



**Republic v Odhiambo alias Lizer (Criminal Case E002 of 2023)  
[2024] KEHC 15809 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15809 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE E002 OF 2023  
RN NYAKUNDI, J  
DECEMBER 16, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JACKSON ODHIAMBO ALIAS LIZER ..... ACCUSED**

**JUDGMENT**

1. Jackson Odhiambo alias Lizer was charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that between the night of December 31, 2022 and 3rd January, 2023 at Noble Breeze Apartments in Chebisaas area, Moiben Sub-County in Uasin Gishu County within the Republic of Kenya, Jacktone Odhiambo alias Lizer murdered Edwin Kiprotich Kiptoo Alias Chiloba.
2. The accused person pleaded not guilty to the offence, calling upon the prosecution to discharge the burden of proof as against the accused person. The state at all times was under the leadership of Senior Prosecution Counsel Mr. Mark Mugun whereas the accused person was represented by Learned Counsel Mr. Mathai Maina.
3. The prosecution marshalled twenty-three witnesses to establish the ingredients of the offence of murder. Their evidence is as follows:
4. PW1 Ramsey Chebwao Simbiri testified that he is a high school student and that he is the accused's cousin. On 23<sup>rd</sup> December, 2022 the accused called him and requested for his help in moving household items to a place that he was relocating. He was directed to a place called Noble Breeze apartments in Chebisaas area where he found the accused with his girlfriend and their baby. He helped them load the household goods onto a lorry that had been parked there. They left behind certain items at the behest of the accused.



5. On 22<sup>nd</sup> January, 2023, the accused came to their home while driving a white Toyota Fielder. In the morning, he was requested to once again help the accused to move other household goods. The accused asked him to solicit help from a friend, which he agreed to and asked Emmanuel Omondi. The accused drove them to Noble Breeze apartment and when the door to his house was opened, the house had a putrid odour. The accused instructed them to carry a dark green metallic box. It was then that he noticed that the rancid smell came from inside the metallic box. When he asked the accused why the box smelled so rancid, the accused told him that it was because of dirty clothes and that the dog had defecated on the clothes. He loaded the metallic box inside the white Toyota Fielder and the accused drove off. Due to the stink coming from the box, they had to lower the windows as they drove off. The accused dropped them off at home saying that he was going to deliver the box to Chiloba, whom they had seen photos of and knew him to be the accused's friend. The accused came back home later in the evening without the car.
6. On 4<sup>th</sup> January, 2023, the accused yet again asked him to accompany him to his place so that they can move other things. Jean Ochieng, the accused's brother tagged along this time round. When they got to the house, he noticed that although the rancid smell was still there, it was not as strong as before. They loaded the things that had remained behind from the previous day on to a white pickup and took them home. Later, on the 7<sup>th</sup> January, 2023 he was escorted to Langas police station where he recorded a statement and was placed in custody. He identified a dark green metallic box as the one he had helped the accused load onto the white Toyota Fielder.
7. PW2: Emmanuel Omondi Alela testified that he is also a high school student. On the 3<sup>rd</sup> January, 2023, Ramsey Chebwao (PW1) informed him that the accused had wanted his help in moving household goods to a new house. Because he had known the accused from his childhood, he agreed to help. They boarded a white Toyota Fielder driven by the accused and headed to Chebisaas area to an apartment where the accused used to reside. The accused opened the house and he noticed there was a heavy stench coming from a dark green metallic box. When they inquired why it smelled so bad, the accused told them its because of dirty clothes that the dog had defecated on, alcohol and dirty shoes that he had kept inside the box. Although there were other things in the house, the accused instructed them to only carry away the metallic box. When they carried it, he noted that it was so heavy that at one point, they had to drag it down the stairs. They placed this metallic box inside the Toyota Fielder and the accused drove them back home. Inside the car, the heavy stench was so bad that even after the accused lowered the car windows, the smell would not go away. The accused told them that the metallic box belonged to his frined Chiloba and that he was going to deliver it to him in Maili Tisa. On 7<sup>th</sup> January, 2023 police officers came looking for him, found him, placed him in custody and interrogated over the murder of Chiloba. He identified the dark greenish metallic box as the very same one that he had helped the accused load onto the white Toyota Fielder.
8. PW3: JEAN OCHIENG OOKO testified that he is the accused's younger brother. On 3<sup>rd</sup> January, 2023 he came back from their rural home in Siaya. He noticed that there was a lot of household goods that he had not left at home before he went to Siaya. He was informed that the accused had brought them home. In the morning of 4<sup>th</sup> January, 2023, the accused asked him and their cousin Ramsey (PW1) for help in moving other household goods. They escorted him to a place where he hired a pick-up and left for the accused's house in Chebisaas area. The accused led them to his house and when he opened the door, he noticed there was a stench coming from the house. The accused told them that it was a dead rat. They then emptied the house and acting on the accused's instructions, cleaned the house and went back home. They offloaded the household goods at their parent's home then had supper. On 7<sup>th</sup> January, 2023 police officers came to their home to inquire about the household goods. They were asked to visit Langas Police Station the following day together with Ramsey. When they



