



**Republic v Muthama (Criminal Case 72 of 2014)
[2024] KEHC 14000 (KLR) (11 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14000 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 72 OF 2014**

FR OLEL, J

NOVEMBER 11, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

MUNYAO MATHA MUTHAMA ACCUSED

JUDGMENT

1. The accused herein ‘Munyao Matha Muthama’ was charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code (cap 63). Laws of Kenya. The particulars of the offence were that on the 18th day of November 2014 at Nduuni Village, Yathui location Mwala Sub County within Machakos County murdered Hellen Mbinya Kimatu. The accused took a plea and denied committing the offence and a such a plea of not guilty was entered.
2. PW1 Ann Kalekye Kimatu stated that on 18.11.2014 at around 4.30 pm, she was at home with her children, when her daughter, Hellen Mbinya Kimatu (the deceased herein), who was about 14 years old requested her permission to go fetch firewood. She left for a meeting and came back at about 6.00 pm only to discover that her daughter had not come back. She sent her son Martin to search for her at their grandmother’s place, while she also went around the bushes near her home to look for her to no avail. She sought help from her neighbours to assist her search for her daughter and upon further search they found her limp body lying in the bush while facing upward, it had scratch marks around the neck and her underpant were missing.
3. They raised an alarm and other members of the public turned up at the scene which was about 100m from her home. The police were called and when they arrived, they interviewed the two herd’s boy concerning what had occurred. Upon cross examination, PW1 confirmed that she had known the accused for a brief period as he had been employed by John Makula Kalili who was her neighbour. Her deceased daughter had left home at about 4.00 pm to go fetch firewood at a thicket that was sparsely forested near her home and upon raising alarm the accused was one of the persons who came to the



incident scene. She did not know who harmed her daughter but suspected that the accused might have had a hand in her daughter's untimely death.

4. PW2 Purity Ndungwa Kyalo testified that she was a neighbour to PW1 and recalled that on 18.11.2014 she was at her home in the evening when she heard screams and rushed to the scene only to discover that PW1's daughter had been murdered in a nearby thicket, where she had gone to fetch firewood. She saw the deceased body, recognized it and also noted that her undergarment had been partially removed. The police were called and they arrested two herdsmen who were earlier seen around the area and were suspected of having a hand in the murder. Under cross-examination, she stated that she had known the accused for only one month and confirmed that he was at the incident scene after the body was discovered.
5. PW3 John Makula Kalili also recalled that on 18.11.2014 he was at home when at about 8.00 pm, he heard screams and proceeded to where the screams were coming from. He found a large crowd gathered and discovered that PW1's daughter had been murdered. The deceased family was his neighbour and the accused too was his employee tasked with the duty of looking after his goats. The accused was arrested and after investigations charged with the offence before court. He confirmed that the deceased was a school-going girl and he was not present when the accused was arrested.
6. PW4 Kimatu Kavuu confirmed that the deceased was her daughter. On 18.11.2014 in the evening, his wife PW1 called him and informed him that their eldest daughter (the deceased herein) was missing. He rushed home and while enroute before he arrived, heard screams and joined a group of villagers rushing to the scene, which was a thicket near his home. On reaching the crime scene, to his disbelief, he discovered that his daughter had been murdered, blood was still oozing from her nose and her inner pant had been removed on one leg and lowered down.
7. He inquired from the other children who were with his daughter as to what may have occurred and they told him that they had seen the accused herding cows nearby and the accused, who was amongst the crowd was arrested as the prime suspect. Upon cross-examination, he confirmed that he had not known the accused before and did not know how his daughter met her death. Further, his sons had also been grazing his goats nearby and seen the accused around the area where his daughter was murdered.
8. PW5 Simon Muia Nguyo testified that on 18.11.2014 he was at home with his cousin Martin Kimatu and had been assigned duty to graze goats in a nearby thicket. The accused too was grazing his employer's goats where they were. Later at about 5. 00 p.m. the deceased came while carrying a rope and a panga and told them that she wanted to fetch firewood. They left her in the thicket collecting firewood and went to drink water but when they came back, they did not see her. His cousin's mother, PW1 came and enquired if we had seen the deceased and they informed her that they had earlier seen her at the thicket fetching firewood.
9. They joined the search team and eventually found her body in the thicket. Her skirt had been lifted and her inner pant had been removed. Upon cross-examination, he confirmed that he saw the accused around the vicinity of the incident scene, grazing his employer's goats and when they came back after drinking water, they did not see him nor did they find the deceased and this is why they suspected he had something to do with the murder.
10. PW6 Martin Mbuvi Kimatu also confirmed that on 18.11.2014 he was grazing goats with PW5 while his sister, the deceased was fetching firewood in a nearby thicket. The accused was also within the same vicinity grazing his employers' goats. Later they left to go drink water and left their goats under the care of the deceased. When they came back they did not see the deceased and eventually drove the goats home. PW1 later came home and got concerned about his sister's whereabouts as she had not returned home from fetching firewood. They embarked on a search and rescue mission and eventually stumbled



