



**Republic v Nyabuto & 2 others (Criminal Case 29 of 2019)
[2023] KEHC 23918 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE 29 OF 2019
REA OUGO, J
SEPTEMBER 21, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

EVANS MARUBE NYABUTO 1ST ACCUSED

GILBERT MUSA NYABUTO 2ND ACCUSED

ABEL ORENGE OMBASO 3RD ACCUSED

JUDGMENT

1. Evans Marube Nyabuto (1st Accused), Gilbert Musa Nyabuto (2nd Accused) and Abel Orenge Ombaso (3rd Accused) are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The accused persons jointly face two counts of Murder:

Count No.1: Murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence are that; On the 10th July 2019 at Keberesi village in Kenya sub-county within Kisii county the 1st, 2nd and 3rd Accused persons jointly murdered Diana Kerubo Atuti.

Count No. 2: Murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence are that; on the 10th July 2019 at Keberesi village at Kenya sub-county within Kisii County the 1st, 2nd and 3rd Accused persons jointly murdered Stephanie Kerubo.

2. The accused persons pleaded not guilty to the above charges and the prosecution called ten (10) witnesses to prove their case.



Prosecution Case

3. Amazo Amuse Kerosi (Pw1) was the uncle of Diana Kerubo Atuti and Stephanie Kerubo (the girls) and was staying with them together with his wife (Pw2) at Kenyeny. On the 10th July 2019, he left the 2 girls at home after having lunch together and returned to work. He chose to go home early in the afternoon as it was about to rain. On reaching his gate he hooted and raced his motorbike to signal the girls that he was home so that they could open the gate for him. He called out the names of his 2 nieces but there was no response. He waited for some time and then climbed over the gate and entered the compound. He found the padlock of the main door hanging on the grill door. He went round and found Diana down near the water tank. Diana was lying on her back, her school dress (Pext. 1) was lifted up to her chest and her pants (Pext. 2) were down to her legs. Her tongue was out, she had drops of blood in her mouth and her eyes. She was dead. He also found Stephanie in the kitchen area. She was lying on her face with her head slightly turned. She was still in her uniform (Pext. 3). She also had a pink short (Pext. 4). She was also dead. He went out to get help from the neighbors. He tried to get his wife but he did not get her, thereafter he went to the police and reported. On returning with the police, they entered the house and found their bedroom thoroughly searched, things were scattered all over. They took the 2 bodies to Hema Hospital. His wife later told him that she had kept about Kshs. 30,000/- in the house. The post-mortem that was done revealed that the 2 girls had been strangled. A bra and belt were used to strangle Stephanie and Diana was tied with a string of her uniform. He knows the 1st accused Marube as his wife would send the 1st accused to collect items.
4. Gladys Ondieki Nyangera (Pw2) testified that she stays at Kenyeny. She knows the 1st accused. He is a resident of their village. On the material day, she saw the 1st accused at the market at 5.00 pm. She does not know the 2nd and 3rd accused persons. Diana and Stephanie were staying with them. On 10.7.2019 she left them home after they had lunch at 2.15 pm. Diana locked the gate after she left. The 2 girls were still in their uniform. Her husband called him at 5.00 p.m. to go home. She found many people home. The 2 girls were dead. She also found money which she had kept in their bedroom Kshs.28,000/- missing and things scattered in their bedroom.
5. Daniel Kerongo (Pw3) testified that he knows the 1st accused, the 2nd accused and 3rd accused. He also knew the deceased Diana and Stephanie. He also knows Pw1 and Pw2. On 10.7.2019 at 4.30 pm, he was from home going to the market at Kenyeny. He met the 1st and 2nd accused persons close to the place where the incident happened. They were 30 meters from the home of Pw1. He saw the 1st accused play with a phone. The 1st accused took the upper part route and he walked with the 2nd accused and parted after 40 meters. He returned home and heard screams at Pw1's place. He heard that the 2 children had been killed. He went to the said boma and found them lying on the ground. He called Assistant Chief Mainga and told her what he had seen. The accused persons were arrested the same night.
6. Polycarp Lutta Kivau (Pw4) testified that he was a senior government analyst. On 12.7.2019 he received and obtained the following samples;
 - (1) Nail cuttings from Stephene Kerubo indicated as deceased- 'S1'.
 - (2) High vaginal swab for the Stephene Kerubo deceased- 'S2'.
 - (3) Anal swab for Stephene Kerubo, deceased- 'S3'
 - (4) A small light brown/white panty with an orange hem lining from Stephane Kerubo deceased- 'S5'.



