



**Republic v Ngeru & 2 others (Criminal Case 41 of 2016)
[2023] KEHC 18770 (KLR) (14 June 2023) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 41 OF 2016
HK CHEMITEI, J
JUNE 14, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

PAUL WAWERU NGERU 1ST ACCUSED

THOMAS ONDIEKI MOMANYI 2ND ACCUSED

JOYCE WANGARI GATHECHA 3RD ACCUSED

JUDGMENT

1. The accused persons herein were charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on 29th June, 2016 at Likia Location in Njoro Sub-County within Nakuru County jointly murdered Dickson Githinji Ngeru.
2. The accused persons pleaded ‘Not guilty’ and the case proceeded to hearing. The prosecution called a total of 9 witnesses.
3. PW1 was Beatrice Muthoni Ngeru a resident of Njoro. She testified that the 1st accused was her brother, the 3rd accused his wife and the 2nd accused was a great friend of the 1st accused. That on 30th June 2016 she was informed by her niece PW4 that the deceased who was also her brother was missing. According to her testimony, the deceased lived in the same compound with the 1st accused in their home in Likia. That as she was preparing to go there, PW4 called again and told her that the 1st accused was in their home in Likia and had said that the deceased had gone to do casual work in Masai land so she did not bother to go home.
4. PW1 testified further that on 10th June 2016 she went to their home in Likia where she found a crowd who they told her to go and talk to 1st accused. She searched all over but she did not see him. She testified



that the 1st accused had also vanished but the 3rd accused was present throughout and she decided to go and report to the police so she went into deceased's house to look for his ID card.

5. PW1 testified on that she got a jembe, dug up the soil and in there she found some documents and a blanket which she had given to the deceased and at that moment she got shocked and lost consciousness and when she regained consciousness she found police in their compound and the deceased's body was found hidden under the bed of the 1st accused. The said body was covered with soil, blankets, and stones and the police recovered and took it to the mortuary. That the next time she saw the 1st accused he was in the cells but the 2nd and 3rd accused person were present throughout until the deceased body was recovered.
6. On cross examination by the 1st accused's advocate, she stated that their home compound had three houses one belonging to their mother, the other two belonged to the 1st accused and the deceased respectively. She confirmed that when she arrived home she never saw the 1st accused but she was told that he had been seen earlier and she only saw him at the cells. She stated that the 1st accused house was not locked and that when their mother died he had started selling the household items but the deceased had questioned him so the two had quarrelled before. She stated further that the 1st had accused had named the 2nd and 3rd accused persons and she also believed that they were also involved in the deceased killing even though she did not witness the incident.
7. On further cross examination by the 2nd and 3rd accused advocate, she confirmed that the 3rd accused was the 1st accused's wife and they quarrelled frequently but she was not aware at the time they had separated. That she never saw the 2nd and 3rd accused do anything but it was the 1st accused who had named them and that she had not recorded any statement. She added that the 2nd accused who was also the neighbour of the 1st deceased assisted in searching for the deceased's body.
8. Upon re-examination, she testified that at the material time the 1st and 2nd accused were living as husband and wife and the 2nd accused was a very close friend and neighbour to the 1st accused.
9. PW2 was Francis Njeru a teacher and a resident of Molo. He testified that the 1st accused was his friend and he also knew the 3rd accused who was the 1st accused's wife. He testified that on 2nd July 2016, he received news from his niece PW4 that the deceased who was also his brother was missing. That he tried reaching the 1st accused on phone but he could not and later on 8th July 2016 the man who it was alleged had called deceased to do casual work told PW4 that he had not gone anywhere with the deceased. He testified that the 1st accused said the deceased had gone to work in Kisiriri.
10. PW2 went on to testify that on 10th July 2016, he was informed that the body of the deceased was found buried inside the house of the 1st accused. He rushed there and found the police and the body of deceased partly exposed in a shallow grave inside the house of the 1st accused. The police exhumed the body in his presence and took it to the mortuary but at the scene he did not see the 1st, 2nd or 3rd accused. He testified that on 12th July 2016 he went to witness the post-mortem and as far as he knew the 1st accused and deceased had a good relationship and he was not aware of any hostility between them.
11. On cross examination by the advocate for the 1st and 2nd accused persons, he stated that Kisiriri where the deceased had allegedly gone to work was 30 kilometers away. He stated further that he could not tell when the deceased's body was buried in the 1st accused house but the same had deep cuts on the head, one tooth had fallen out and the eyes were pierced. He went on to state that he had recorded his statement with the police and the 1st accused and 3rd accused were not living together but he did not know the 2nd accused.