on the deceased body inside the thicket. PW1 raised alarm and neighbours/police joined them. Upon inquiry from neighbours, he informed them that he had seen the accused within the same vicinity and he too had been grazing his employer's goats. Upon cross-examination, PW6 confirmed that he did not see the accused harm his sister.

11. PW7 Richard Nzioka Kavuu testified that on 18.11.2024 at about 7.00 pm he received a call from his wife Irene Nthenya Richard and she informed him that his niece was missing. He rushed home and on arrival found out that she had been murdered in a thicket near their home. He viewed the body and saw that she was oozing blood from her nose and her underpant had been partly lowered on one leg. The police were called and upon inquiry, it was revealed by PW5 and PW6 that they had seen the accused within the vicinity herding goats. The accused was in the crowd of persons at the scene and attempted to escape but was arrested. He was dressed in a jean trouser which had some blood stains.
12. PW8 Stephen Muysoka Kiki the area chief Yathui location recalled on 18.11.2014 at about 8.00 p.m. he was at his home when his assistant chief Penina Kamene Kiindi alerted him that a certain girl had been murdered at the Kyangulumi sub location. He alerted the police and proceeded to the incident scene where he confirmed that indeed a gruesome murder had occurred. He observed the body and noted that it was foaming from the mouth and her clothes had blood stains. The accused was arrested at the scene but he was a person not known to him.
13. PW9 Dr. Waithera Githandu a consultant pathologist at Machakos Level Five Hospital confirmed that on 25.11.2014 she conducted an autopsy on the body of the deceased. On examination, she noted that the deceased blouse was blood-stained and she had bruises on her neck. Internally there was subluxation of the neck and one vertebrate disc had snapped but there was no evidence of rape. She formed an opinion that the cause of death was 'manual strangulation'. In cross-examination, she confirmed that physically there was no evidence of rape and no vaginal swabs were taken to confirm the same.
14. PW10 Samson Mutinda Nguu confirmed that the deceased was his niece and also confirmed that he rushed to the incident scene upon hearing screams from PW1 and was confounded by the sad reality that his niece had been murdered. Other neighbours also joined them and the accused was arrested at the scene. Later he accompanied the police and escorted the accused to the police station and was present when the accused was undressed and he saw blood stains on his private part and his clothes.
15. PW11 Susan Wanjiru Ngugi confirmed that she worked at the government chemist laboratory in Nairobi, forensic section and had 8 years of experience in dealing with DNA analysis of human body, fluids and comparisons. She had a report prepared by her colleague at work one Mr Kinyua Muture who was away pursuing his PhD studies in Hungary but she was conversant with his handwriting and signatures. She had a report necessitated by an exhibit memo forwarded to them by CIP Joseph Muguna from Masii police station on 28.11.2014 and he had requested them to ascertain whether exhibit B1 was matching with exhibit marked as B2. Further, they were to establish whether blood stains on Exhibit B1 matched with blood samples B2 and B3.
16. She explained that their findings were as follows; B1 was the green trousers packed in a Khaki envelop belonging to Munyao Matha Muthama, B2 was the blood sample indicated as of deceased Hellen Mbinya Kimatu, B3 was the blood sample of the accused Munyao Muthama. After analysis, the results were received as follows
 - a. The trouser (B1) was found with light-stained human blood.
 - b. The DNA profile generated from the blood stains on the trouser (B1) matched the DNA profile generated from the blood sample (B2) which is the blood of the deceased.