- (5) A small pant short for Stephene Kerubo deceased- 'S6'.
- (6) A small white vest decorated with blue/ green/ red strips of Stephane Kerubo, deceased- 'S8'.
- (7) A blue school uniform for Stephene Kerubo deceased- 'S7'.
- (8) Blood sample for Stephane Kerubo, deceased- 'S4'.
- (9) Nail cutting for Diana Kerubo, deceased- 'D1'.
- (10) High vaginal swab for Diana Kerubo, deceased- 'D2'.
- (11) Anal swab for Diana Kerubo, deceased- 'D3'.
- (12) Blood sample for Diana Kerubo, deceased- 'D4'.
- (13) A blue school uniform dress for Diana Kerubo, deceased- 'D5'.
- (14) A black petticoat for Diana Kerubo, deceased- 'D6'.
- (15) A small white panty with blue hem lining for Diana Kerubo, deceased- 'D7'
16. He obtained the following samples;
 - (17) Buccal swab sample from Heimatty David Omwenga indicated as accused.
 - (18) Buccal sample from Timothy Oroni Munga indicated as accused
 - (19) Buccal sample from Gilbert Musa Nyabuto indicated as accused
 - (20) Buccal sample from Evans Marube Nyabuto indicated as accused.
7. On 15.7.2019 Pw4 obtained a buccal sample from Abel Orenge Ombasa. He was requested to carry out an analysis to find out if there was any genetic relationship with the submitted exhibits. After using a variety of chemical physical and instrumental methods of analysis he found as follows;
 - (1) The small light Brown/white panty with the orange hem lining ('S5') had light yellow stains tested positive for spermatozoa.
 - (2) The small pink short ('S6') and white vest ('S8') were lightly stained with mud.
 - (3) The blue school uniform dress ('D5') for Diana was stained with mud and fecal matter.
 - (4) The black petticoat ('D6') was stained with fecal matter and white stains which tested positive for spermatozoa.
 - (5) The small white panty with blue hem lining ('D7') was heavily stained with fecal matter.
 - (6) The small blue uniform dress ('S7') for Stephane was stained with mud and light blood stains of human origins.
 - (7) No DNA samples were generated for the anal swabs of Stephane ('S3') and swab for Diana and small pant ('D3') short for Stephane.
8. Pw4 testified further that, every person has a unique DNA and this is acquired from his or her parents by examining the DNA from a blood sample or any body fluid it is possible to determine the origin of the blood on body fluid given that blood sample as body fluid of the suspects. From the analysis he came up with the following conclusion:



