



**State v Arusei (Criminal Case E016 of 2022)
[2024] KEHC 14794 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E016 OF 2022
RE ABURILI, J
NOVEMBER 20, 2024**

BETWEEN

STATE PROSECUTION

AND

DAVID ARUSEI ALIAS MOHAMMED ACCUSED

JUDGMENT

Introduction

1. The accused person David Arusei alias Mohammed 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 diverse dated between 27th April 2022 and 20th April 2022, while at Milimani Estate in Miwani Location within Muhoroni sub-county in Kisumu County, the accused murdered one Julius Arusei. The accused person pleaded not guilty to the charge against him and the case proceeded to full trial. The prosecution called a total of twelve (12) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

2. PW1 Francis Ongora Sikuda testified that the deceased was his neighbour in Milimani, Miwani and that the deceased lived alone. PW1 identified the accused as the deceased's brother. He testified that on 25th April 2022, the deceased received his brother, the accused herein as a guest who stayed for 2 days after which they left together towards the deceased's workplace in the morning of 27th April 2022. It was his testimony that earlier on in 2017, the accused had come to visit the deceased and stayed for 2 weeks.
3. PW1 testified that on the 27th April 2022 he saw the two brothers leave at 6am on two different Turbo motorcycles and that they subsequently returned at 8.30pm in the night. He testified that he saw them arrive because he was at his house as his house was next to that of the deceased and he was using the



- outside –external jiko when the duo returned. He testified that the following morning at 6am, the two brothers again left but he never heard them return. It was his testimony that on Thursday 28th April 2022, he never saw any one of them arrive but that he saw the motorcycle on the following Saturday.
4. PW1 testified that on Thursday 28th April 2022 at 7am, he woke up and went to ask the neighbour if he had seen the deceased who had left with his brother but never returned and that the neighbor responded in the negative. He testified that a lady neighbour heard PW1 and the neighbour conversing and asked them if the motorcycle was at the house of Julius and after concerns from other neighbours, a security officer also came and said that they ought to find out if the motorcycle was in the house so PW1 used the rear door and opened the door from outside as it was not locked using a padlock.
 5. PW1 testified that the security officer entered and saw a motorcycle in the sitting room and informed them about it after which he got into the bedroom and returned holding his nose saying the house was smelling badly and that he had seen blood all over and that he had seen the deceased inside/under the bed covered in a bedsheet.
 6. It was his testimony that they traced the Assistant Chief and the Chief and further that the police were called who came and removed the deceased's body to the mortuary. He testified that the entire house had blood all over the bedroom and that the deceased's body was decomposing and smelly. PW1 reiterated that the accused stayed for 2 days with the deceased and that on the third day, they left together though he could not tell if they returned. It was his testimony that they did not see the deceased's brother on 28th April 2022 and neither did they see the brother's motorcycle. He testified that the deceased's house had about six rooms and he lived alone.
 7. In cross-examination, PW1 testified that he knew the accused from the time he spent 2 weeks at the deceased's house. He admitted that he did not know what the accused did for a living and that if there were noise and screams from the next house, he would be able to hear it. It was his testimony that he never heard any noise or commotion prior to finding the body of the deceased. He further testified that he never heard the deceased return to his house and further that he never saw the accused kill the deceased.
 8. PW2 Elizabeth Akinyi another neighbour of the deceased testified that she did not know the accused. It was her testimony that on 30th April 2022, she was at her doorstep when she heard her neighbour saying that he had not seen Arusei after he left with his brother who had visited him. She testified that she lives 50 metres away and so she shouted at them saying that maybe Arusei was in his house sick and that they should enter the house. PW2 testified that they found Julius lying down covered in a bedsheet so she screamed and people came. It was her testimony that there was blood all over the floor, mattress, wall and mosquito net and that the bedroom where they found the body was smelly.
 9. PW2 testified that she called the Chief who later called the police who came to the scene, secured the scene and left with the body.
 10. In cross-examination, PW2 admitted that she did not know the accused and had seen him in court for the first time. It was her testimony that when they got to the deceased's house, the door was open not locked and further that she did not know who killed the deceased.
 11. PW3 Joseph Nundu the Chief of Miwani Location testified that he knew the deceased Julius Arusei who was his neighbour. It was his testimony that on 30th April 2022, he was in his house at 10.00 when one Julius Tuwei came and informed him that the deceased had been found dead with injuries.
 12. It was his testimony that he went and found the deceased who had stabs all over his body with blood all over. He testified that he called the police who came from Miwani Police station after one hour during