17. PW11 produced her report dated 21.07.2014 as an exhibit and confirmed in cross-examination that their analysis was accurate and conclusive, that the deceased blood was found on the accused trousers.
18. PW12 PC Samuel Mbuthia Njuguna recalled that on 18.11.2014, he was based at Yahtui AP post when at around 7.00 pm two villagers came and reported a murder incident. They rushed to the scene and confirmed that what was reported was true. He interviewed PW5 and PW6 and they confirmed that they had been herding goats in the vicinity where the deceased had been murdered and the accused too was herding his employee's goats in the same area. The accused was amongst the persons in the crowd that had gathered at the murder scene and upon interrogation and close observation, he noted/ established that the accused had scratch marks on his neck. He also checked the accused trousers around the knees to see if it was soiled and confirmed that indeed they were soiled. DCI officers arrived and he handed over the accused to them for further interrogation.
19. PW12 identified the accused trousers in court and also identified him as the suspect he had arrested. Upon cross-examination, the witness confirmed that they did not note down the names of persons who made the first information report, but maintained that after interrogating PW5 and PW6 at the scene of the incident, he got information that the accused was a suspect and proceeded to interrogate him though he denied any involvement in the murder.
20. PW13 Supt Joseph Muguna testified that as at 2014, he was attached to Masii police station, DCIO office and as part of his work, undertook investigation duties. On 18.11.2014 at around 9.00 p.m., the station OCS – Chief Inspector Kiring called him and informed him of a murder incident involving a young girl. Together with the OCS, they proceeded to the incident scene and were informed that the deceased was fetching firewood and did not return home. The villagers started to search for her and discovered her body in the thicket. She was half naked, had bruises on her neck and her inner pant was partially removed.
21. They were informed that the accused was suspected to have had a hand in the murder and proceeded to detain him. At the police station, they took the accused blood-stained trouser and retained it as an exhibit. Later they forwarded the said trouser and blood samples extracted from the deceased body to the government analyst and upon conclusion of the investigations charged the accused with the offence he faced before the court. PW13 also produced the panga and rope which the deceased was carrying and the accused trouser into evidence.
22. Upon cross-examination PW13 confirmed that they arrested the accused from amongst the crowd that had gathered at the incident scene and though nobody saw him commit the offence, they had a strong basis for arresting him. Further, he confirmed that he did not have an inventory of items received at the scene but the items produced as exhibits were the said recovered items. He also confirmed that the report produced by the government analyst had returned a positive match of the deceased blood on the accused trousers.
23. At the close of the prosecution case, the accused was placed on his defence and opted to give sworn evidence. He confirmed that as of 18.11.2014 he was employed by PW3 (John Mukuli) to look after his livestock and do general work within the home. On the said day at about 3.00 p.m. He opened for the goats and guided them to the shrubs in front of his employers' compound to graze. While there he saw two boys playing and continued to look after the goats until 6.30 pm when he returned home. As he waited for supper at about 8.30 pm he heard screams outside their compound and when he went to the scene, he discovered that a child had been killed and her body dumped in the bush.
24. While at the scene, the crowd told him to sit down and started to beat him before he was rescued by the police. Later he assisted in carrying the deceased body into the police van and it was at his point that



his trouser got stained by the deceased blood. He denied killing the deceased and asserted that he was not the guilty party. Upon cross-examination, the accused reiterated that he helped the police carry the body into the police van and it was at this point that his trouser got stained by the deceased blood.

25. He had been falsely accused of having a hand in the murder because PW5 and PW6 had told the crowd that he was herding his employers' goats in the bush where the deceased body had been found and they therefore suspected him have had a hand in her death which allegations was not true. He confirmed that he was arrested at the incident scene and the police told him to unfold the trouser he wore, which he had folded to knee length.
26. The accused further denied that his trouser was soiled with the same soil seen at the scene, where the deceased body was found and in the alternative stated that it had been raining and he had fallen, which then would explain why his trouser was partially muddied. After he was arrested, he was taken to the police station and on the following day at about 10.00 am, was told to remove his trouser. As regards, the wound on his neck, he asserted that it had been caused by the physical assault inflicted on him by the crowd and it was not caused by the deceased nails scratching him.
27. The accused reiterated that he did not know or harm the deceased, and had had nothing to do with the murder. In re-examination the accused restated that he helped the police carry the deceased body and place it on the police van and that explained, how the deceased blood stained his trouser. As regards the dirt on his trouser, it had previously rained and he fell down and finally his neck injury was sustained due to mob justice.