1. The DNA generated from the yellow stain (spermatozoa) on the small light brown/white panty 'S5' (Stephanie's pant) with orange hem lining matched the DNA sample of Abel Orange Ombasa ('B5').
2. The DNA samples from the blue school dress ('S7'), Stephanie's high vaginal swab ('S2'), and her stained white vest ('S8') matched the DNA samples of Stephanie Kerubo, deceased.
3. The DNA generated from the high vaginal swab ('D2') of Dinah and the white panty with blue hem lining ('D7') for Diana was matched to the DNA profile of Diana Kerubo and Evans Marube Nyabuto.
4. The DNA profile generated from the blue school uniform dress ('D5') of Diana indicated the DNA profile of Diana Kerubo, the deceased.
5. The DNA profile generated from the spermatozoa stain in the black petticoat ('D6') of Diana matched the DNA Profile of Evans Marube Nyabuto ('B4').
6. The DNA profiles of David Omwega ('B1'), Timothy Orondi ('B2') and Gilbert Musa Nyabuto ('B3') didn't match with any of the DNA profiles listed. He prepared the report on 2/8/2019 signed it and produced it as an exhibit, Pext.8.
7. No. 78257 Cpl. Charles Kitur, (Pw5) a scenes of crime officer testified that; on 17.7.2019 at 7.10 pm he accompanied Inspector Wambugua and his team to a scene of accident, the homestead of Mason Mirochi, at Keberesi village in Kenyenyia sub-county. At the scene, there were 2 bodies of 2 minors namely Diana Kerubo and Stephanie Kerubo. It was alleged they were defiled and killed. The body of Diana was facing the house and she had a strap of cloth tied around her neck. Her underpant was pulled and it had faeces. She also had blood stains in her left nose. The body of Stephanie was lying facing up in the house near the rear entrance. A bra was tied around her neck. On 18.9.2019 while at the scene of crime Cpl Ekrapa showed him Kshs.14,000/- of 1000-shilling notes and requested him to take photos of the said notes. He took 22 photos of the deceased persons and 14 notes with the serial numbers. The photos were produced under his supervision. During re-examination, he stated that he visited the scene the same day the incident happened and was not the first person at the scene as there were police officers who had secured the scene.
8. Charles Kibori Mainga (Pw6) assistant chief Kenyenyia Sub location testified as follows; he knows that the accused persons they come from his area where he is an assistant chief. He knows their homes and their fathers. On the 10th of July 2019 at about 6.00 pm in the evening, one of the clan elders called him and told him that the children of teacher Kerosi had been murdered. He left for Mwalimu Kerosi place. He found many people. 2 children had been killed and one was on top of the septic tank and another was inside the house. He rang the OCS. As they waited an elder called Daniel Omwoyo Kerongo called him and told him to go where he was. The elder told him that he had seen 1st and 2nd accused persons along the road as they walked slowly in the evening. The 1st accused was holding a phone and 2nd accused was a little ahead but when they saw him, the 1st accused crossed the road and took the upper road and the 2nd accused took the path leading towards Kenyenyia. He called the chief since he was at the scene. They discussed and decided to inform the DCIO. They told the police how we had gotten the information and the police told them to take the names of the boys. Since the African Cup of Nations was on, he asked the police to wait till that time the game was over. They stayed with the security team till 1:00 a.m. They went to their homes. They found the boys asleep. They were made to wake up – the 1st accused was arrested. The 1st accused took



them to the owner of the phone he was seen with earlier. The person was arrested this was about 4.00 am. They parted and the next day on the 11th, the DCIO called him to take them to the 1st accused's home as he wanted to see the mother of the 1st accused. There was money lost at Mwalimu Kerosi's place. He was with a clan elder called Paul Nyandieka. They went to the boma at 3.00 p.m. and found the mother of the 1st and 2nd accused persons cooking out there. The DCIO told her they were after the money the 1st accused had. She agreed to show them where the money was. There was a sack full of clothes and she removed a wallet at the end of the sack. The money was Kshs. 22,600/=, Kshs 14,000/= was of old notes 500/= and 100/= notes. The 500/= and 100/= were of the old notes. Their sister-in-law told them that the 1st accused had given her money, Kshs 420/=, to keep for him. They went with the police and the 2 ladies, their mother and sister-in-law, to the police. They were left there to help with investigations. On the 12th the DCIO asked him if I knew a boy called Abel. He was requested to assist trace Abel and, on the 12th, they went with clan elders to Abel's place. Abel was at home helping his parents. Abel was arrested.