- which time he secured the scene by opening the window and closed the door as there were many people. He further testified that the deceased's body was decomposing. PW3 testified that the police called DCI who came and took over investigations and after 2 hours, they removed the body to Nyando Sub-County Hospital Mortuary. PW3 testified that he heard that the deceased and his brother had land disputes at their home in Uasin Gishu and that he had not known the accused prior to his arrest.
13. In cross-examination, PW3 admitted that he did not know who killed the deceased and that he had never heard of the accused threatening people.
 14. PW4 testified that he was a brother to both the deceased and the accused. It was his testimony that the accused who is his elder brother constantly disturbed them over land issues forcing their mother to move severally and that subsequently, after they sold a piece of land in Siwa and decided to share the proceeds amongst all the siblings together with their mother, the accused refused to allow the proceeds of the sale to be shared with their sisters saying that the girls did not deserve their share.
 15. It was his testimony that this was the genesis of the deceased's issue with the accused and that on the 15th March 2022, while at their uncle's place with the deceased, the accused followed them and told their uncle that he would finish Julius in Nandi 'Hasa huyu macho nyekundu, nitakutafuta nitakumaliza.' PW4 testified that the deceased stated that his blood had rejected the accused.
 16. PW4 testified that about a month later on the 30th April 2022, he received information that Julius was found dead in his house in Milimani and that David was seen at Kapsaret Center near PW4's house. He testified that his neighbour informed him that he had met the accused seeking for help to get fuel for his motorcycle and that the accused had gone to Chemelil. It was his testimony that after receiving information of Julius' demise, he and the accused went to Siwa where the accused informed him that he had been with the deceased 2 days earlier. He testified that they later went to Ahero Mortuary to view the deceased's body and that the accused was arrested and taken to Miwani Police station.
 17. In cross-examination, PW4 reiterated his testimony in chief and further admitted that he never saw the person who killed the deceased.
 18. PW5 David Kipkemei Kogo testified that he knew the deceased with whom they made charcoal together Kiroro area in Chemase area. It was his testimony that on the 27th April 2022 at about 7am, a Wednesday, he was taking tea at a hotel that they frequented with the deceased when the deceased arrived in the company of another person whom the deceased introduced to the witness, PW5 as his brother. He testified that they left on their motorcycles with PW5 boarding the accused's motorbike which stalled as they crossed a river forcing PW5 to board the deceased's motorbike.
 19. PW5 further testified that he spent the day with both brothers until 9pm when they parted ways with each riding their own motorbikes with the deceased informing PW5 that they should meet at 6.00 am the following day. He testified that the following morning, he arrived at the same hotel at about 5.50am and between 6.30am – 7am, he tried calling the deceased but he was unreachable. He testified that he waited for the accused and the deceased at the market and stayed there until late then he went back to his house.
 20. PW5 testified that the following day, which was a Friday, he went to the same hotel to wait for the deceased but he never turned up so PW5 went to the deceased's neighbour, Franco, to inquire on the whereabouts of the deceased but the neighbour denied seeing the deceased as his house was locked. He further testified that on Saturday at around 9am, he saw people running towards the deceased's home and he later learnt that the deceased had been murdered so PW5 rushed there and confirmed the death.