- honored those summonses, the police recorded his statement and released him but detained Ramsey in custody. He also confirmed that he had known the late Chiloba as the accused's friend and had even seen pictures of him on his phone.
9. PW4: Patricia Nyambura Ndegwa testified that she was a student at Eldoret University. The deceased was her classmate who also lived a short distance away from where she lived. She had known him to be dating the accused and would occasionally find them together in his (the deceased's) house. On the night of 31<sup>st</sup> December, 2022, she went to Tamasha Bar & Lounge together with her boyfriend Dennis. The first people they met were the deceased in the company of the accused. the deceased was dressed in a Nigerian hat, black leather coat, red long trousers, black laced top and black high-heeled boots. After a night of merry-making, they decided to leave the club together with the accused and deceased and split the taxi bill. The accused hailed a taxi and sat on the Co-driver's seat while she sat on the back seat together with the deceased and her boyfriend. The deceased appeared to have been overwhelmed by booze because he slept all the way home. They were the first ones to arrive at Canaan B, where she lived with her boyfriend, and left the accused to go home with the deceased. He has assured them that despite the fact that the deceased had blacked out, he would get him home. They sent him their half of the taxi bill and went to sleep.
  10. The following morning, i.e. 1<sup>st</sup> January, 2023 around midmorning, the accused came to their house inquiring whether they had seen his phone. She noticed that he was bleeding but could not tell whence the bleeding came from. She asked him to wash off the blood at the sink, which he did. She noticed that the accused had the deceased's phone and charger which, upon inquiry, the accused said that Chiloba was still blacked out from the previous night's drinking. He further told them that he was hoping to charge the phone at their place because of a power black-out at his place then call the taxi driver to inquire whether the deceased had left his phone in the taxi. After charging the deceased's phone, the accused scrolled through the phone and left in a hurry. She left for her parent's place that evening.
  11. On the 5<sup>th</sup> January, 2023, Dennis (PW5) her boyfriend, called her to inform her that he had seen photographs of the deceased trending online, saying that he was found murdered and was dressed in the very same clothes that he wore on the night of 31<sup>st</sup> December, 2022. She went online and confirmed it to be true. She was later asked to record her statement with the police.
  12. PW6: Dennis Baraza Ochieng testimony was similar to that of PW5 in that on 31<sup>st</sup> December, 2022 he went out partying with his girlfriend. They met with the accused and the deceased at Tamasha. He noticed that the deceased was flamboyantly dressed in red trousers, long sleeve meshy black shirt, a Nigerian cap and black boots. He confirmed that he is a teetotaler and, on the night, he only partook of soft drinks as the rest drank alcohol. At around 03:00am, they decided to go back home and agreed to split the taxi bill. PW5 and him were the first ones to be dropped off at Canaan B which is about 100m away from Noble Breeze Apartments. By this time, he had noted that Chiloba had blacked out from the alcohol while the accused appeared tipsy. The morning after, the accused came to their house while bleeding. He gave him a piece of tissue to wipe the blood and apply pressure on the wound. He told them that Chiloba, the deceased was still sleeping off the alcohol from the previous night's drinking. The accused had the deceased's mobile phone and charger and requested to charge the phone. After charging he left hurriedly. He left for Nairobi with PW5. On 5<sup>th</sup> January, 2023 he saw pictures of the deceased dressed in the same way he had when he last saw him. He notified PW5 about the trending pictures of Chiloba, who was said to have been murdered and dumped inside a metallic box.
  13. PW7: Whitney Kavinya Kaloki told the court that she is a student at the University of Eldoret and was a classmate of the deceased. The deceased had disclosed to her that he was dating the accused and she was aware that they lived together in the house at Noble Breeze Apartments. On 23<sup>rd</sup> December, 2022 in the afternoon, she was visiting a friend at Noble Breeze where she hung out with Walter Ogilo and Steve