9. Paul Omanga Nyandieka (Pw7) testified that on 11/7/2019 he was called by assistant Chief Charles Mainga at 3.00 pm. The Chief asked him if he knew Sibia Nybonye place. Thereafter he led the assistant chief to Sibia's place at Kiboko. Sibia is known to him. She is the mother of Evans Marube. The police asked her for money and she admitted to being given the money. Kshs. 14,000/- was recovered from a sack of clothes and 420/- from her daughter-in-law. He left the 2 at the police station.
10. Sibia Nyamboni (Pw8) testified that; the 1st and 2nd accused persons are her sons. On 10/7/2019 children died. She was not at the place where they died. Evans went home at 8:00 p.m. and gave her money. Evans asked her to keep the money for him. She did not count the money. She kept the money inside a sack. The next day at 6.00 am the police arrested Evans and Gilbert. She handed the money to the police who went to her home after the arrest of her sons. She was also arrested and later released.
11. No. 110980 P. C Lawrence Kurgat an officer attached to Kenyena police station testified that; on 10/7/2019 at 17.50 hours the OCS asked him to accompany him to a scene of murder. On entering the home, they found the body of Diana Kerubo lifeless with a strap of cloth around her neck. In the main house, they found Stephanie Kerubo lying on her back with an injury on her head. Photos were taken by the scenes of crime and the bodies were taken to the mortuary. On 11/7/2019 he accompanied the DCI to the home of Sibia Nyabongi and they recovered Kshs. 26,000/- from Sibia and Kshs. 420/- from Faith. They escorted the suspects to the police station.
12. A trial within a trial was held and 3 witnesses testified. In the said trial No.235082 CIP Ronald Rono Kiprotich (Pw1) testified as the officer who took a confession statement from Evan Marube, the 1st accused person. That he followed the procedure and process of taking a confession statement. The accused gave his statement voluntarily. No. 86157 CPL. Philip Ekerapa (Pw2) testified that on 18/7/2019 the 1st accused told him that he had a confession to make. This was after the arrest of the 1st accused over a case of murder. He took the 1st accused to CIP Ronald Rono. The accused had no injuries. Being a minor, they incorporated the services of a children's officer Mr. Kiogi. He had no reason to suspect that his confession was not voluntary. David Mwangi Koigi (Pw3) testified that he is a sub-county children's officer. He cares for children who have not attained the age of 18 years. He was called by the sub-county criminal investigating officer and requested to go and witness as the 1st accused gave his statement on 18/9/2019. CLP Rono wrote the statement. Recording of the statement took



about 3 hours. The 1st accused had no health issues. He was not sick nor was he tortured. He gave his statement voluntarily. He was not threatened. The 1st accused's rights as a child were not violated. He was in the room with Officer CIP Rono who recorded the statement and the 1st accused's mother. The 1st accused stated in a sworn statement that he did not write the statement voluntarily, he was handcuffed in both hands and a stick was placed in between his legs, and the askaris beat him and told him to admit. The 2nd time they held him and placed a gun on his head and a panga on his neck and they told him that if he admitted they would leave him. He did not know what was happening. He was forced to admit. In a ruling dated the 16th June 2021, this court ruled that the process for obtaining the confession was in compliance with the law.

13. Doctor Brian Ayara (Pw9) a pathologist testified that; he conducted a post-mortem report, Pext. 14 (a), on the remains of Stephanie Kerubo and Diana Kerubo on 12/7/2019. Stephanie was 4 years old. She had a royal blue clothing resembling a school uniform with white and orange underpants. She had a bruise on the forehead about 4 by 4cms. On the neck there was a clothing item that appeared like a black bra around the neck completely. She also had a brown belt around her neck. There was a ligature mark where the bra and belt were. Her tongue was out bitten between the teeth. She had passed stool. On external examination what was significant was a hemorrhage under the forehead and there were blood vessels prominent on the surface of the brain. As a result of his examination, he formed the opinion that the cause of death was lack of oxygen due to ligature strangulation. He took specimen tissue samples from the liver, the whole left kidney, tissue from the rib cage for DNA and stomach contents, blood, anal and vaginal swabs, and nail clippings. On the genito- urinary area there was an injury on the genital area, he took swabs for examination. He also conducted a post-mortem, Pext. 14 (b), on Dinah Kerubo. She appeared to be 9 years old. She had a blue uniform, soiled pants, and a black petticoat. The significant findings were there was bleeding in the outer part of the eyeball i.e. conjunctival hemorrhage which is seen in a case of asphyxia. There was a royal blue strap from the uniform she was wearing. There was a ligature mark on neck which was about 24 cms. There were multiple abrasions on the left face and right cheek. She was bleeding from the nose and the tongue was bitten between the teeth. She had also passed stool. In her anal area, there was hemorrhage and abrasions which is in keeping with penetration. On internal examination, what was significant in the genital area was the labia was edonatus, they were swollen there was hemorrhage and the hymen was perforated. This suggested that there was recent penetration. That it is possible, it was penial. In her head region, there was bleeding in her scalp in the left temporal area. As a result of his examination, he formed the opinion that the cause of death was asphyxia due to ligature strangulation and that there was evidence of head injury and sexual penetration. He took specimens of her body organs for further examination, that is the liver, the entire right kidney, the stomach with its contents, vaginal and anal swab, nail clippings, and one rib from the cartilage.
14. No. 86157 CPL. Philip Ekachoi (Pw10) an officer attached to DCI Kenyenyia testified that; on 10/7/2019 he was in the office when Pw1 reported the murder of the 2 children. The report was booked and they proceeded to the scene together with the scenes of crime personnel. They found the 2 bodies at the scene of Diana Kerubo and Stephanie Kerubo. Preliminary investigations revealed that the 2 minors had been strangled to death. The scene was processed by the scenes of crime and thereafter the 2 bodies were taken to Hema Hospital mortuary. The postmortem was done on 12/7/2019. They continued with their investigations. The 1st, 2nd and 3rd accused persons were cited within the scene immediately after the incident occurred. Several other suspects were rounded up. On the strength of their intelligence, they narrowed