21. PW5 testified that the deceased's body had deep cuts along the thighs near his private parts and that on the forehead, there was a blunt injury looking like he had received a blow from a blunt object. He testified that the accused was the last person to be with the deceased. He further testified that on 27th April 2022, he had tried to uproot a tree which was difficult and observed that when the deceased, Julius, went to inspect that tree, the accused picked up the axe while Julius was bent down inspecting that tree and tried to cut the same tree prompting him, PW5, to ask the accused why he was cutting the tree yet Julius was bending under the said tree and that, the accused said that he could see that.
22. It was PW5's further testimony that he told the accused not to do it but that the accused continued cutting that tree then it fell and both of them rolled it away and that as they continued working, the accused took a jembe wanting to hit the deceased on the forehead but realized that PW5 was watching him. PW5 testified that the accused had ill intentions against the deceased and PW5 realized this after finding Julius killed.
23. In cross-examination, PW5 testified that when they parted, the accused and the deceased had had no quarrels with each other. He admitted that he did not see the two get into the deceased's house. He reiterated that the accused and the deceased never parted ways because they went and had dinner together.
24. PW6 Jane Jebet Maiyo testified that she is the accused and deceased's mother. She corroborated PW4's testimony regarding the land issues that arose due to the accused's actions. It was her testimony that she later learnt of Julius death in April 2022 at Chemoroi and as they mourned, the accused went to console them saying whatever had happened had happened.
25. In cross-examination, it was her testimony that the deceased was the one sharing the monies collected following sale of land and that he shared it equally amongst his siblings. She testified that she did not see the person who killed the deceased but that he was killed due to money issues.
26. PW7 Samuel Arap Koskei, an uncle to both the deceased and accused testified that in April 2022, he was at home when 4 boys who sold land went to his home, with the accused arriving last after the 3 had earlier arrived. It was his testimony that the accused was dissatisfied with the deceased's sharing of the funds received from the sale of land equally amongst the siblings especially, that the deceased had shared the funds to his married sisters.
27. It was his testimony that he urged the two brothers not to quarrel but that the accused pointed at the deceased saying they shall meet "tutakutana na wewe". He testified that he later learnt that the accused went to visit the deceased and later the deceased was found dead.
28. PW8 Abraham Kiplagat Koskei, the accused and deceased's cousin testified that on 15th March 2022, he was in his home in Siwa when Julius, Joseph and Henry went in the evening and shortly, the accused, David, also arrived pointing at the deceased saying that he thought he had brothers but now he knew that he had none and especially the one in the middle with red eyes, pointing at Julius, the deceased herein, saying that Julius would see him. He testified that the accused was angry.
29. It was his testimony that on the 30th April 2022, they received information that Julius had been murdered and that subsequently on the 1st May 2022, they met at home as a family and left for the accused's home where they met the accused and together they proceeded to the deceased's house. He testified that on reaching Chemoroi police station, they introduced themselves and the police told them that David Arusei would remain behind because he was the last to be seen with the deceased. PW8 testified that they went to the scene and proceeded to the mortuary where they identified the body of the deceased before returning home.



30. PW9 Simeon Kipchirchir Kemboi, the deceased's brother testified that on the 30th April 2022, he was in Kakuma when he received information that his brother Julius had been found murdered. It was his testimony that on 5th May 2022, he went to the mortuary and witnessed the post-mortem on the body of the deceased and identified the body of Julius to the doctor. He testified that he learnt that Julius was last seen with David and that there were issues over land money between the duo.
31. In cross-examination, PW9 testified that he saw the injuries on the deceased's body that included deep cuts below the ear, on the hand and cuts on the thighs. He testified that he lived in Kakuma because of bad relations with the accused who had threatened him when he was their family's treasurer.
32. PW10 Dr. Orimbo Guda testified that on the 5th May 2022 he conducted a postmortem on Julius Kimeli Arusei's body at Ahero County Hospital mortuary at 1400hrs. It was his testimony that the body had no clothing, it was of a male, middle aged, who was in fair nutritional status and fair physique of 166cm in height, well embalmed and rigor mortis was present.
33. He testified that externally, the boy had multiple cut wounds on both thighs bilaterally cutting through both femoral veins and femoral arteries that the right cut wound measured 30cm long extending from the lateral aspect towards the medial aspect, running in feromedially while the left cut wound measured 26m long. It was his testimony that both were deep to the level of the bone with exposure of the femur bones bilaterally.
34. Dr. Orimbo testified that there were 2 deep cut wounds on the back measuring 4cm in between the scapular and below of 3cm but not extending to the level of the bones that there was a penetrating stab wound on the middle right upper arm entry wound was 6cm wide medially. He further testified that there was a shallow wound to the right shoulder 3cm, a deep penetrating cut wound to the neck more to the lateral aspect but not involving any large vessels of the neck. He observed that no obvious fracture was noted. It was his testimony that internally, all systems were essentially normal.
35. Dr. Orimbo testified that as a result of his examination, he formed the opinion that the cause of death was massive haemorrhage secondary to sharp object cut wound secondary to assault. He testified that he issued Death Certificate No. 1485294 and signed the Report and stamped it on 5th May 2022. Dr. Orimbo produced the post-mortem report as P. Exhibit 1.
36. PW11 No. 11777 PC Daniel Chimera testified that on the 30th April 2022 at 0900hrs while at Miwani police station, the OCS, CIP Meli received a call from Oduol, the area Assistant Chief of an incident at Miwani estate. He testified that he and IP Michael Okoyo went to the scene and on arrival found a man lying dead in a pool of blood who was wrapped in blankets and that they saw deep cuts at the right chin, right hand upper side, 2 deep cuts on both hip joints and thighs.
37. It was his testimony that the Deputy OCS informed DCI Muhoroni who came to process the scene after which they moved the body to Ahero sub-county mortuary and after investigations, the accused was arrested and arraigned. He testified that he did not know how the accused was arrested.
38. PW12 No. 88466 PC Alvin Kinyua testified that he was one of the investigating team. He testified that the deceased was found dead at Miwani estate within Muhoroni, the having been made by the Area Assistant Chief of Miwani to Miwani Police station. It was his testimony that it was established that Julius Arusei resided in the estate and his neighbours established him as missing for some days so they informed the Area Assistant Chief.
39. PW12 testified that subsequently, the deceased was found dead and wrapped in bed sheets. He testified that the accused's home was visited because he was seen in the company of the deceased and that