12. Upon re-examination, he testified that he arrived at their home at about 7.00pm and found a crowd but he did not know all the people who were there. Also, that the 1st and 3rd accused had an on and off relationship so he could not tell if they were living together at the time.
13. PW3 was Dr. Titus Ngulungu a pathologist and consultant based at PGH Nakuru. He testified that on 14th July 2016 he conducted an autopsy on the body of the deceased at Egerton University funeral home at 11.00 am and the body was identified by PW2 and one Nahashon Ngeru. He testified that the skin on the deceased body was peeling, blood vessels were prominent, there was melting fat and death had occurred 10-20 days earlier.
14. He testified that the deceased body had a few injuries namely; lacerations and a bruise on the head, bruise on the right side of the head, laceration on back of the head 45x 20 mm, fracture on the forehead 60x40 mm, laceration associated with commuted fracture on front of head and incisional wound on left side of the neck 50x 20 mm.
15. He said that upon conducting an internal examination there was fracture on left side of the head-skull defect 110x 80 mm on the forehead 50mm across and the brain was liquid mixed with blood. That after the said examination he opined that the cause of death was severe head injury attended by skull fracture and brain laceration due to multiple blunt force trauma to the head in keeping with homicide. He produced the postmortem report prepared by him and the same was marked as Pexb 1.
16. PW4 was Beatrice Muthoni Wanjiru. She testified that both the deceased and the 1st accused were her uncles and that all the accused persons were well known to her. That on 30th June 2016 her son PW5 informed her that deceased had not come home but she did not bother to find out where he was as he was an adult. Further, that on 1st July 2016 she met 1st accused and she asked him if he had seen deceased but he told her that he was just around. Then later 1st accused told her that he would go together with the 2nd accused to the police station to report that the deceased was missing and they did.
17. PW4 testified further that on 3rd July 2016, together with her two friends they went home to search for the deceased and she found PW1 and PW2 and together they began searching for the deceased in the shamba but they did not find him. At around 11.00 am, they went to the house of accused 1 but it was locked with a padlock so they broke it and inside the said house they found soil. They then moved the bed aside and one Karanja who had a jembe dug the areas and they saw a sack then Karanja started shouting 'ui Githinji ako hapa' meaning Githinji is here.
18. PW5 was Francis Karimeri a minor and the court conducted a voire dire. He testified that both the deceased and 1st accused were his grandfathers, accused 3 was the wife to accused 1 and accused 2 was a friend of accused 1. That on 28th July 2016 at 6.00pm he went home as he used to live with the deceased but he found no one so he went to his mother PW4's house and informed her that the deceased never came home that night. He testified that he used to sleep in the same room with the deceased and the 1st accused lived in a separate compound not with his wife the 3rd accused but she used to come and visit him.
19. PW5 testified further that after 2 weeks the body of the deceased was recovered under the bed of the 1st accused. The police came and took the body to the mortuary. He testified on that the deceased never used to go to the house of Accused 1 but he was aware that one day accused 1 and the deceased fought and he did not know the reason.
20. On cross examination by advocate for the 1st accused, he confirmed that the deceased body was found in the accused house although he did not see the body.