- Odumbe (PW14) watching TV. The accused came with other people and started moving household goods from Chiloba's house. Baffled by that on-goings, she tried to notify Chiloba about what was happening but was unable to raise him on phone. The accused, who was there with his girlfriend and baby, informed her that they were only but moving out a few of the things. When Chiloba finally rang her back, he confirmed that he had not authorized the accused to take away his property. He appeared cross with the accused but later agreed to the property being moved out after the accused told him that he was moving them to a bigger, more spacious two-bedroomed house.
14. On the night of 31<sup>st</sup> December, 2023, she went to Tamasha Lounge to usher in the new year. She saw the deceased and the accused making their way into the club. She took note of his dressing; a Nigerian cap with a golden ribbon, a black leather trench coat, a black net top with shiny pearls. Due to the crowding at the club, she decided to go to another location for the night.
  15. On the 3<sup>rd</sup> day of January 2022, she happened to be together with Steve Odumbe and Walter in their house at Noble Breeze Apartments. She heard some noises like something metallic being dragged along the stairs and peeped outside. He saw the accused and another carrying a dark green metallic box down the stairs. From the way they were carrying it, the box appeared to be too heavy. She did not bother the accused because on the 23<sup>rd</sup> December, 2022, Chiloba had confirmed that he had changed his mind and was ok with the accused moving his things out of that house.
  16. On 5<sup>th</sup> January, a friend notified her that Chiloba had been found murdered and his body dumped inside a dark green metallic box. She went online and confirmed that the trending news was indeed true. She noted that the deceased was dressed in the very same manner that he had on the night of 31<sup>st</sup> December when she saw him in Tamasha Lounge. She later went to the DCI Langas to record a statement over the murder.
  17. PW8: Alex Nyamweya Morimbocho told the court that he was the caretaker of Noble Breeze Apartments located in Chebisaas area. He knew the deceased as one of his tenants. The deceased would call him from Tel No. 0716765054 whenever he had any issues with the house. The accused later moved into the deceased's house. On 23/12/2022 he was made aware that the accused had moved some of the household goods from the house. On 4/1/2023 the accused called him from Chiloba's phone and notified him that they intended to move out of the house. He asked urgently for the keys to the gate and even offered to cater for the cost of the boda-boda ride.
  18. When he arrived at the premises, he found that some things had been moved from Chiloba's house. When he went inside the house, he noticed that there was a pungent stench which the accused initially informed him to be due to the dirty stagnant water outside. However, when he went back downstairs the stench was still there particularly on the couch where flies had started hovering around. The accused told him that the smell was possibly from a dead rat that he had thrown away. Before the accused drove off with the goods, he agreed with him that he would send the deposit after inspecting the house. A new tenant took possession of Chiloba's house, cleaned it and later moved out after it emerged that the house could be a crime scene.
  19. PW9: Obadiah Otieno Ochieng testified that he was a metal-work fabricator, that he made metallic boxes amongst other items. On the 3/1/2023 at around 07:30 the accused, who was a stranger then, approached him to procure a metallic box. He was unsatisfied with the boxes that the witness had, which he said were too small. He took the accused to another stall and showed him bigger boxes but the accused was still unsatisfied saying he wanted a large box. He then took him to another shop and the accused pointed at a size 24 box which he said was large enough for him. As soon as he pointed at the box, the accused left saying he was going to get a vehicle to carry the box. This struck the witness as highly odd because usually his customers would ask an negotiate a price before getting means of