subsequently, he established that the accused had a quarrel with the deceased, his brother over division/ sharing of sale of land proceeds and that the suspect was not happy with the division of the proceedings.

40. It was his testimony that the post-mortem was done on the body of the deceased by Dr. Orindo and that some exhibits were handed over to him by the Investigating team but the said exhibits do not support their case.

The Defence Case

41. Place don his defence, the accused person gave sworn testimony in which he denied killing the deceased. It was his testimony that he was close with the deceased and that they used to visit each other and help each other. He testified that he only heard of Julius' death when he was in Eldoret. The accused testified that he had gone to Chemelil to visit his son for 2 days then he proceeded to visit Julius and stayed with him for 2 days helping him on his job of charcoal burning. He testified that on the 3rd day, the deceased escorted him and he left and they parted at Miwani.
42. It was his testimony that at Kapsaret, his fuel got finished so he asked for help and the deceased was called by petrol attendants and that the deceased send the accused money for fuel after which the accused went up to Soy, slept there and left. He testified that he learnt of the deceased's death 2 days later from his wife and they subsequently started planning for the funeral and to go to Miwani to find out what had happened.
43. The accused testified that he was arrested on their way to Miwani. It was his testimony that he had no disagreement with the deceased and that he had no issue over land with the deceased to lead him to kill the deceased. It was his testimony that his family of 9 depended on him.

Analysis and Determination

44. I have carefully considered the charge of murder against the accused person, the evidence adduced in this case where a brother is accused of the murder of a brother and the defence offered by the accused. The issue for determination is whether the prosecution has proved all the elements of the offence of murder against the accused person and proof to the required standard of beyond reasonable doubt.
45. The accused faces the charge of murder contrary to section 203 of the Penal Code. That section provides:
- “ Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder”
46. To sustain the charge of murder, the prosecution must adduce evidence to establish that there was death, proof of that death, that the accused caused the death of the deceased by an unlawful act and that the accused person's action or omission was with malice aforethought. The most important and essential ingredient for the offence of murder is malice aforethought.
47. The death of Julius Arusei was confirmed by the testimony of all the prosecution witnesses. PW1, PW2, PW3 and PW11 all saw the deceased's body at the scene in the house where he lived and worked as a charcoal burner and described the body as having various stab wounds on the thighs near the private parts as well as a wound on the forehead. PW4 viewed the deceased's body at the mortuary in Ahero while PW9 testified that he witnessed the post-mortem of the deceased's body. Dr. Orimbo carried out an autopsy on the deceased's body and established the cause of death to be massive haemorrhage secondary to sharp object cut wounds secondary to assault.