21. On cross examination by the advocate for the 2nd and 3rd accused persons, he stated that at the scene he found a crowd and the 2nd and 3rd accused were also present. He confirmed that the 3rd accused was the wife of the 1st accused, the 2nd accused his neighbor and both of them assisted in the search of the deceased.
22. PW4 (PW6) was recalled back to the stand and she reiterated her previous testimony.
23. On cross examination by the advocate for the 1st accused, she confirmed that the deceased body was found inside the 1st accused's house but she did not see the said body. She stated that the deceased and the 1st the accused used to live in the same compound but each of them had their own room adjacent to each other and PW5 used to sleep in the same room with the deceased.
25. On cross examination by the advocate for the 2nd and 3rd accused persons, she stated that the 1st and 3rd accused were man and wife. That they had children who lived with the 1st accused and on the material day the children were at the centre. She stated further that the 3rd accused had quarreled with the 1st accused and she left and went to live with the children. She added that she did not see anyone kill the deceased.
26. PW7 was Geoffrey Ndungu Kareitu the Chief Likia Location, Mau Narok Division Njoro Sub-County. He testified that on 10th July 2016, he was called by one Margret Wanjiku his village elder at Likia trading Centre village who told him that the deceased had disappeared and they suspected that he had been buried in the 1st accused's house where a grave had been dug. He testified that he called the OCS Likia who sent officers from Mauche who exhumed the grave and found the body of the deceased who was alleged to have disappeared. That the body was identified by the village elder and it had injuries of pangas – deep cuts on the head and the police took it to the mortuary.
27. On cross examination by the advocate for the 1st accused, he stated that no report had been made that day and people suspected the 1st accused as he was not in good terms with the deceased.
28. On cross examination by the advocate for the 2nd and 3rd accused, he stated that the deceased's body was found in the 1st accused's house. He stated further that he knew the 2nd and 3rd accused very well and that he saw the 1st accused at the scene on that day, although there were many people at the scene.
29. PW8 was no.88636 Michael Kuria. He testified that on 10th July 2016, he together with PC Kingoo went to Likia Trading Centre and as they headed to butchery he heard a scream from another direction, and he rushed to the scene and he saw a lady called Beatrice crying being brought to where he was and being held by people. He testified that upon inquiring, he was told that one of her relatives had been killed by one of the relatives and buried in the house but he was not given his name.
30. He went to the scene and saw on the ground a human bone like that one of a knee protruding from the ground. He called the in charge Inspector Nyagaya and after securing the scene, the OCPD arrived and called the scene of crime officer who took over. He said that he did not know the owner of the house or who committed the offence.
31. PW9 was No.67817 PC Sanga Tunje, carried out he investigations. He testified that on 10th July 2016 at 4p.m, he was within the office when he received call from Inspector Nyakenya, Likia Police Station. He informed him that a body had been discovered in a shallow grave at Likia farm. They went to the scene and entered a room where the body was. He said that the deceased had been reported missing by the 1st and the 2nd accused on 2nd July 2016. Further, that PW1 went to the 1st accused house to get a photo and she found loose soil under the bed of the suspect. She saw the body of the deceased and she