transport. The accused came back with a white Toyota Fielder and ordered that the box be loaded on the vehicle. The witness protested that he could not comply unless his price was met. They finally agreed at a price of Kshs. 7,500/= which the accused sent to his Mpesa account from Mpesa account No. 0716765064 registered in the name of Edwin Kiptoo. As they were negotiating, he noted that the accused appeared uneasy, desperate and confused so much that he was unable to open the car boot. He called someone to ask how the boot opens, was given directions but could still not open the boot. It was at this juncture that he advised the accused to fold the rear seats and they were then able to push the box inside the car. The accused insisted that he wanted the box placed in the boot because he would carry two other passengers. They obliged and, in the process, tore a piece of the car roof, something which the accused seemed not to have notice because he was absent minded. He then drove off.

20. The witness identified a dark-green metallic box as the one he had personally made. To demonstrate that the box was indeed a product of his hands, under intense cross-exam he showed the court where he had painted over the box from its initial blue color to the dark green color. He also identified the accused as the man he had sold the box to. He similarly identified the white Toyota Fielder as the very same car he saw the accused driving away.
21. PW10: Francis Were Miriasi testified that he operates a taxi within Eldoret and its environs although he sometimes offers the cars for hire. On 02/01/2023 the accused contacted him from a stranger number, introduced himself as the son of Julius Ooko and asked for car for hire. The car had been booked by another client but later, that client brought the car back earlier than expected. He later took the car to Nyathiru areas and handed it over to the accused. That car was a white Toyota Fielder Registration No. KCL 299L. The accused then sent him money, Kshs. 3,500/= to his Mpesa account from Mpesa account 0716765064 registered in the name of Edwin Chiloba. The accused told him that he had registered the number using his friend's identity card.
22. When the accused eventually returned the car the following day at around 1700Hrs, he noticed that it had a putrid smell and when he inquired from the accused why the car smelled so terribly, the accused told him that he had carried fish. The accused sent him a further Kshs. 300 to cater for the car wash and buy air freshener for the car. He was then summoned by the police to present the car because it has been used to dump a dead body.
23. He offered the car tracking details to officers who impounded the vehicle. He insisted that he had known the family of the accused for too long that he did not hesitate to hand over the vehicle to him.
24. PW11: Peter Pfaltzgraff told the court that he is from the USA doing missionary work in Mumias. He came to know the deceased through an online page where the deceased advised his clothes and designs for sale. He came to learn that the deceased had an interest in pursuing further studies in fashion and design but did not have anyone to pay the university fees. He and his wife offered to sponsor his education and subsequently, the deceased matriculated at University of Eldoret. They would also send him a stipend to cater for his living expenses and rent. This money was always sent from their US Bank account to the deceased's Mpesa account on 1716765664. Sometime in mid- 2022, the deceased introduced the accused as his friend and roommate.
25. In December 2022, the deceased visited them in Mumias with the intention of spending Christmas holidays with them. On 23/12/22 Chiloba received a phone call that the accused was moving things out of his house, something which seem to upset him so much because he had neither known about it nor had he authorized it. He told the court that he had to personally intervene to ask why the accused did that, to which the accused answered that he gotten a new two-bedroomed house and had intended to surprise the deceased. After his intervention, Chiloba calmed down and allowed the accused to move some of the household goods. The issue was put to rest when the accused went to Mumias to visit