48. As to whether the deceased's death was caused by an unlawful act or omission, Article 26 (1) of the Constitution guarantees every person the right to life. The postmortem report revealed that the deceased sustained multiple cut wounds all over the body in some instance exposing the bone as a result of which he suffered massive loss of blood leading to his death. Those injuries, in my humble view, could not have been self-inflicted and neither was there evidence of the deceased having been an aggressor thereby sustaining fatal injuries as a result of self defence by another person or the person charged with his alleged murder. I am therefore persuaded that the deceased died as a result of an unlawful act of a third party.

49. As to whether it was the accused who unlawfully caused the death of the deceased person, none of the prosecution witnesses was present when the incident occurred. Admittedly, 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 had this to say on this point:

“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.”

50. See also *Musili Tulo v Republic Cr. App. No. 30 of 2013*.

51. 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; (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.

(see also *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.”

52. The accused person in his own defence stated that he indeed visited the deceased who was his brother, stayed with him for two days then they parted. He testified that on the day that he left the deceased, he got stranded on the way when he ran out of fuel so he went to a petrol station and petrol attendants called the deceased who send him money for fuel. That the accused then fueled his motor cycle and went to his home only for him to learn later that the deceased had been found dead.
53. In other words, the accused raised the defence of alibi which this court must examine and determine fully.
54. 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.
55. 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....”
56. 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....”
57. In the South African case of *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.
58. In another persuasive South African case of *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:
- “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.”
59. The comparative decisions cited above 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 *Mhlungu - v - S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014))
60. In the instant case, as earlier stated, the accused admitted visiting his now late brother the subject of this murder case but that he had left by the time the deceased was found dead, two days later. The question is whether the defence of alibi adduced by the accused can stand. Prior to the repeal of Section 235 of the Criminal Procedure Code, the law required that an accused who wished to rely upon the defence of an alibi, had to give the particulars of the place where he was, and the particulars of the persons with whom he was. Today, the law is that, it is up to the prosecution to displace any defence of an alibi



and show that the accused was present at the place, and at the time the offence was committed by the accused or his accomplices. See Republic – v - John Kimita Mwaniki [2011] eKLR).

61. As earlier stated, the accused testified that he had parted with his brother after staying with him for two days and on the third day, he learnt of the death. The deceased was found dead in his house, his body rubbed in sheets and blankets and blood was all over the house. His motor cycle was in the house. The door was closed but not locked. According to the evidence of the deceased's neighbors, the deceased left in the company of the accused and that they never returned. They could not tell how the deceased's body found its way into his house and rubbed into blankets with such serious cuts all over his body. They never heard any screams for help coming from the deceased's house.
62. According to PW4, the accused had expressed his intention to cause harm to the deceased on a number of occasions. PW4, the deceased's brother, PW6, the deceased's mother, PW7, the deceased's uncle and PW8, the deceased's cousin all testified of the instance where the accused threatened to harm the deceased on account of him sharing the proceeds of sale of land amongst his siblings specifically their married sisters. The threats were made just about one month to the accused visiting the deceased and the deceased being found dead in his house after the two had left together but were never seen returning to the deceased's house by neighbours to the deceased.
63. PW4 testified that on 15th March 2022, while at their Uncle's place with the deceased, the accused followed them and told their uncle that he would finish Julius in Nandi 'Hasa huyu macho nyekundu, nitakutafuta nitakumaliza'.
64. PW5 on the other hand testified that on 27th April 2022, he had tried to uproot a tree which was difficult and observed that when the deceased, Julius, went to inspect that tree, the accused picked up the axe while Julius was bent down inspecting that tree and tried to cut the same tree prompting him, PW5, to ask the accused why he was cutting the tree yet Julius was bending under the said tree and that, the accused said that he could see that.
65. PW5's further testified that he told the accused not to do it but that the accused continued cutting that tree then it fell and both of them rolled it away and that as they continued working, the accused took a jembe wanting to hit the deceased on the forehead but realized that PW5 was watching him. PW5 testified that the accused had ill intentions against the deceased and PW5 realized this after finding Julius killed.
66. PW7 Samuel Arap Koskei, an uncle to both the deceased and accused testified that in April 2022, he was at home when 4 boys who sold land went to his home, with the accused arriving last after the 3 had earlier arrived. It was his testimony that the accused was dissatisfied with the deceased's sharing of the funds received from the sale of land equally amongst the siblings especially, that the deceased had shared the funds to his married sisters.
67. It was his testimony that he urged the two brothers not to quarrel but that the accused pointed at the deceased saying they shall meet "tutakutana na wewe". He testified that he later learnt that the accused went to visit the deceased and later the deceased was found dead.
68. PW8 Abraham Kiplagat Koskei, the cousin to the accused and the deceased testified that on 15th March 2022, he was in his home in Siwa when Julius, Joseph and Henry went in the evening and shortly, the accused, David, also arrived pointing at the deceased saying that he thought he had brothers but now he knew that he had none and especially the one in the middle with red eyes, pointing at Julius, the deceased herein, saying that Julius would see him. He testified that the accused was angry.
69. The accused testified, and he was not bound to testify to prove his innocence that he left the deceased and when he reached Kapsaret, his motor cycle fuel got finished so he asked for help and the deceased