- screamed which alerted the public and the police. They thereafter removed the body which had brown trouser, black jacket and the skin was peeling and took it to the mortuary.
32. PW9 went on to testify that he conducted his investigation and interrogated some members. That he was told he was seen on 29th June 2016 within Likia centre. He also establish that PW5 on 28th June 2016 while coming from school, met the 1st and 2nd accused at the gate but they left immediately. Additionally, he established that the deceased and 1st accused were not in good terms. He testified that after the body was discovered the 1st accused surrendered to Mauche Police Post where he was booked and upon interrogating him he mentioned the 2nd accused and 3rd accused persons whom they committed the act together. The two were also arrested after the said interrogation.
 33. He added that he witnessed the post mortem by PW3. No weapon was recovered at the scene
 34. On cross examination, he stated that PW5 did not find the deceased on 28th June 2016 when he came from school and they were staying in the same room but the deceased's body was found on 10th June 2016. He stated that the deceased was buried in the house of 1st accused but he did not establish the time he was murdered. That the 1st accused knew he had killed and made a report of his disappearance but he later disappeared when he was suspected. He confirmed that later the 1st accused surrendered himself to Mauche Police Post and told the police he was involved in the murder.
 35. On cross examination by the advocate for the 2nd and 3rd accused, he confirmed that there was no confession by the 1st accused and that both the 2nd and 3rd accused did not live in the same compound.
 36. Upon re-examination, he testified that the statement/confession was not recorded as the 1st accused had given a plain statement therefore confession was not necessary.
 37. When put to their defence the accused persons gave sworn testimony.
 38. The 1st accused testified as DW1. He testified that on 10th July 2016 he was in Tipis Trading Centre and at 6.30 pm he received a call from one Paul Wanguru Ngeru who told him that the deceased' body had been found inside his house. That members of public were looking for him to harm him so he told him not to alight at Likia but go to Mauche Centre. He testified that at Likia he saw many people so he went to Mauche where he met Paul who bought him supper and later they together went to take alcohol at Zone bar.
 39. He testified further that at 10 pm they went to Mauche police post and, he was already drunk. Paul then told the police what had happened and requested them to lock him in the cells. The police interrogated him and he explained to them that he saw the deceased on 29th June 2016 and they ate chicken together with four others including Karanja. That he was later escorted to the stage on his way to Narok and he left the three of them with some lady but he did not know her name.
 40. The 1st accused went on to testify that on 30th June 2016 at 5 pm he was called by Karanja who told him that the deceased was missing and on 2nd July 2016 they reported to the police together with the 2nd accused. He said that they continued with the search and on 8th July 2016, Paul called him and said the deceased had been found at Kisiriri Narok and that's where he had gone that day. Further, that the deceased was found in the 1st accused's previous house where he used to stay alone and was using the same as a store. The 1st accused testified that he knew the 2nd accused who was his workmate and the 3rd accused was his wife whom he had been living with all along in a rented house.
 41. He testified that he met Paul Wangumu at Njoro police station and he recorded his statement because the investigating officer wanted another statement and he had refused to sign a statement he had not written. Further, that on 16th July 2016 he was summoned to the DCI office in Njoro where he met



- the same people Paul and Karanja and he was told the 2nd and 3rd accused persons were mentioned. He said that Paul was friend to the deceased and he knew most of their family issues.
42. On cross examination, he stated that they lived together with the deceased in a two roomed house with different doors and there was no bed in his room but there was a bed in the room belonging to the deceased. That it was a mud house as well as the floor and he had the key to his house and the deceased also had his key as there was no common door.
 43. The 1st accused stated that he went to Narok on 29th at 1 pm, he got to know of the disappearance on 30th evening.
 44. The 1st accused stated further that he ate lunch with deceased on 29th around noon and he was within that area on 27th and 28th but the body of the deceased was found on 20th July. He said that he came back on 1st July in the evening and his house was closed the way he left it. He added that he had a good relationship with the deceased and he did not know if he had difference with anyone else but the two of them had no issue about their mother' properties as she had already divided them.
 45. The 2nd accused testified as DW2 and he said that he had known the deceased for many years and he was his friend but he last saw him on 27th June 2016 at Likia Trading Center. That they had greeted each other, parted ways and he never saw him alive thereafter. Further, that when he met the DW1 at trading center he told him the deceased had gotten lost for sometime and he asked him if he had asked the relatives or reported at the police station. That he thereafter accompanied him to Likia police post.
 46. DW2 testified further that the deceased was found on Sunday 10th July 2016 by a niece in the house of DW1 and he went to the scene when he heard the deceased had been found. That it was afternoon hours and the police came and carried the body.
 47. Further, the police called him to go and assist in the investigations but he also later met 1st accused already at the cells. He testified that he did not know what happened to the deceased and he had no relationship with the 1st accused except as masons and he also had no relationship with 3rd accused.
 48. On cross examination, he stated that he had known the 1st accused for sometime as they were both masons and the deceased was a causal whom he could engage when there some work. He confirmed that the body was inside DW1's house, but he did know whether he slept in that house and one could see a disturbed ground. He stated that DW1 on 29th had told them that the deceased had been seen at Kisiriri. He added that the 1st accused stayed with the 3rd accused but had separated and he did not assist them but DW1 was the one who committed the offence.
 49. Upon re-examination, he testified that they were more 10 people searching for the deceased and they searched him for many days.
 50. The 3rd accused testified as DW3. She testified that she knew the deceased as they schooled together. That they stayed in a rented house in Likia centre together for 7 months then they separated. Further, that she was told by DW1's niece to go and help search for the deceased as he was lost. They went and searched in the river, bushes and the borehole in vain and he was later found inside buried inside DW1's house. She testified that she did not live in that house and when she went to work on Monday, the police came and arrested her ostensibly to help with the investigation and she did not know of the deceased death.
 51. On cross examination, she confirmed that they separated for 4 months not three weeks with the 1st accused. Also, that his body was found inside DW1's house and that they had not stayed in that house but in his uncle's house. She stated that they also stayed in her house. She stated further that she stayed



