiet does not amount to the admission of the charges and it is upon the prosecution to prove the accused's guilty.

Analysis and Determination

43. The accused person is charged with the offence of murder. Section 203 defines the offence of murder and ingredients for the offence are
 - i. proof of death,
 - ii. proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and,
 - iii. that the unlawful killing was with malice aforethought.
44. The above ingredients were listed for the offence of murder in the case of *Anthony Ndegwa Ngari vs Republic* [2014] eKLR. Similarly, in the case of *Republic versus Andrew Omwenga* (2009) eKLR the court stated as follows: -

“It is clear from this definition that for an Accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission - there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They 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 Accused had the malice aforethought”.

45. Further, in the case of *Joseph Kimani Njau v Republic* [2014] eKLR the Court of Appeal stated as follows: -

“In all criminal trials, both the *actus reus* and the *mens rea* are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the *actus reus* and *mens rea* have



been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific *mens rea* required for murder had been proved by the prosecution.

(a) Proof of Death of the Deceased

46. From the evidence adduced, there is no dispute that the deceased herein Anita Chelagat died on 8th January, 2016. Dr. Philip Kamau performed postmortem on the 13th January, 2016 and confirmed that the cause of death was homicide but the mechanism was not clear, probably strangulation or smothering. She produced a copy of the Postmortem report signed on the 13th January, 2016 as exhibit 1.

(b) Whether the Accused Unlawfully Caused the Death of the Deceased

47. The death of the deceased was unlawful however there is no eye witness to the killing of the deceased. The accused was arrested as a result of circumstantial evidence. In the case of *Abamad Abolfathi Mobammed and Another v Republic* [2018] eKLR, the Court of Appeal had this to say concerning 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 is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

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

48. In the above case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated as follows: -

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. 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.”

49. From the evidence adduced by the prosecution, it is clear that the accused was the last person to be with the deceased prior to her death. PW1, PW 2, PW 3 and PW 4 all visited the scene in the morning of the incident and it was their testimony that the body of the deceased was lying inside the sawmill



a few meters from the saw mill's gate where accused was working as night watchman that night. The witnesses said they found the accused alone in the compound of the sawmill. It is not disputed that the accused was working as a watchman in the saw mill that night. There is no mention of any other watchman working with the accused on the material night.

50. PW8 the investigating officer gathered evidence that on 8th January, 2016 at around 1p.m, the deceased went to the saw mill and requested the accused to allow her spent the night there. From his evidence, the deceased was allowed into the saw mill through the gate by the deceased but after walking for a short distance, the deceased who appeared very drunk fell down and the accused took advantage and raped her after which he went to the house, took a blanket and covered the deceased since it was cold. The accused chose not to give his side of the story.
51. From the above evidence, it is clear that it was the accused who was last seen with the deceased before she was found dead in the morning. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death is responsible for his death and the accused is therefore expected to provide any explanation as to what happened. Having been placed at the scene of the incident as the person who was last seen with the deceased before she died, the accused herein had a duty of explaining the last moments of the deceased.
52. In the Nigerian case of *Stephen Haruna v The Attorney-General of The Federation* (2010) 1 iLAW/CA/A/86/C/2009 the court opined thus:
- “The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus, where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”
53. Similarly, in the Indian case of *Ramreddy Rajeshkhanna Reddy & Another v State of Andhra Pradesh*, JT 2006 (4) SC 16 the court held that:
- “Even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small, that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”
54. In view of the above, the accused herein was required to offer an explanation on how the deceased met her death. Sections 111(1) and 119 of the *Evidence Act* provides as follows:
- “ 111 (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
- Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:



Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”
55. From the doctor’s evidence, the deceased had injuries and she died from strangling or smothering. Given the cause of death arrived by the doctor, the deceased must have sustained the injuries while at the scene where she was found death. The accused did not deny that he was the night watchman that day. The witnesses who say are related to accused and also related to the deceased say the accused was not involved in the offence having been a cousin to the deceased. The say other people are at large. However, no evidence was adduced which point at other people committing the offence. But even if other persons participated in the killing of the deceased, there is no doubt in my mind that the accused herein played a role in the death of the deceased. From the foregoing find that there is strong circumstantial evidence linking accused to the death of the deceased. I am satisfied that the prosecution proved beyond reasonable doubt that the accused participated in an act that unlawfully caused the death of the deceased.

(c) Whether Malice Aforethought was Proved Against the Accused

56. Under 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 actually killed or not;
 - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - (c) an intent to commit a felony;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

57. The Court of Appeal in the case of [Joseph Kimani Njau v R](#) (2014) eKLR, the Court of Appeal 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 serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention 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 or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

58. In the instant case, PW7 who carried out the postmortem on the deceased’s body testified that his examination revealed that the cause of death was probably strangulation or smothering. PW7 also noted that there were multiple lacerations on the body and on the face on the right cheek/ mandible that extended to the upper neck, lacerations on the chest and on the legs. From the report, the number of lacerations were 21. In my view, the nature of injuries clearly show intention to kill. The death could not have been accidental. The accused must have known that strangulation or smothering could result in death of the deceased. From the foregoing, the accused knew the injuries he was inflicting on the deceased would lead to death which make me conclude that he had the intention of killing the deceased and actualized by inflicting serious injuries on her. I therefore find that the 3rd ingredient of the offence of murder being malice aforethought was proved beyond reasonable doubt.

59. Final Orders: -

- 1. Accused is hereby found guilty of the offence of murder contrary to section 203 as read with 204 and convict him accordingly.
- 2. Right of appeal 14 days.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT ELDAMA RAVINE HIGH COURT (SUB-REGISTRY) THIS 18TH DAY OF JULY 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

CA Karanja/Christopher.

Ms. Omari for state.

Mr. Mwaita counsel for the Accused.

Accused Present.

