



**State v Otieno (Criminal Case E008 of 2022)  
[2024] KEHC 14875 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14875 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE E008 OF 2022  
RE ABURILI, J  
NOVEMBER 20, 2024**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**JACOB OLUOCH OTIENO ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused person Jacob Oluoch Otieno is charged with the of 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 are that on the 20<sup>th</sup> February 2022 at hotel Ventakone, Kondele area in Kisumu central sub-county within Kisumu County, the accused murdered one Beryle Akoth Okoko.
2. The accused person pleaded not guilty to the charge against him and the matter proceeded to trial.
3. The prosecution called a total of eleven (11) witnesses in support of its case which is summarised herein below.

**The Prosecution's Case**

4. PW1 Samson Odhiambo Odemba, a hotelier, testified that the accused was his customer at Hotel Ventakone Kisumu. He testified that on the 19<sup>th</sup> February 2022 he was at the reception at 7am when a customer came asking for accommodation stating that he had travelled overnight so he wanted a room to rest.
5. PW1 testified that he took him round the rooms and the customer selected Room 109 on the 1<sup>st</sup> floor. It was his testimony that they returned to the reception where he took his ID Card and saw that it had the name Kelvin Ng'ang'a Kimemia with the ID card number 39XXXX42. He testified that when he looked at the customer, he almost looked like the photo on the ID Card so he registered him and gave



him the keys to the room. PW1 testified that he handed over his duties at 9am as he had been on night shift and proceeded to his house to return the same day at 9pm.

6. PW1 testified that he saw the said customer in the company of a lady passing towards the restaurant although the lady had not been registered as a customer. He testified that he worked until 9am on 20<sup>th</sup> February 2022 when he handed over work and went to his house. It was his testimony that his colleague Eric Owino later called him asking about the whereabouts of keys to Room 109 to which he responded by telling him that the customer was still inside when he left and as such he should go and check the room as the customer had informed him that he would stay for more than one night.
7. It was PW1's testimony that he reported back to work at 9pm the same day and when he checked, the keys for Room 109 were missing. He testified that he called the receptionist Phinber Wekesa who informed him that they had tried knocking the door to Room 109 but nobody responded although the TV was on. PW1 testified that he also went and knocked the door and got no response though he could hear the TV was on so he got the extra key and went to open the door to Room 109. He testified that he opened the Room at 11pm and found a lady lying on the bed foaming from her nostrils while holding a bottle of 'hunter's choice' on her right hand as she faced upwards.
8. PW1 testified that they only sold soft drinks and food at the hotel so he got scared and informed the Director of the Hotel who directed him to go and report the incidence at Kondele Police Station. It was his testimony that the girl he found lying dead on the bed was the same one he had seen in the company of the customer who had earlier on booked Room 109. He testified that the DCI came to the scene and he surrendered the Register of customers to them and that subsequently he was called to go and identify a suspect on a parade which he positively did. He testified that on the 19<sup>th</sup> February 2022 he slept at work in a staff room No. 114 on the same floor as the Room 109 however the said rooms were far apart and he never heard any incident that night.
9. In cross-examination PW1 testified that when he went to the Identification Parade, he identified the person whom he booked in the Hotel as Kelvin Ng'ang'a Kimemia. He reiterated that he saw the deceased and accused on 19<sup>th</sup> February 2022 walking past the restaurant and that the deceased had braids on.
10. PW2 Joyce Atieno testified that she works at Ventakone Hotel. It was her testimony that on the 19<sup>th</sup> February 2022 she came to work at around 7am. She testified that she went to check on the rooms and noticed that Room 109 was booked by Kelvin Ng'ang'a who had left saying he would return in the evening. She testified that she left work at 6pm but had confirmed the bookings at 4pm. PW2 testified that on the 20<sup>th</sup> February 2022 she was off but when she returned on Monday morning, on the 21<sup>st</sup> February 2022, a worker, Samson, told her of what he found in Room 109 after opening it using the spare key. It was her testimony that the accused person herein was the person she had seen booking at the reception and whom she confirmed to have booked room 109.
11. In cross-examination PW2 testified that she met Samson and the client, the accused herein, at the reception on 19<sup>th</sup> February 2022 where she stood for about 5 minutes. It was her testimony that she did not witness what happened to the lady in the Room 109 and neither did she attend a parade identification.
12. PW3 Dr. Dickson Mchana who carried out the deceased's autopsy on the 1<sup>st</sup> March 2022 after her body had been identified by one Kennedy Okoko. It was his testimony that the body was at JOOTRH Mortuary, draped in a maroon sheet, of an African female of about 23 years, good nutrition, 168cm. whose body showed early signs of decomposition, skin peeling off, about 1<sup>1</sup>/<sub>2</sub> weeks had lapsed since