- them. The accused left for his father's rural home and came back on 28<sup>th</sup> December, 2022. They all stayed together till 31<sup>st</sup> December, 2022 when Chiloba and the accused left for Eldoret. He sent him KShs. 123,800 to his Mpesa account to cater for his fees, supplies and usual stipend. He also sent KShs. 1528 to the accused to cater for their fare to Eldoret. He dropped them off at a bus stage and later that night, Chiloba called to notify him that they had arrived safely.
26. On 1<sup>st</sup> January, 2023 at about 0631Hrs, he got a WhatsApp message from Chiloba's number wishing him a happy new year and informing him that Jack's (the accused's) surprise was successful and the new premises was pretty. Because he was expecting a video from Chiloba that he would use for promotional video for the missionary work, he called back. The accused answered and told him that the deceased had gone to the shop and left the phone with him. He was also told that Chiloba and the accused would be going for a party that night.
  27. On 2<sup>nd</sup> January, 2023 at about 05:42 P.M he missed a call from Chiloba's number and when he called back, the accused picked the call and told him that Chiloba had come back home the party they went to the previous night. When asked why he still had Chiloba's phone, the accused answered that they had changed phones at the party. He called yet again at around 10:09 p.m. and the accused told him that Chiloba and not yet come home and incase he did not come home that night; he would report the matter with the police the following day.
  28. On 3<sup>rd</sup> January, 2023 at around 08:39 a.m., he called to ask if the accused reported the matter, to which the accused confirmed that he would be doing so in the course of the day. At around 01:29 p.m. he called to get an update on whether the accused had reported the matter, to which the accused said he was at the police station booking that report. He promised to send the OB but never did.
  29. On 4<sup>th</sup> January, 2023 at around 08:19 a.m. he called the accused, still on Edwin's phone number, to ask for an update. The accused promised to call him back from his (the accused's phone number) but never did so. By this time, he had grown so concerned by the lack of concern from the accused that he contacted a friend and asked him to accompany the accused to the police station to book a report. He then sent his friend's no to the accused and asked that they link up to report the matter.
  30. On 5<sup>th</sup> January, 2023 he confirmed from his friend that the accused had not called to do as requested. When he called the accused, still on Chiloba's phone number, he said that he was on his way to meet up with his friend. Later at around 07:32 p.m. the accused called to say that Chiloba had been murdered and stuffed in a metallic box. He then sent pictures. On 6<sup>th</sup> January, 2023, he travelled to Eldoret, went to the morgue to view Chiloba's body. He was greatly disturbed that the accused did not go with them to view the body. They went to Langas Police Station where the accused was detained as suspect. He confirmed that the police recovered the deceased's phone from the accused.
  31. PW12: Sammy Kibet Chomangei testified that he hailed from Kaptinga village within Kapseret sub-county. On 3<sup>rd</sup> January, 2023 at around 01:00pm, he was sent home when his son called him to inform him that there was a dark-greenish metallic box that had been dumped by the road and had foul smell. He went to the scene and confirmed that indeed there was a terrible smell coming from the box. He called the village elder asking him to notify the police of the discovery. The police arrived shortly thereafter and when the box was opened, they saw a body of a man dressed in female clothes stuffed inside. Officers from DCI Langas were informed and they came to document the scene.
  32. PW13: Faith Toroitich testified that she was a cashier at Tamasha Lounge. She was also the deceased's half-sister. On the night of 31/12/2022 she went to work and received a call from Chiloba. He told her that he would be coming to Tamasha to usher in the new year from there. He requested that she reserves seats for them. The deceased came at around 2200hrs and introduced the accused to her. She