down to the 3 accused persons. Samples were taken from the deceased persons during the post-mortem and also from the accused persons. They received a report from the government analyst which showed that the spermatozoa of the 1st accused were found in the DNA sample of Diana and the spermatozoa of the 3rd accused person in the DNA profile of Stephanie Kerubo. They recovered money Kshs. 23,020/- from the 1st accused's home which Pw2 said was stolen from her home. Thereafter the accused persons were charged in court. Pw10 produced the clothing and monies as exhibits, Pexts 1,2,3,4,5a & 5b,6,7, 8,9,10, 12, 15.16 &17.

Defence Case

15. Evans Marubo Nyabuto the 1st accused gave an unsworn statement. He testified that he still denies the offence of murder. He woke up and went to carry luggage as usual. He got tired and went home. He left home and went to Kenyeny. In the evening he went home. He slept and woke up at about 3.00 a.m. The chief and his people arrested him. He was taken to the police station and brought to court and charged with murder. He does not know the children who were killed to-date.
16. Gilbert Musa Nyabuto, the 2nd accused, testified that he works as a post carrier and he stays at Kenyeny. He denies the murder charge. On the material day he woke up and went to the shop of his uncle called Nyabuto. He took tea and went to work up to 3.00pm and then he went home. He slept and at 3.00am the chief and askaris arrested him. His brother too was arrested and taken to the police station. They stayed 14 days and then they were charged.
17. Abel Orange Ombaso, the 3rd accused, testified that; he is from Kenyeny and is a carpenter. On 10/7/2019 he woke up and went to work. There was no work and his parent told him to go and join the person who was working at a building. The house was being built in their home. He took out the cows and fed them. The fundi asked him to measure 12 wheelbarrows of soil and mix with cement. He did the said work with the said fundi and his father. On Thursday, he worked again with the said fundi. On Friday, a person hired him to go and cut trees using a power saw. His father asked him to go as he was not feeling well. The chief and clan elders went to his father and told him that he should accompany them. His father said he should not go but the chief insisted. They went to the police station. On reaching the police station he was arrested. The 1st and 2nd accused persons were brought out. They were asked if they were at the murder place. They denied. Their place to the home is about 100 meters away. When he heard the screams, they did not go as it was drizzling. They had also mixed the soil and cement and they could not go. On inquiring about the screams, he was told that the children had been murdered. He was not there. He was home with his father.
18. Julius Ogoro Ondari, (DW4), testified that he is a mason. He does not know the exact names of the 3rd accused. He does not recall the date and time has gone. He knows that the accused's father is called Thomas. Thomas gave him work to build a house. There were many fundis. The work was not much. He was given the 3rd accused to help him with the work. As they continued to work at about 3.00 pm three people came in the company of the chief. They picked up the boy he was working with. He asked them why they were picking him. They told him that they had some evidence. He worked till evening and in the evening, he accompanied the father to the police station. The police told them that he was safe at the police station. He recalled that he heard screams but did not go where the murder had happened. He does not recall the date or time as it happened a long time ago. He testified that it was the day he was with the accused from 8 a.m. to 5.00 pm. The accused did not go to the place where the screams were coming from. They even ate together. Thomas would go for the materials they needed. He was with Abel on the 10th.