- time of death. He further testified that the nails, lips and tongue appeared dark blue in colour and that there was no fracture on limbs and neck, no defence injuries and no signs of poor health.
13. Dr. Mchana testified that internally he observed a dry neck assessment i.e. that there was extensive bleeding under the skin of the front of the neck, a small C-shaped bone on the front of food pipe – C-shaped – fractured in the left arm of the bone and that there was froth in the airways. He testified that in the abdomen, there was minimal food in the stomach with alcohol smell while on the head, there was bruises on the scalp but no bone fracture and that the genitals were intact with no injuries.
  14. Dr. Mchana testified that he formed the opinion that the cause of death asphyxia secondary to manual strangulation. He testified that he filled in the burial permit No. 149425 and signed the Report on 1<sup>st</sup> March 2022. It was his testimony that he did not take any samples for further analysis as the same were of no value granted that the body was decomposing. He produced the post-mortem Report dated 1<sup>st</sup> March 2022 as P. Exhibit 1.
  15. PW4 No. 239811 Inspector David Alan formerly of Kondele Police station testified that on the 28<sup>th</sup> March 2022 he was requested by his colleague IP Cheruiyot, the In-charge DCI Kondele to hold an Identification parade involving the accused who was in their custody over a murder charge. He testified that he made all necessary arrangements where 2 witnesses Samson Odemba and Phineber Wekesa positively identified the suspect.
  16. It was his testimony that before conducting the parade he asked the suspect if he consented to the parade and he stated ‘nataka kuifanya’. He further testified that he then proceeded and arranged the parade; that he sought and obtained 8 persons aged between 23 and 28 years of same height and complexion of the suspect. PW4 testified that the suspect chose the position in the parade, for the 1<sup>st</sup> witness, Samson Odemba, the suspect elected to stand between No. 4 and 5 and for Phineber Wekesa, the suspect stood between No. 7 & 8.
  17. PW4 testified that he filed one form for the two witnesses for ID Parade exercise. It was his testimony that after the ID parade, he noted all the comments by the suspect who said ‘nimeridhika’ and further that the suspect also had no objection with the procedures. He testified that before he held the Identification parade, the suspect was held in a separate cell within Kondele police station where the parade was held within the police station in a separate room free from unauthorized persons. He further testified that in Part B, he informed the suspect of the purpose of the parade and he chose a friend Stanley Kiprono to be present at the parade. PW4 produced the Police ID form dated 28<sup>th</sup> March 2022 as P. Exhibit 2.
  18. In cross-examination PW4 stated that the ID parade was conducted from 3.30pm – 3.50pm with the witnesses arriving at the police station less than an hour before the parade was conducted and kept at the DCI Office. He testified that there were 8 men on the parade and further that the 1<sup>st</sup> witness said the suspect was a man while the 2<sup>nd</sup> witness said the same. He testified that in paragraph ‘D’ he gave names of persons who were in the parade.
  19. PW5 Polycarp Lutta Kweyu the Principal Chemist at Kisumu Government Chemist testified that he prepared a report under request of PC Kariuki of DCI Kondele Police station on 25<sup>th</sup> March 2022. He testified that he received an exhibit memo dated 25<sup>th</sup> March 2022 with a black biker, an inner wear/pant stained with white substance “A”. It was his testimony that he obtained buccal swab of Jacob Oluoch Otieno (suspect).
  20. PW5 testified that he was requested to carry out DNA analysis if the suspected semen on the biker matched the DNA profile of the suspect Jacob Oluoch Otieno. He testified that he did analysis and found that the stains on the biker ‘A’ tested positive for seminal stains. It was his testimony that he