well with the deceased and did not know if he went to Narok but she was told to help in investigating as she was married to DW1.

52. The court directed the parties to file written submissions which they have complied

Prosecution Written Submissions

53. The prosecution submitted that the 1st accused had informed them that he did not live in the room where the deceased was buried but only visited it daily. That however, the prosecution witnesses confirmed that he slept in the said house and the 1st accused never availed any witness to controvert or assist in his evidence that he never slept in the said house. Further, that the 1st accused never produced in court the defective padlock which he used to lock his room with.
54. The learned state counsel submitted further that nobody could confirm that the 1st accused actually travelled on the 29th after having lunch with the deceased. That the 1st accused ought to have produced an alibi evidence for purposes of confirming that evidence. Further, that the 1st accused denied ever having a difference with the deceased but the witnesses who came to court said that they witnessed altercations between the accused and the deceased. Additionally, that the 1st accused was conspicuously absent when the deceased disappeared and the deceased only enemy was him as no other person was ever cited.
55. The learned state counsel went on submit that circumstantially, the 1st accused movements and the place where the deceased body was found placed him as the probable person who committed the offence. That he never denied that he visited the scene daily and he was the only one who accessed the room where the deceased was buried. Further, that the traveling was a diversion so that he would not be roped into a murder saga but he was not clever enough to bury the deceased in the room.
56. It was the state counsel's submission that the 2nd and 3rd accused persons were roped in by having a close relationship with the 1st accused. That the 1st accused had only mentioned that the 2nd and 3rd accused had assisted him to dispose of the body of the deceased. However, the investigating officer did not avail evidence linking the two with the murder or being an accessory to the murder. He therefore conceded that the 2nd 3rd accused persons were victims of circumstances.
57. In conclusion, the learned state counsel submitted that the prosecution had no doubt that the 1st accused carried the heinous killing of the deceased.

1st Accused Person Written Submissions

58. In the said submissions, it was submitted on behalf of the 1st accused person that for one to be found guilty of the offence of murder, the prosecution pursuant to section 203 of the Penal Code must prove the accused had malice aforethought and he inflicted the injuries that resulted in the death of the deceased.
59. The learned counsel for the accused person submitted that malice aforethought was not proved against the 1st accused to link him to the death of the deceased. He placed reliance on the case of *Roba Galama Wario v The Republic* [2015] eKLR where the court held that for a conviction of murder to be sustained it was imperative to prove that the death of the deceased was caused by the appellant and that he had the required malice aforethought. The court's attention was also drawn to the case of *Nzuki v Republic* [1993] KLR 171 on the definition of malice aforethought and the case of *Anthony Ndegwa Nari v Republic* [2014] eKLR on the elements of the offence of murder.