was called by petrol attendants and that the deceased send the accused money for fuel after which the accused went up to Soy, slept there and left.

70. I have carefully considered and weighed the prosecution evidence which is circumstantial and the defence of alibi and it is clear to this Court without doubt that the accused was out to get rid of his brother, the deceased in an effort to make him pay for not sharing the proceeds of the land sale in a manner that pleased the accused.
71. Further, from the testimony of PW1, the deceased's neighbour and PW5, who worked with the deceased, the accused was the last person to be seen with the deceased prior to the deceased being found dead, and in the house of the deceased where the mutilated body which was rotting was found rubbed in beddings.
72. 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 who bear the burden of proving the accused person's guilt beyond reasonable doubt.
73. Thus, the accused 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 happened to his brother, a victim of vicious assault with cuts all over his body. It is not lost to this Court that the deceased was only discovered dead after the accused and the deceased had been seen leaving together and they were never seen returning.
74. Under Sections 111(1) and 119 of the [Evidence Act](#):

“ 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.”

75. 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.”

76. 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.”

77. 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.”

78. In the present case, and from the evidence of PW1 and PW5 it is the accused who was the last person ‘to be seen’ with the deceased. The deceased was found dead the following morning. The accused person was under no duty to adduce and challenge the prosecution’s case but having been the person last seen with the deceased, he failed to offer any explanation as to how the deceased met his death. His defence, that he parted with the deceased and subsequently learnt of his death from his wife, was, in my view, not credible and the alibi defence was displaced by the strong circumstantial evidence adduced by the prosecution’s witnesses including evidence of the threats by the accused that he would harm the deceased for allowing their sisters to share in the proceeds of sale of the land. I therefore find the defence of alibi which was raised late (see *Erick Otieno Meda v Republic*) during the defence cannot hold in light of the evidence above and that the alibi defence by the accused person amounted to a mere denial. It is worth reproducing here the principles laid down by the Court of Appeal in the *Erick Otieno meda* case on alibi defence:

- (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))
79. In the circumstances, I am satisfied that the prosecution has proved that it was the accused person and not any other person who committed the unlawful act which caused the deceased's death.
80. 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.”
81. In the instant case, evidence adduced by the prosecution shows that the aim of the deceased's attacker was clearly to cause grievous harm. This is further established by the nature of injuries suffered by the deceased which were as follows: multiple cut wounds on both thighs bilaterally cutting through both femoral veins and femoral arteries that the right cut wound measured 30cm long extending from the lateral aspect towards the medial aspect, running in feromedially while the left cut wound measured 26m long; 2 deep cut wounds on the back measuring 4cm in between the scapular and below of 3cm but not extending to the level of the bones that there was a penetrating stab wound on the middle right upper arm entry wound was 6cm wide medially; shallow wound to the right shoulder 3cm, a deep penetrating cut wound to the neck more to the lateral aspect but not involving any large vessels of the neck. Such an attack was clearly meant to cause the deceased grievous harm. I therefore find that the essential element of malice aforethought on the part of the accused was proved beyond reasonable doubt. More so, in this case, motive for the murder was clear as stated above.
82. 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.
83. Accordingly, I find the accused person David Arusei alias Mohammed Guilty of the offence of murder as charged contrary to section 203 of the Penal Code. I convict him accordingly.
84. Sentence to follow after mitigation.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF NOVEMBER, 2024.

R.E. ABURILI



JUDGE