generated DNA profiles from the seminal stains, compared two DNA profiles and found that the male DNA profile generated from seminal stains from item 'A' belonged to a single male person but did not match the DNA profile of Jacob Oluoch Otieno. PW5 testified that he prepared and dated the Report on 1<sup>st</sup> April 2022, signed it and produced it as P. Exhibit 3.

21. PW6 No. 73932, PC Peter Kimurei Keberei from CSI Kisumu testified that he was gazette vide Gazette No. 407 dated 18<sup>th</sup> January 2010. He testified that on the 20<sup>th</sup> January 2022, at about 23.30 hours he was contacted by CIP Makitsa of Kondele DCI on phone requesting him to accompany him to hotel Ventakon in Kondele within Kisumu County.
22. PW6 testified that at the scene he was led to Room No. 109. He testified that inside the Room was the deceased lying on a bed and in her hand was a bottle of suspected drink. He further testified that in the room was a chair and a table whereas on the table was a bottle of Fanta drink, Monster Energy drink, a plate, a fork, a bottle opener, half eaten roasted maize, and a hotel booking receipt. He testified that additionally in the room was a bag containing different clothes. PW6 produced the 18 photographs as P. Exhibit 4a – o and the Report dated 9<sup>th</sup> May 2024 as P. Exhibit 5.
23. PW7 Phinber Kusimba Wekesa testified that the accused was their customer in 2022 when he worked at Hotel Ventakon. He testified that he met the accused on the 19<sup>th</sup> February 2022 when he worked as the Hotel receptionist. It was his testimony that he got to work at 10am and at 11am, the suspect came from the room upstairs and gave him the key for Room 109 and told him that he was rushing somewhere and was to return.
24. PW7 testified that at around 4pm, the accused came back with a girl, picked the keys from him at the reception and they both went to the room. He testified that after about 5 minutes, Erick the Room cleaner came and told him that the customer in Room 109 wanted the chips so he ordered for chips from the chief chef and after 20 minutes, the suspect client returned and inquired about the chips he had ordered but the same were not ready. He testified that the suspect left him with Kshs. 1,000 saying he should take to him the chips with soda, once the chips are ready, together with his change which he did.
25. PW7 testified that at about 9pm, the two came down and went out but never left the keys to him at the reception. He testified that he signed off at 9.30pm and left Odemba on duty. It was his testimony that the following day he came to work at 10am and when Eric the room cleaner asked for the keys for Room 109, he informed him that he had just come in so he should ask Sam.
26. It was his testimony that he was off duty on Monday when his supervisor Joy called him and asked him to rush to work as there was an emergency that the girl in Room 109 was dead. He testified that on the 27<sup>th</sup> February 2022 they were called to go to Kondele police station to record statements. He further testified that he did not go to the Room 109 to confirm which girl had died.
27. In cross-examination PW7 testified that he met and saw the suspect herein on 19<sup>th</sup> February 2022 and that he had seen him at 11am, at 4pm, when he came to pay for the chips and when he left with the girl. It was his testimony that he also identified him on a police ID parade. PW7 testified that he saw his physical appearance, that he was shaven, a little brown and not tall. He testified that the others in the parade were shaved too but he identified the suspect because he saw him well at the hotel. He testified that he did not know Kennedy Nganga and that he was not at the hotel when the incident of murder took place.
28. PW8 Quinter Achieng Ochieng testified that she was a roommate to the deceased as they were students at Ramogi Institute. She testified that on the 19<sup>th</sup> February 2022, she was in the company of the deceased as they had competition at Kisumu National Polytechnic during which the deceased informed