19. Ezekiel Ombasa Gisera (Dw5) testified that Able Orenge is his son. On 10/7/2019 he was building at home. Ogoro was his fundi. He knows of the death of the 2 children. It was drizzling a little. They heard screams. He left them building. On going to the compound, they found officers there. One child was outside and another was inside. He saw the child lying there. He stayed there till the bodies were collected. After one day the assistant chief collected Abel to help with the investigations. He did not ask any more questions. Later that evening the chief told him that DCIO had asked him to arrest Abel and to take him to the police station. The next day he accompanied the fundi to the police station. The DCI told him that Abel had been named. He had left Abel at home. He was asked to go home where the screams were coming from. Abel did not leave his compound. Abel was not involved in the murders.

Submissions

20. At the close of the defence case. The prosecution chose to rely on the evidence on record.
21. Mr. Kaba for the 1st and 2nd accused persons did not file any submissions. Mr. Kerosi for the 3rd Accused filed written submissions. A summary of the 3rd accused submissions are as follows; the prosecution case remains very shaky. That the prosecution did not lead Pw1 to explain why he was staying with the 2 children, and that Pw1's story remains a suspicious story. That the witnesses did not connect any of the accused to the crime committed. That Pw1 was a suspect. That Pw2 was the last person with the 2 children. Pw2 did not raise evidence towards any of the accused persons. That Pw3 who saw the 1st and 2nd accused persons near Pw1's place did not explain why he was suspicious of the 2 and that he did not see the 2 accused persons leave Pw1's place. On the evidence of the government analyst, it was submitted that in obtaining any samples from a suspect or victim is whether there was compliance of Chapter 4 on the Bill of Rights in relation to Articles 49, 50, and 51 in obtaining samples. That the accused persons were entitled to an advocate/lawyer of their choice each and/or a next friend was required to be present during the extraction of the any sample and/or any material from the accused person or analysis. That this is done to safeguard the normal abuse by the investigators who can simply mix up the swabs and/or samples to implicate a suspect. That the 3 accused persons were arrested away from the scene and nothing in particular belongs to them was recovered from the scene. That the DNA results stands to be the only thing that can connect the accused person with the crime, but without following the rules of obtaining samples for analysis it remains a fairy tale. That Pw4 was not sure how the samples were obtained. That on the money recovered there was no evidence adduced on the source of the money. That the alibi evidence of the 3rd accused person remains unshaken that the same was introduced very early during the investigation stage. The 3rd accused called witnesses to corroborate his evidence. Reliance was made on the case of Victor Mwendwa Mulinge vs. R [2014] eKLR the Court of Appeal held that the burden of proving the falsity if at all of an accused's defense of alibi lies on the prosecution. Reliance was also made in the case of Kiarie vs. R [1984] KLR on the principle to follow in a case where an alibi defense is raised. It was further submitted that the law does not provide for the timing when an alibi defense be raised and that it is the duty of the prosecution to disprove the alibi defense. That the prosecution case direct or circumstantial evidence must be established whether the accused was elsewhere and not at the scene of crime.

Analysis And Determination

22. I have considered the prosecution evidence and the submissions of the 3rd accused person. In a case of murder, the prosecution is required to prove the following;
- a. Proof of the fact and the cause of death of the deceased.