60. In conclusion, the learned counsel for the 1st accused submitted that no witness testified that the 1st accused murdered the deceased because there was no bad blood between them. That it was not the 1st accused who committed the offence and no evidence had been tendered in court to prove the same. He urged the court to set him free.

2nd and 3rd Accused Persons Written Submissions

61. The learned counsel for the 2nd and 3rd accused persons submitted that the evidence adduced by the prosecution against the said accused persons was purely circumstantial and hearsay evidence. It was his submission that circumstantial evidence could be a basis of conviction only if there was no other existing circumstances weakening the chain of circumstances relied on. That no single witness saw the 2nd or 3rd accused person attack, maim or stab the victim and both of them were present during the search of the deceased. Further, that no murder weapon was produced and no single witness linked both the 2nd and 3rd accused to the deceased's death.

62. In conclusion, the learned counsel for the 2nd and 3rd accused person submitted that the prosecution case was very weak and could not be relied on to convict the said accused person. He urged the court to acquit them forthwith.

63. The court's attention was drawn to the several case including; Elizabeth Waithiegeni Gatimu v Republic [2015] eKLR, Sawe v Republic [2003] KLR 364 and Abanga alias Onyango v Republic Cr. A No. 32 of 1990 (Ur).

Analysis and Determination

64. I have looked at the evidence on record and duly considered the submissions before this court. This court has a duty to weigh and evaluate the evidence as placed before it by the prosecution to establish whether the offence charged against the accused persons has been proved beyond reasonable doubt. The burden of proof to tender evidence to disapprove the innocence of an accused person(s) is always cast upon the prosecution.

65. This is well illustrated under Section 107 (1) of the [Evidence Act](#) Cap 80 of the Laws of Kenya which provides as follows:

- “(1) Whoever desires any Court to give judgment as to any legal right or liability on the existence of facts which he asserts must prove those facts exists.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

66. In addition, Lord Denning dealt with the onus of proof in criminal cases in the case of Miller v Minister of Pensions (1947) 2ALL ER 372 where he stated:

“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 community if it admitted fanciful possibilities to deplete the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course it is possible but not in the least probable; the case is proved beyond reasonable doubt but nothing short of that will suffice.”



67. It is also trite law that the accused person(s) is presumed innocent until the contrary is proved as clearly provided for under Article 50 (2) (a) of *the Constitution* of Kenya, 2010. Therefore, the prosecution bears the burden to prove that the offence was committed and the culprit is the accused person in the dock. The evidence by the prosecution must meet the threshold of beyond reasonable doubt and nothing less like fanciful and suspicious possibilities.
68. In the instant suit, there are three accused persons and having looked at the evidence adduced before this court I find that the prosecution failed to prove its case against the 2nd and 3rd accused person. The prosecution in its submissions also admitted that the two were victims of circumstances. There was no direct or indirect evidence to link the two to the offence. Neither was there any circumstantial evidence as clearly submitted by their counsel.
69. The only link which the investigating officer suggested was an alleged confession by the 1st accused which in this case was not reduced into writing as is required in law.
70. In the premises this court does not find any sufficient evidence to convict the 2nd and the third accused and are hereby set free unless lawfully held.
71. In addressing the 1st accused's case, it is not in dispute that he has been charged with the offence of murder contrary to section 203 of the Penal Code. The said section provides as follows:
- “ Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”
72. This definition was well captured in the case of Republic v Andrew Omwenga [2009] eKLR where the Court stated:
- “ It is clear from this definition that for an accused person 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 that 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.”
73. The first ingredient of death of the deceased and the cause of death was proved by the post-mortem report produced in court by PW3 as Pexh1 and it was his testimony that the cause of death was severe head injury attended by skull fracture and brain laceration due to multiple blunt force trauma to the head in keeping with homicide.
74. On the second ingredient, where the prosecution is required to prove beyond reasonable doubt that the accused committed the unlawful act which caused the death of the deceased the prosecution in proving the same relied on the testimony of PW1, PW2, PW4, PW5, PW6, PW7, PW8 and PW9 who testified that the deceased was found buried inside the 1st accused's room or house. There was no evidence that the 1st accused did not stay in that house or in this case there was another person he lived with in the said house.
75. Having analyzing the evidence adduced by the said prosecution witness, I note that none of them saw the deceased being attacked by the accused and the same is wholly circumstantial and premised