- her that she was to meet her boyfriend, Felix, at the end of the competition at 4pm. It was her testimony that the deceased stayed for 30 minutes then returned to where they were, which was about 20 metres away.
29. PW8 testified that the deceased and her boyfriend Felix who was wearing a facemask left and the deceased had not returned by the time the Institute Bus came and took them back to the institute. She testified that the deceased had not returned by 8pm and when the deceased picked her phone she sounded drunk and not ok. It was her testimony that at 10pm, Jacob, the deceased's baby daddy called her inquiring about the deceased but she informed him that she had not reached her. She further testified that the following day at 7pm she tried calling the deceased but she was unreachable.
  30. PW8 testified that on the 21<sup>st</sup> February 2022 Jacob called her to ask if she had heard anything to which she responded in the negative after which Jacob informed her that he had received information through sms that Beryle was found dead. She testified that Jacob was using phone number 0706XXXX22 and forwarded to her the two text messages which he told her had been sent to him. She testified that she called the deceased's sister (Ruth) number, 0711XXXX64, and confirmed the deceased's passing. She testified that in one of the messages, Jacob said that the deceased was found in a hotel with her boyfriend called Kelvin Ng'ang'a.
  31. In cross-examination she testified that the person who came to meet the deceased had a face mask on and she could not tell who he was. She testified that the deceased never used to drink alcohol but when she called her on 19<sup>th</sup> February 2022, she sounded drunk.
  32. PW9 No. 80056 Sergeant James Makori working with DCI seconded to Safaricom as a police liaison officer security department testified that he had call data records for mobile phone 0706XXXX22 and 0725XXXX73 covering the period of 10<sup>th</sup> February 2022 to 24<sup>th</sup> February 2022. He testified that the data records were processed following a request from DCIO Kondele signed by CIP Cosmas Mukusa on 24<sup>th</sup> February 2022.
  33. It was his testimony that Mobile phone 0706XXXX22 belonged to Jacob Otieno of ID Card No. 32XXXX29 as per the registration.
  34. He further testified that on the 19<sup>th</sup> February 2022 at 0657 hours, there was a communication from ATC Kisumu Car Wash calling mobile number 0725XXXX73 at 0653 hours for 49 seconds. He further testified that again on 19<sup>th</sup> February 2022, the phone was within Kondele in Kisumu and Kisumu Polytechnic, Kisumu North areas up to and until 20<sup>th</sup> February 2022 at 0055 hours when the number is located at Kisumu Bus Station. He testified that the next communication was on 20<sup>th</sup> February 2022 at 0840 hours at Mathare North Estate within Nairobi Area and that the phone remained in Mathare North Area, Queen of Apostles until 24<sup>th</sup> February 2022.
  35. It was his testimony that the phone number 0725XXXX73 was registered in the name of Beryle Okoko. ID. No. 36XXXX23. He testified that the subscriber was at Riat college within Western Region of Nyanza. That the phone was located at Kisumu Polytechnic and Kisumu North area in Kondele area where it remained up to the last communication on 21<sup>st</sup> February 2022 at 1141 hours when there was an incoming sms from 0799XXX472 while the subscriber was at Kisumu North.
  36. PW9 produced call data for 0706XXXX22 as P. Exhibit 6(a), the call data for 0725XXXX73 as P. Exhibit 6(b), the electronic evidence certificate dated 15<sup>th</sup> January 2024 as P. Exhibit 6(c) and the letter dated 24<sup>th</sup> February 2022 received from DCIO Kondele office as P. Exhibit 6(d).
  37. In cross-examination PW9 testified that at 0055 hours, the call in 0706XXXX22 was at Kisumu Bus Station while at 8.40 hours it was at Mathare area, Nairobi. It was his testimony that at 0330 hours most