- took note of his dressing. After a short conversation, she left them to enjoy themselves as she went back to work. She said that Chiloba came to her work-station about 3 times and although he was inebriated, he seemed to be unhappy and aloof. She could not sustain a conversation with him because she was still on duty. Before he left, Chiloba bade her goodbye and they wished each other a happy new year. On 5<sup>th</sup> January, 2023, she learned that a body of a man had been found stashed inside a metallic box. She noticed that the man bore an uncanny resemblance to her brother and was even dressed the same way as he was when she last saw him. She confirmed it to be him the following day when they identified the body at MTRH morgue.
33. PW14: Steve Odumber testified that he was friends with the accused and the deceased. He was aware that the two were dating. His testimony was similar to that of Whitney Kaloki (PW7) in that on 23/12/22 they were together at Walter Ogilo's house in when he saw the accused moving the household goods belonging to the deceased. The deceased was notified and although was annoyed at that revelation, he later agreed for the household goods to be moved. Of particular interest with his testimony was that on the night of 31<sup>st</sup> December, 2022 at about 03:00 a.m. he was playing video games at the home of Walter. He heard banging from the gate and a few moments later heard footsteps of people going upstairs. Chiloba was wearing a red trouser and a black shirt with pearls. Shortly thereafter, he heard Chiloba crying briefly then went quiet. That cry sounded like a desperate cry for help. Then the deceased suddenly went quiet. Because he heard him crying several times before, he did not pay much attention to what was going on but promised himself that he would inquire from him what caused him to cry the next time they meet.
34. On 3<sup>rd</sup> January, 2023 he was in the house with Whitney (PW7) when they heard a loud bang from the stairs. When they checked, they saw that it was the accused in the company of another man carrying a dark-green metallic box down stairs. The box seemed to be heavy from the way they were carrying it. On 5<sup>th</sup> January, 2023 he learned that Chiloba had been found murdered and his body stashed inside a metallic box, quite similar to the one he had seen the accused carrying down the stairs. Chiloba's body was dressed the very same was as he had last seen him walking up the stairs.
35. PW15: Jane Waya testified that she is a government analyst working with the toxicology department. She testified that their lab received a request from the DCI requesting for a toxicological analysis from bio samples sent to them. She conducted the analysis and found no traces of toxins in the samples provided. She produced her government analyst report as Exh 4A and the accompanying Exhibit Memo form as Exh 4B.
36. PW16 Chief Inspector Irungu testified that he helped to process photographs taken at the scene where the body was recovered, at Noble Breeze Apartments and in the morgue prior to and during the post mortem. He produced those pictures together with the certificate of photographic enlargement as Exh No. 3A, 3B, 3C, 3D and 3E.
37. PW17: PC Jonatha Limo testified that he is a police liaison officer working with Safaricom. He received a request from DCI Hq together with a court order authorizing him to release call data records and a print out of M-pesa statement for mobile no. 0716765064 which he confirmed to have been registered under the name of Edwin Kiprotich Kiptoo and 0759XXXXX89 registered in the name of Jacktone Odhiambo. Of particular interest to this case are transactions on 3/01/2023 at 08:15:03 under the transaction code No. RA35KP7607 where Kshs. 7,500 was sent to Obadiah Ochieng (PW9) from the deceased's account. Also, of interest is the transaction of 02/01/2023 under transaction code no RA22KBG00K and RA33MFV5S7 done on 03/01/2023 where Kshs. 3,500 and 300 were sent to Francis Miraasi (PW10).