- on allegations that the 1st accused had disappeared when people were searching for the body of the deceased.
76. It appears from the evidence of pw1 and pw5 that there was bad blood between the 1st accused and the deceased which led into some altercation at some point. Pw9 the investigating officer found so as well.
77. In *Abanga alias Onyango v R* (supra), as relied on by the counsel for the 2nd and 3rd accused persons, the Court of Appeal court set out the test that would be necessary in a case based on circumstantial evidence 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 Accused; (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. Further, in the cited case of *Rex v Kipkering Arap Koske & Another* [1949] EALR it was held as follows
- “..... In order to justify on circumstantial evidence the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”.
79. In applying the principle established in the above cited cases on circumstantial evidence to the case at hand the accused never denied living with the deceased in one house but in different rooms and that the deceased body was found buried in his room. The 1st accused in his defence testified that he had left for Narok on the material day after having lunch with the deceased and two other persons. He also testified that he had met two of his friends when he returned from Narok but he never called any of them to testify or present any alibi evidence to show that he was actually in Narok when the incidence occurred.
80. Further, the 1st accused locked his room and no other person was linked to having had access to his room except him and he was the only person who seemed to know the whereabouts of the deceased as he told PW4 that the deceased had gone to Kisiriri to work. Additionally, PW1 testified that when their mother died the 1st accused had stated selling the household items but the deceased had questioned him so the two had quarrelled before.
81. I therefore from the above evidence conclude that the prosecution has circumstantially established its case against the 1st accused, namely that he was involved in the gruesome death of the deceased who was his brother. Although nobody witnessed the incident one cannot resist to conclude that the accused may not have done it alone but was with other accomplices.
82. Lastly on the third ingredient, the offence of murder is complete when, “malice aforethought” is established if, pursuant to section 206 of the Penal Code evidence proves 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.”

83. In the instant case, the evidence adduced by PW3 the pathologist described in detail the severe injuries sustained by the deceased. The severity of the attack by the accused on the deceased was quite clear from the post-mortem report produced in court as Pexh1. PW1 testified that when their mother died the 1st accused had stated selling the household items but the deceased had questioned him so the two had quarrelled before. PW5 testified that he was aware that one day 1st accused and the deceased fought but he did not know why they fought. PW9 who was the investigating officer in this matter testified that upon conducting investigations, he established that the deceased and 1st accused were not in good terms.
84. In view of the foregoing, I find that the 1st accused in launching so vicious an assault had the clear intention to kill or cause grievous harm to the deceased. Men’s rea was thus proved.
85. I therefore from the above evidence conclude that the prosecution has circumstantially established its case against the 1st accused, namely that he was involved in the gruesome death of the deceased who was his brother. Although nobody witnessed the incident one cannot resist to conclude that the accused may not have done it alone but was with other accomplices.

Conclusion

86. Judgement is therefore entered against the 1st accused in line with Section 203 of the Penal code as read with Section 322 of the criminal procedure code.
87. The 2nd and 3rd accused are hereby set free under the provisions of Section 215 of the Criminal Procedure code unless lawfully held.
88. The sureties are hereby discharged.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 14TH DAY OF JUNE 2023.

H. K. CHEMITEI

JUDGE