- likely the subscriber was travelling to Nairobi and that on the 19<sup>th</sup> February 2022 the said number was communicating with other numbers. He further testified that at Kisumu Gor Mahia, the two numbers for Jacob and Beryle were being served by the same booster although he could not tell if they were exactly at the same venue of communication.
38. PW10 Kennedy Aggrey Okoko, the chief of central Kagan location testified that he knew the accused who was married to his sister the deceased. He testified that on the 21<sup>st</sup> February 2022 at 0422 hours he received a call from the DCI Kondele that Beryle's body was found in a hotel room lifeless and that he should proceed to Kisumu which he did on the 22<sup>nd</sup> February 2022 at 8am when he arrived at DCI Kondele.
  39. It was his testimony that the DCI led them to JOOTRH Mortuary in Kisumu where they were shown the deceased's body which they identified despite it being decomposed. He testified that they also met the deceased's roommate Quinter who gave them the timeline of events of how the deceased had informed her that she was to meet Jacob her former husband as he was to travel from Nairobi and they were to sleep at unknown place.
  40. It was his testimony that the accused and deceased were married but had separated although the family intervened and they got back together. He testified that the deceased got pregnant and gave birth to a baby girl and that because she was still young, she had issues with her husband so they took her back to college which the husband did not want and told her that she would not enjoy the fruits of her education.
  41. PW11 number 95737 PC Brian Kariuki, the Investigating officer testified that on the 20<sup>th</sup> February 2022, he received a call from CIP Makosa at midnight who briefed him of a murder at Hotel Ventakone. He testified that together with DCI and OCS Kondele they moved to the scene and removed the body of a lady from a lodging to the morgue. It was his testimony that the body was lying on the bed with some strangulation marks on the neck, it was naked. He testified that they found plastic straps on the floor, a black biker on the side of the bed, a small bottle of whiskey and a glass of whiskey.
  42. PW11 testified that a lady called Quinter received a message through phone number 0706XXXX22 that Beryle was dead at Hotel Ventakone and so she went to Kondele police station. He testified that the lady Quinter tried calling the number but it could not go through and that through their normal channels, they located the number in Nairobi.
  43. PW11 testified that on 18<sup>th</sup> March 2022 he arrested Jacob Oluoch Otieno, the accused herein, at Mathare, Nairobi and brought him to Kisumu. He testified that he got Samson and Pheniber who worked at the Hotel Ventakone who said that they saw the deceased and the accused at the hotel before she was found dead and the two identified the accused positively on a parade conducted by IP David Alari at Kondele police station as per (P. Exhibit 2). He further testified that a post-mortem was conducted on the body of the deceased and the cause of death established to be manual strangulation.
  44. In cross-examination, PW11 testified that the deceased's body had a few scratches on her neck. He testified that he investigated the accused person's mobile number which kept calling the deceased's phone and send a message to Quinter. He admitted that he was aware of other numbers that were in communication with Beryle and that his case opened up and the suspect was positively identified by witnesses who had served him at Hotel Ventakone. He further testified that Quinter informed him that the deceased told her that her boyfriend was visiting her as he had a job interview in Kisumu.
  45. In re-examination, PW11 testified that he singled out 0796XXXX22 because Quinter was the one who gave them the number which had a message that she received to the effect that Beryle had been found dead at Hotel Ventakone.