- b. That the cause of the deceased's death was a result of the direct consequence of the accused/accuseds unlawful act or omission.
 - c. Proof that the unlawful act or omission was committed with malice aforethought as defined by section 206 of the Penal Code.
23. There is sufficient evidence that Diana Kerubo and Stephanie Kerubo died on the 10/7/2019. Pw1, Pw2, Pw3, Pw5, Pw6 saw the bodies of 2 girls on the 10/7/2019 in the compound of Pw1. Pw9 Doctor Anyara did a post-mortem on the bodies of Diana Kerubo and Stephanie Kerubo. His examination of Diana (9 years old), revealed that the cause of death was asphyxia due to ligature strangulation. There was also evidence of head injury and sexual penetration. His examination of Stephanie (4 years old), revealed that the cause of death was asphyxia due to ligature strangulation. She also had a head injury.
24. On whether it is the accused persons who cause the death of the deceased persons. There is no direct evidence that was adduced that any of the witnesses saw any of the accused persons kill Diana and Stephanie. The prosecution case is based on circumstantial evidence. In *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990 the Court of Appeal 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 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.”
25. The evidence against the 1st and 2nd accused person is that they were seen by the Pw3 close to Pw1's home on the material day at about 4.30pm whilst on his way to the market. The 1st and 2nd accused persons are persons Pw3 knew well. Pw3 informed Pw6 who in turn informed the police Pw9. The 1st and 2nd accused person were arrested at night at 3.00 a.m., after Pw6 led the police to their home. The 3rd accused was arrested on the 12th of July 2019. After their arrest, buccal swabs were taken from each accused person. Pw9 Doctor Ayara also took the following samples from the deceased persons; from Diana, he took samples from her liver, the whole kidney, tissue from the rib cage for DNA, stomach contents, blood, anal and vaginal swabs and nail clippings. He noted on her genito-system, her hymen was perforated she had edomatis labia and hemorrhage was noted.
26. Pw4, the government analyst, received the said samples on 12/7/2019. Pw4 testified that he took the buccal swabs from the accused persons after he received the samples taken during post-mortem. He confirmed that there was no advocate present. The examination done by Pw4 indicates that the DNA profile from the yellow stain (spermatozoa) on the light brown/white panty with orange lining matched the DNA profile of Able Orange, the 3rd accused person, and that the DNA profile generated from the high vaginal swab (D2) and white panty in the blue hen lining (D7) was a mixed DNA profile of Diana Kerubo and Evans Marube, the 1st accused person and the DNA profile generated from the spermatozoa stain on the black petticoat also match the DNA profile of Evans Marube. Doctor Pw9 Ayara's evidence confirmed that the he took vaginal swabs and nail clippings from Stephane Kerubo. He did both internal and external examination on the 2 girls and took the specimens for examination. He also noted an injury on Stephanie's genital area and took vaginal swabs. On Diana Kerubo apart from the other injuries he noted he noted that in the anal hole there was hemorrhage and abrasion consistent with penetration and that in the genital area, there was a swelling, and hemorrhage and



the hymen was perforated. It suggested a penetration that was recent. During cross-examination, he stated that the hymen of Stephanie was intact as per his examination and that there was no evidence of abrasion but that does not translate to a lack of penetration.

27. The defence has raised an issue on the manner in which the samples were taken. The samples were taken by Pw4. Reference has been made to Chapter 4 of the Bill of Rights in *the Constitution* in relation to Articles 49, 50, and 51 in obtaining the samples. It has been argued that the accused persons were entitled to an Advocate of their choice and or a next of friend was required to be present during the extraction of any of the samples and or any material from the accused persons. This is done to safeguard the normal abuse by the investigations who can simply mix the swabs and or samples to implicate a suspect. That though the DNA results stand to be the only thing that can connect the accused person with the crime, without following the rules of obtaining samples for analysis it remains a fairy tale. Counsel for the 3rd accused referred generally to Chapter 4 of *the Constitution*, Bill of Rights and further to Article 49 which deals with the Rights of an arrested person, Article 50 deals with the Right to a fair hearing and Article 51 is in regard to the rights held by imprisoned/detained persons or persons held in custody. The above provisions have all been referred to in a general manner. The issue raised by the defense is that the samples were not taken in the presence of an advocate or a next of friend. Be that as it may, section 122 A of the Penal Code does not require presence of an advocate during the DNA sampling procedure. Section 122A of the Penal Code provides as follows:

122A. Senior police officer may order DNA sampling procedure on suspect

- (1) A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.

- (2) In this section—

“DNA sampling procedure” means a procedure, carried out by a medical practitioner, consisting of—

- (a) the taking of a sample of saliva or a sample by buccal swab;
- (b) the taking of a sample of blood;
- (c) the taking of a sample of hair from the head or underarm; or
- (d) the taking of a sample from a fingernail or toenail or from under the nail, for the purpose of performing a test or analysis upon the sample in order to confirm or disprove a supposition concerning the identity of the person who committed a particular crime;

“serious offence” means an offence punishable by imprisonment for a term of twelve months or more.

28. Pw4 informed the court that he took the samples from the accused persons on various dates. The samples were taken after the directorate of criminal investigations complied with section 122A of the



Penal Code. Pw4 was requested in writing to take samples from the accused persons. The samples were taken by the police during the investigations. Although the 1st accused person was a minor at the time of arrest it would have been appropriate to have a next of friend at the time of taking the sample. Pw4 testified to taking the sample himself after the request of Inspector Wambugu during the investigations. In my view, the exercise was not prejudicial to the 1st accused. I do note that during the trial within a trial, the prosecution invited a next of friend who testified that the 1st accused person had not been beaten and had no injuries.