Submissions

28. The accused counsel submitted that the prosecution evidence adduced was insufficient to convict the accused of the offence of murder. While the said evidence established that Hellen Mbinya Kimatu died due to asphyxia (suffocation), no direct evidence was led to show that it was the accused who committed the offence. It was to be noted that PW2, PW5, & PW6 did not describe the colour of trouser the accused was wearing and the fact that the accused did not sign an inventory for the recovered exhibits created doubt on how the said exhibits (especially the trouser) was recovered.
29. The prosecution's case when considered alongside the accused explanation as to how his trouser got smeared with the deceased blood stain, raised material doubt as to the veracity of the evidence adduced, which evidence must then be interpreted in favour of the accused. Reliance was placed on Pius Arap Maina versus Republic (2013)eKLR.
30. The accused counsel further urged that the court to find that the accused had offered a plausible and tenable defence, especially concerning how blood stains were found on his trouser and urged the court to find that the prosecution had failed to prove the charge of murder beyond reasonable doubt. He therefore urged the court to acquit the accused of the offence charged under Section 215 of the Criminal Procedure Code and proceed to set him free.
31. The prosecution did not file any submissions in this matter and urged the court to rely on the evidence presented to convict the accused person.

Determination

32. Based on the said evidence, this Court is being called upon to determine whether the accused is guilty of the murder of the deceased. The prosecution's case in summary is that on 18.11. 2014 at about 4.00 pm, the deceased asked permission from her mother (PW1) to go fetch firewood in the thicket within their home vicinity and indeed. Where she went, she met PW5 and PW5 herding goats and the accused



- too was in the same vicinity herding his employer's (PW3) goats. PW5 and PW6 requested the deceased to watch over their goats as they went home to drink water and on coming back, they did not find the deceased. Later when they returned home, they realized that the deceased had not returned home and PW1 raised the alarm prompting a search team to start tracing her.
33. Unfortunately, they stumbled on her dead body in the thicket, her skirt had been lifted and the inner garment partially removed. PW1 raised alarm and other villagers promptly came to the scene. While at the scene, PW5 and PW6 confirmed to the crowd that, they had seen the Accused within the vicinity of the incident scene and he was promptly arrested by the public. PW7, PW 10 and PW12 in their evidence confirmed that when the accused was arrested, they noticed that his trouser had blood stains, and he had some scratch marks on his neck, which could be attributed to the deceased action of defending herself during the ordeal. PW12 further checked the accused trouser and confirmed it was soiled around the knee area, implying it must have been soiled as he struggled to pin the deceased down.
 34. PW 13 Supt Joseph Muguna, also confirmed that he was involved in investigating this crime, and on the material night also visited the crime scene. They were informed that one of the suspects, the accused was in the crowd and they promptly arrested him. They noticed that his trouser had blood stains and when they took him to Masii police station, they promptly recovered the trouser and sent it to the government chemist for Analysis, together with a blood sample of the deceased drawn from her during the post-mortem. PW9 Dr Waithera Githendu undertook the post-mortem and confirmed that the deceased died due to manual strangulation and also had scratch marks on her body, though there was no evidence of rape.
 35. Finally PW 11, the government Analyst, from the Government chemist Laboratory, Nairobi did produce their report dated 21.07.2024, where they compared the blood retrieved from the accused trouser (B1), blood sample retrieved from the deceased (B2) and blood sample of the accused (B3) and it was their finding that the DNA profile generated from the trouser (B1) matched the DNA profile generated from blood sample (B2), which was the deceased blood. It was the prosecution's case that they had provided circumstantial and direct evidence linking the accused with this gruesome murder and it was just and proper that he be convicted.
 36. The accused gave sworn evidence. He did admit that on the material evening, he too was grazing PW3's goats in front of his employer's compound and saw PW5 and PW6 playing. Later at about 6.30 pm, he returned home, and while waiting for supper at about 8.30 p.m, he heard screams and went to see what had transpired. It turned out that somebody had been murdered in their neighbourhood. PW5 and PW6 told the crowd, that had gathered, that they saw him within the said vicinity and the crowd told him to sit down, while others started to beat him up. Fortunately the police came in the nick of time to rescue him.
 37. The accused further testified that he helped the police carry the deceased body into their van and that is how his trouser ended up being stained by the deceased blood. Upon cross-examination, the accused clarified that he had held the deceased by her leg as they carried the deceased body into the police van, and did not how many persons assisted in carrying the body. His trouser was dirty because it had rained and he had fallen, which explained the mud/soil noted on it. The accused vehemently denied being involved in the murder of the deceased and for good measure, also stated in re-exam that the bruises/injuries on his neck were sustained during the mob justice melted on him by the crowd that had gathered at the scene of the incident.