## The Defence Case

46. Placed on his defence, the accused person gave sworn testimony denying that he killed the deceased. It was his testimony that he and the deceased got married in 2017 and that they had a child together. He testified that he was a chef and that on the 18<sup>th</sup> February 2022 he was in Nairobi and travelled to Kisumu arriving on the 19<sup>th</sup> February 2022 at 6am and proceeded to Sweet Melon Hotel where he was to do his chef duties. He testified that he carried out his duties and returned to Nairobi at 11pm.
47. The accused admitted that he met with the deceased on the 19<sup>th</sup> February 2022 at 3pm at Corona Market, stayed with her for one hour then returned to the hotel where he was working. It was his testimony that the deceased left him informing him that they had a cocktail party with her friends. It was his testimony that he knew the deceased's friend, Quinter whom he would call whenever the deceased was not reachable.
48. The accused testified that on the 19<sup>th</sup> March 2022 he was at his rental premises at Nairobi when he was escorted to Ruaraka Police Station and that the following day, the 20<sup>th</sup> March 2022 he was brought to Kondele Police Station where the arresting officer took his photo and that the following day the arresting officer informed him that he would attend an identification parade. It was his testimony that he did not know the persons who identified him and further that he never knew nor went to Hotel Ventakone.
49. In cross-examination, the accused denied knowing Kelvin Nga'nga and that he only saw his identity card in court. He further testified that he never had any issue with the deceased's friend Quinter. He further admitted that he did not have any evidence to prove that he had come to cook at Sweet Melon Hotel and further that he had never spoken to the manager of the Sweet Melon Hotel. The accused further denied knowing PW1 and PW7 or their Hotel, Hotel Ventakone. In re-examination, the accused reiterated that on the 19<sup>th</sup> February 2022, he was at Sweet Melon Hotel as he had been called to cook for some foreigners.

## Analysis and Determination

50. I have carefully considered the evidence adduced in this case and the arguments in submissions by the accused's counsel. The accused faces a charge of murder contrary to section 203 of the Penal Code. That section defines murder as follows:

“ Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder”
51. To establish the offence of murder under section 203 of the Penal Code, the prosecution has to adduce evidence to establish that there was death, the cause of that death, that the death was caused by an unlawful act or omission and that it was the accused person who unlawfully caused the death of the deceased and with malice aforethought. The essential ingredient for the offence of murder is malice aforethought.
52. As to whether there was proof of death, PW1 testified that he and other hotel employees accessed Room 109 at their Hotel Ventakone where they worked only to find the deceased's body on the bed. PW6, the Scenes of Crime Officer at DCI Kisumu also testified that he saw the deceased's body when he was directed to take photographs of the crime scene and PW11 the Investigating Officer, also testified that he saw the deceased's body on the 20<sup>th</sup> February 2022 when they went to the scene to retrieve the body following reports of the murder. Dr. Mchana, PW3, confirmed the deceased's cause of death as asphyxia secondary to manual strangulation.



53. On whether the death of the deceased was caused by an unlawful act or omission, the aspect of when an act causing death can be said to be lawful has been recognized from the time immemorial. Article 26 of the Constitution is clear that every person has the right to life and that a person shall not be deprived of life intentionally except as au or other written law. In *Gusambizi Wesanga v Republic* [1948] 15 EACA 65 the Court stated:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”

54. As stated above, there is no doubt that the death of the deceased was caused by the injuries that she sustained on neck as was detailed in PEX 1. There is no evidence showing that the injuries found on the body of the deceased were self-inflicted or that it was justified in any way under the law. Further evidence presented before court irresistibly points to an unlawful act that led to the death of the deceased following an assault. Accordingly, I find and hold that the death of the deceased was caused by an unlawful Act.

55. As to whether it was the accused person who unlawfully caused the deceased person’s death, none of the prosecution witnesses was present when the incident occurred. The prosecution case against the Accused person primarily rests on circumstantial evidence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows on circumstantial evidence:

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

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.” See also *Musili Tulo v Republic Cr. App. No. 30 of 2013*.

56. The Court of Appeal laid down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

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

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; 9iii) the circumstances taken cumulatively, should from 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. (see *Sawe v Republic* (2003) e KLR and *GMI v R* Cr. App. No. 38 of 2011).