29. Pw4 also testified that if there were any interference, he could have rejected the samples. None of the accused persons alleged being coerced at the time the samples were collected, nor did they claim that the officers responsible for the collection had any intention to falsely incriminate them, as suggested in the submissions. In my view, the samples were taken voluntarily from the accused persons by an expert, Pw4, who was authorized to do so by the investigating officer. I cannot fault the prosecution for the manner in which the samples were taken.
30. The 3rd accused person raised the defence of alibi and the prosecution had the responsibility of substantiating the falsehood of the defence of alibi that was raised. The Court of Appeal in *Victor Mwendwa Mulinge vs. R* [2014] eKLR stated:

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja vs. R* [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

31. The court in *Waka Evans Amira v Republic* [2021] eKLR cited with approval the South African case of *Ricky Ganda vs. The State*, [2012] ZAFSHC 59, where the Free State High Court, Bloemfontein held as follows:

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

32. The 3rd accused relied on the evidence of Dw4 who testified that he was with the 3rd accused person on the material day from 8:00 a.m. to 5.00 p.m. He testified that an alarm was raised but the 3rd accused did not go to that home. However, Dw1 on cross-examination testified that he could not recall the day and time in which he was with the 3rd accused person as the incident occurred a long time ago. Dw5 who was the father to the 3rd accused was not with him on the material day but heard a scream and went to the compound of Pw1 and found officers there. Although the 3rd accused person claimed that he was working and was not involved in the offence, the forensic evidence presented by Pw4 places the



- 3rd accused person at Pw1's compound. Pw4 testified that the 3rd accused person's spermatozoa was found in Stephanie Kerubo's small light brown/ white panty. This was consistent with the finding of Pw9 who noted that there was penetration. Although the 3rd accused person raised the defence of alibi, the forensic evidence placed him in the compound of Pw1 and I reject his defence of alibi.
33. In addition, there was evidence from Pw3 that he saw 1st and 2nd accused persons near the home of Pw1 and Pw2 during the day the same day the 2 girls were killed. I have considered the testimony of Pw3 which placed the 1st accused persons within the locus in quo as well as the DNA results which conclusively link the 1st accused and 3rd accused to the murder of the Stephane Kerubo and Diana Kerubo. The murders took place the same day in the same premises, that is, the home of Pw1. On the monies recovered from the 1st accused's mother, the prosecution failed to recall Pw2 to identify the monies she alleged were stolen from her house on the material. I can only presume that it was the same money she lost on the material day.
34. The prosecution was further required to prove malice aforethought.
- Section 206 of the Penal Code defines malice aforethought in the following terms:
- “ 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 death or to do grievous harm to any person whether such person is the person actually killed or not.
 - (b). Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such 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 be caused.
 - (c). An intent to commit a felony.
 - (d). An intention to facilitate the escape from custody of a person who has committed a felony.”
35. Pw9 testified that Stephanie Kerubo and Diana Kerubo died as a result of asphyxia due to ligature strangulation. There was also evidence that the two children had been defiled by the 1st and 3rd accused persons. The evidence strongly suggests that the accused persons had the intent to inflict grievous harm or cause the death of Stephanie Kerubo and Diana Kerubo. There was no direct evidence that linked the 2nd accused Gilbert Musa Nyabuto to the offence. He is acquitted of both charges he is free to go unless lawfully held. The upshot is that I find Evans Marube Nyabuto and Abel Orenge Ombaso guilty of the offence of murder of Stephanie Kerubo and Diana Kerubo as charged in Counts No 1 & 2 and convict them accordingly.

DATED, SIGNED, AND DELIVERED AT MICROSOFT TEAMS THIS 21ST DAY OF SEPTEMBER 2023.

R.E. OUGO

JUDGE

In the presence of:

Evans Marube Nyabuto/1st accused person-Present



Gilbert Musa Nyabuto/ 2nd accused person

Abel Orege Ombaso/3rd accused person

Mr. Kerosi for the 3rd accused & h/b for Mr. Kaba for 1st and 2nd accused persons

Mr. Ayodo - State Counsel ODDP

Orwasa/ Aphline - C/A