38. I have considered the evidence on record. Section 203 of the Penal Code under which the accused is charged provides that:-

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

39. Arising from the foregoing the ingredients of murder were explained in the case of *Roba Galma Wario vs. Republic* [2015] eKLR where the the court held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

40. In *Republic vs. Mohammed Dadi Kokane & 7 Others* [2014] eKLR the elements of the offence of murder were listed by M. Odero, J as follows:-

1. The fact of the death of the deceased.
2. The cause of such death.
3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly
4. Proof that said unlawful act or omission was committed with malice aforethought.

41. In this case, there was no doubt as to the fact of death of the deceased, which was also admitted by the accused. PW9 who conducted the post-mortem examination on the body of the deceased confirmed that the deceased died due to Asphyxia (suffocation) from manual strangulation. She also confirmed that the deceased had bruises on her neck, one of her vertebrate discs had snapped and further had external injuries on the skin of her left buttock, lower back, and neck region. I therefore find that the fact of the death of the deceased was proved beyond reasonable doubt.

42. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person. In this case, none of the witnesses saw the accused manually strangle the deceased. The evidence was largely circumstantial. However, proof in criminal cases can be either by direct or circumstantial evidence. When a witness asserts actual knowledge of a fact, that witness's testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is described as circumstantial evidence.

43. Therefore, where circumstantial evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged. In fact, in *Neema Mwandoro Ndurya v. R* [2008] eKLR, the Court of Appeal cited with approval the case of *R vs. Taylor Weaver and Donovan* (1928) 21 Cr. App. R 20 where the court stated that:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”



44. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established a certain threshold to be met if a conviction is to be based thereon. In *Sawe –vs- Rep* [2003] KLR 364 the Court of Appeal held.

“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 hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

45. In *R. vs. Kipkering Arap Koske & Another* [1949] 16 EACA 135, in the Court of Appeal for Eastern Africa had this to say:

“In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

46. In *Abanga Alias Onyango vs. Rep* CR. A No.32 of 1990 (UR) the Court of Appeal set out the principles to apply to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“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.”

47. PW5 and PW 6 confirmed that on the material evening, they were grazing goats in a nearby thicket, and the accused person too, was in the same area grazing PW3’s goats a fact confirmed by the accused in his evidence-in-chief. PW5 and PW6 further testified that the deceased joined them at about 5.00 p.m. to fetch firewood, and after a while requested her to look after the goats as they went to drink water. On coming back, they did not find the deceased and later when they went home were informed that she had not come back. They joined PW1 in search for the deceased and eventually stumbled upon her deceased body, which had foam and blood oozing from her nose and her inner pant was partially removed.

48. While at the scene, PW5 and PW6 confirmed to the crowd that, they had seen the Accused within the vicinity of the incident and he was promptly arrested by the public. PW7 PW 10, PW12 and PW13 in their evidence confirmed that when the accused was arrested, they noticed that his trouser had blood stains, and he had some scratch marks on his neck, which could be attributed to the deceased action while defending herself during the sexual assault ordeal. PW12 further checked the accused trouser and confirmed it was soiled around the knee area.



49. PW 13 Supt Joseph Muguna of DCI, Masii police station also confirmed that he was directly involved in the investigations and was part of the police team who visited the scene of crime and promptly arrested the accused as a suspect. They noticed the blood stains on his trouser, and when they reached the police station, they recovered the said trouser as an exhibit and sent it to the government analyst for examination. PW 11, the government Analyst, from the Government Chemist Laboratory, Nairobi produced their report dated 21.07.2024, and it was their finding that the DNA profile generated from the trouser (B1) matched the DNA profile generated from blood sample (B2), which was the deceased blood.
50. The Evidence lead revealed that it was the accused who was last seen around the vicinity where the crime was committed and the doctrine of last seen alive based on circumstantial evidence would apply. The said doctrine prescribes that the person last seen with the deceased before his/her death was 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 subject herein has a duty to give an explanation of how the deceased met her death.
51. 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.”
52. 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.”
53. The above proposition is supported by. 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.”