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt. (see *Teper v R* [1952] ALLER 480 and *Musoke V R* [1958] E.A 715). In *Dhalay Singh v Republic*, Cr. App. No. 10 of 1997, this court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”

57. In this case, the prosecution led evidence to the effect that the accused was the last person to be seen with the deceased heading to the scene of crime prior to her body being found at the scene of the crime. PW1 testified that he booked the accused into the Ventakone Hotel in a specific room, Room 109, on the 19<sup>th</sup> February 2022 and that later on that day, he saw the accused in the company of a lady passing towards the restaurant although the lady had not been registered as a customer. It was his testimony that the accused used an Identity Card that had the name Kelvin Ng'ang'a Kimemia and the ID number 39XXXX42 during booking. The said Identity Card was produced as PEx 4(p) and Samson Odemba and Phinber Wekesa positively identified the accused at the police identification parade as the person who checked in at the hotel on the material day. The police identification parade form was produced as an exhibit 2. PW1 testified that the lady whom they discovered lying dead in Room 109 the following day was the same lady he had seen the accused person with the previous day. He further testified that he identified the accused person out of an identification parade carried out by PW4 at Kondele Police Station as the customer he had booked in using the Identity Card that had the name Kelvin Ng'ang'a Kimemia and the ID number 39XXXX42. The prosecution also produced a receipt No. 28204 for Kshs 1300 issued by the Hotel Ventakone on 19/2/2022 in the name of Kelvin as (PEx 4(r)).
58. PW7 another Hotel worker at Hotel Ventakone also testified that the accused person was booked into room 109 at Hotel Ventakone where he worked as a receptionist. It was his testimony that he interacted closely with the accused as the accused had sent PW7 for chips and soda and personally handed him Kshs. 1,000 to cover the cost of the same. It was his testimony that the accused had left earlier in the day only to return later with a lady whom he went with to his room and whom they would discover to be the deceased. PW7 testified that he similarly identified the accused from an identification parade carried out by PW4 as the customer he had interacted with at the hotel and who was in the company of the deceased prior to her death. In the room where the deceased was found dead, was a place with a bottle opener in it and a bottle of fanta soda and the plate shows remnants of food that appears to be chips (PEx 4(i))
59. The prosecution also called PW9 the Safaricom Liaison officer security Department who testified and produced the call logs for the mobile phone numbers 0706XXXX22 and 0725XXXX73 covering the period 10<sup>th</sup> February 2022 to 24<sup>th</sup> February 2022. The former mobile number was registered under id card Number 32XXXX29 in the name of Jacob Otieno. The latter mobile phone number was registered in the name of Beryle Okoko the deceased. The accused person's mobile number was tracked and found to have been served by the same Safaricom booster all through on the day the she was found dead until it was later traced at Bus station at midnight and later in Mathare area, Nairobi. While in Nairobi, the accused person's phone was used to communicate with Quinter, the deceased's friend, telling her that the deceased had been killed at Hotel Ventakone.



60. The accused person admitted in his defense, which he was not obliged to give, that he left Nairobi for work at Sweet Melon Hotel in Kisumu on 18<sup>th</sup> February, 2022, on a special assignment at the said hotel, then he met the deceased and stayed with her for a few hours before leaving for Nairobi at 11.00 pm in the night only for him to be arrested in Nairobi in the month of March, 2022.
61. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is expected to provide any explanation as to what happened. Nonetheless, this does not shift the burden of proving the guilt of the accused person by the prosecution beyond reasonable doubt. However, having been placed at the scene of the incident as the person who was last seen with the deceased before he died, the accused has a duty to give an explanation of what he was doing at the scene and how the deceased victim of his vicious assault as was seen by PW2 met his death.
62. Under Sections 111(1) and 119 of the *Evidence Act*:
- “ 111. 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.”
63. In *Republic v E K K* [2018] eKLR the Court held thus and I agree, concerning the last seen with the deceased doctrine:
- “ Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of *Moses Jua V. The State* (2007) LPELR-CA/IL/42/2006. That court, while considering the ‘last seen alive with’ doctrine held:
- “ Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the



deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

64. In *Stephen Haruna v The Attorney-General Of The Federation* (2010) 1 iLAW/CA/A/86/C/2009 cited severally by Kenyan Courts, the Nigerian Court of Appeal held that:

“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.”

65. In *Ramreddy Rajeshkhanna Reddy & Another v State of Andhra Pradesh*, JT 2006 (4) SC 16 the Indian Supreme 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.”

66. In the present case, and from the evidence of PW1 and PW7, it is the accused who was the last person ‘to be seen’ with the deceased at Hotel Ventakone where the deceased was found dead in the room 109 which the accused had booked himself in and failed to declare to the Hotel management the extra guest.

67. The accused denied being at the Hotel Ventakone or knowing it. In other words, he raised an alibi defence during the defence hearing. In *Erick Otieno Meda v Republic* [2019] eKLR, the Court of Appeal stated that in an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. Further, that a successful alibi defence entirely rules out the accused as the perpetrator of the offence and that there is no burden of proof on the accused to prove an alibi. Additionally, that if there is a reasonable possibility that the accused’s alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.

68. The Court of Appeal in the above case relied on various decisions of the same Court among them, the case of *Kiarie – v- Republic* [1984] KLR, where the Court stated:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable....”

69. In *Victor Mwendwa Mulinge –v- R*, [2014] eKLR the Court of Appeal further rendered itself thus on the issue of alibi:

“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....”

70. In *S -v- Malefo en andere* 1998 (1) SACR 127 (W) at 158 a - e the court set out five principles with respect to the assessment of alibi evidence:

- (a) There is no burden of proof on the accused to prove his alibi.



- (b) If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.
  - (c) An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."
  - (d) If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").
  - (e) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.
71. In R - v - Biya 1952 (4) SA 514 (A) at 521C – D cited by the Court of Appeal in the Erick Otieno Meda (supra) case, Greenberg JA said:
- “If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.”
22. In S –v- Sithole 1999 (1) SACR 585 (W) at 590g - i it was stated that:
- “There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken.”
72. The above cited decisions were adopted as good law in the Erick Otieno Meda case above on considering an alibi, and the Court of Appeal observed that:
- (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
  - (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
  - (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
  - (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlongu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014))
73. The accused person was under no duty to adduce and challenge the prosecution's case but having been the last seen in the company of the deceased at the Hotel Ventakone, and having abandoned the



deceased in the room that he had hired and paid for accommodation in which room the deceased was found lifeless before the accused could surrender it to the Hotel management, the accused had a duty to offer an explanation as to how the deceased met her death. His defence which appeared to be an alibi defence, was, in my view, sufficiently displaced by the firm, cogent and watertight evidence adduced by the prosecution witnesses at the Hotel, the Safaricom Liaison Officer and Quinter, the friend to the deceased. Furthermore, one wonders how the accused person's phone which had by then reached NAIROBI could have known that the deceased had died at Hotel Ventakone to, on its(phone's) own motion, send a message to Quinter alerting her of where the deceased was, all that evidence sufficiently displaced the accused person's theory that he was not at the scene of the crime, which evidence was not credible and amounted to a mere denial.

74. In the circumstances, I am satisfied that the prosecution has proved that it was the accused person herein Jacob Oluoch Otieno who committed the unlawful act which caused the deceased's death.
75. On whether the accused had malice aforethought when he unlawfully killed the deceased, under section 206 of the Penal Code, malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
- “(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.
  - (b) Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
  - (c) an intention 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.”
76. In the instant case, evidence adduced by the prosecution witnesses show that the aim of the deceased's attacker was clearly to cause her grievous harm. The deceased's attacker manually strangled her, snuffing the life out of her. Such an attack was clearly meant to not only cause the deceased grievous harm, but also to eliminate her altogether. Accordingly, I find the element of malice aforethought proved beyond reasonable doubt against the accused person.
77. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person beyond reasonable doubt. I find the accused person Jacob Oluoch Otieno Guilty of the offence of murder as charged and I convict him accordingly.
78. Sentence to follow after records and mitigation.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**R.E. ABURILI**

**JUDGE**