54. In defense, the accused vehemently denied having anything to do with the murder and stated that his neck injury was sustained due to Mob justice inflicted on him at the incident scene and that the blood stain found on his trouser was because he had assisted the police carry the deceased body onto the police van and in the process, her blood had spilled onto his trouser.
55. The evidence adduced did point to the fact that PW5 and PW6 identified the accused as a suspect, and he was immediately arrested at the scene of the crime. PW 7, PW10, PW12, and PW13 all confirmed this fact. Further, immediately on arrest, the said witnesses confirmed that they noticed the scratch marks the accused had and also the blood stains on his trouser, which further aroused their suspicion as to his culpability.
56. A review of the above evidence establishes that the accused was arrested at the scene and his blood-stained trouser was noted and recovered immediately after he reached the police station. His assertion in defense that the said blood stain occurred, when he helped carry the deceased body onto the police van is therefore a fertile imagination befret of logic. The evidence clearly established that members of the public and the police noted the blood stains before him being taken to the police station and/or the deceased body being removed to the mortuary.
57. The accused also alleged that he was beaten up by the mob and they injured/bruised his neck. The evidence adduced confirms that he was mentioned as a suspect and was immediately arrested by PW12 and PW13, who were amongst the police officers already present at the crime scene. At no time was he assaulted as alleged and the scratch marks on his neck in all probability could be attributed to the deceased action to defend herself during the fatal attack on her perpetrated by none other than the accused person.
58. From the set of facts as presented by the prosecution, and also considering the short time frame, within which the accused was left alone in the same vicinity with the deceased and his arrest barely two hours later, with his trouser having blood stains of the deceased blood and bruised neck, the circumstances logically deduced therefrom cogently and firmly established, a definite unerringly tendency pointing towards his guilt in having a hand in the untimely death of the deceased and without doubt, the chain of evidence forms a complete and inescapable conclusion that within all human probability, the murder was committed by the accused and none else.
59. In the circumstances of this case, it is my view that the accused defence failed to exonerate him. He was the last person seen with the deceased and the DNA of blood extracted from his trouser, matched the deceased blood. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused who unlawfully caused the deceased’s death.



60. Having found that the prosecution has proved actus reus, the other issue for determination is whether malice aforethought can be inferred from the prosecution evidence presented. The offence of murder is complete when, “malice aforethought” is established. Section 206 of the Penal Code, w provides that:
- “(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.”
61. It is sufficient to say that the mental element required by section 206 of the Penal Code can be equated to broad guidelines set out in the case of Tubere s/o Ochen vs. Republic [1945] 12 EACA 63:
- “The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one off blow or violent multiple blows, the conduct of the accused in fleeing from the scene afterwards, the permanency or dangerous severity of the bodily harm and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted.”
62. In assessing the weight to be given to intention as an element of murder, the relevant circumstances must be considered to whether the appellant foresaw the real or substantial risk and the consequences of targeting the part of the body that may result in the fatal injuries suffered by the deceased. A similar statement of Law was made in the persuasive authority of S. vs. Sigwahla 1967 4 SA 566 in which the court stated:
- “The expression intention to kill does not in Law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such a result. This form of intention is known as a dolus eventualis as distinct from dolus directus.”
63. It has been proved that the deceased strangled the deceased and broke one of her vertebrate discs. This clearly shows that he applied abnormal pressure on the deceased neck as he pinned her down and tried to defile her, which fact can be correctly inferred as she was found with her inner pant partially removed. The accused being a person of sound mind had Knowledge that this act or omission could cause death and/or will probably cause the death of or grievous harm to the deceased. Men’s rea under the circumstances herein was therefore overwhelmingly proved.
64. In the circumstances I am persuaded beyond reasonable doubt that the prosecution also proved this limb of the presence of malice aforethought on the part of the accused.
65. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the information of murder against the subject herein, Munyao Matha Muthama beyond reasonable doubt and convicted him accordingly under section 215 of the criminal procedure code.



66. Sentencing will await the filing of a pre-sentence report by the probation and aftercare services department, within the next 21 days.

67. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 11TH DAY OF NOVEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 11TH DAY OF NOVEMBER, 2024

In the presence of:-

Mr. Langalanga for accused

Mr. Mangare/Ms Otulo for O.D.P.P

Susan/Sam Court Assistant

Accused present in court