38. Regarding the call date records, show the accused person's phone was off between 01/01/23 – 03/01/23 when he acquired a new mobile phone. His movements can also be traced using the call data records.
39. PW18: Pauline Ephy Anyango testified that she works as a masseuse. On 02/01/2023 a client was referred to her by a colleague. Shortly thereafter, that client called from mobile no. 0716765064 to ask whether she would come to his location and she responded in the negative. That client came for her in a taxi and they went together to an Airbnb place near Kings-Square homes in Kapseret. That client wanted a massage, which she offered and later demanded for sex, which she also acquiesced to. He paid her using the same mobile number on which showed his name as Edwin Kiptoo.
40. PW19 testified that he works with Trail my car Ltd which offers car-tracking services to their clients. He received a request from DCI to give them vehicle movements of motor vehicle registration no KCL 299L. He complied with the request and gave them coordinates of the motor vehicle from 31<sup>st</sup> December, 2022 to 04/01/2023. He explained the time difference in the report as something that arose from the GPS locator which was set in Chinese time zone. Looking at his report, the vehicle was used on the road where the metallic box was found at the time it was alleged to have been dumped there, He produced the vehicle movement report, letter requesting for vehicle movement, certificate of installation as Exh 9A, 9B and 9.
41. PW20: CPL Mercy Kathure testified that on 03/01/2023 she was on standby duties. She was then notified that a metallic box had been dumped in Simat/Hurlingham area. She rushed to the scene and found a crowd had formed around a dark greenish metallic box which had a foul smell. She opened the box and found that it contained a male human body that was dressed in red trousers and a black jacket. Covering the mouth was a jean trouser that appeared to have been tied tightly. Covering the body were clothes, a duvet, dirty blue jeans and sweater. They found nothing to identify the body. She took photographs of the body as found at the scene and escorted the body to MTRH morgue. She took the metallic box to their office to be kept as exhibit. It later emerged that the deceased was called Edwin Kiprotich Kiptoo alias Chiloba, a 4<sup>th</sup> year student at University of Eldoret. She caused the arrest of the accused after recording statements of witnesses who confirmed to her that the last time the deceased was seen alive, he was dressed in the very same manner that his body was found. She also interviewed PW1-PW3 who told her that they had helped the accused carry a dark-greenish metallic box with a foul smell. Her investigations also revealed that the accused had used motor vehicle registration No. KCL 299L, white fielder, to transport the metallic box containing the deceased's body to the place where it was dumped. Her counterparts from the Homicide division of the DCI took over the investigations.
42. PW21: Dr. Johansen Oduor testified that he is the chief government pathologist. He conducted the post-mortem on the body of the deceased. On external appearance, he found that one side of a jeans trouser had been tied tightly around the mouth and nose. There were also three socks stuffed one after the other, down the deceased's throat. There was bruising on the upper and lower lips and a bruising on the inner part of the left side of the tongue. These injuries according to him, were ante-mortem injuries. He extracted anal swabs and other bio samples for further forensic analysis. In his professional opinion, the cause of death was asphyxia due to smothering. He produced the Post-Mortem report as Exh 6.
43. PW22: Polycarp Lutta Kweyu testified that he is a Principal Government Analyst and the in-charge of DNA section in the Kisumu Lab. The lab received 27 items for sampling on the 11/01/2023 and 19/01/2023. He was able to ascertain that the stains on the anal swab, boxer, red trousers and purple bed cover tested positive for seminal fluid which matched with the accused's DNA. The stains from the boxer, red trouser, white bedsheets, piece of canvas, piece of sack, swabs from wheel chamber, torn green face towel, swabs from the box, grey trouser and shoe laces all tested positive for human blood



which was a match with the samples of the deceased. He produced his report and the accompanying exhibit memo form as Exh7A, 7B and 7C.

44. PW23: PC Martin Mwangi testified that on 6<sup>th</sup> January, 2023 he was in the office when they were tipped off that the person last seen with the deceased was within the precincts of the police station. They detained the accused person and he admitted that he was in possession of the deceased's mobile phone. He led them to Noble Breeze Apartment but unfortunately, they found that the house had been cleaned. He then took them to his parent's home in Huruma where they were able to recover the deceased's ID card, Grey iPhone, 4 wall portraits and assorted clothes. He signed an inventory of the items collected. Upon further interrogation on what happened, the accused wove a tale of how they were accosted by two people who sodomized the deceased, tied his hands and legs. He also said that he was hit on the head causing him to pass out and when he regained consciousness, he found that the men had killed the deceased. He then decided to dispose off the body using a car he had hired. He disclosed the particulars of the vehicle he used and it matched with the reports he had obtained from his investigations i.e. a white Toyota Fielder. The vehicle was impounded and the hirer detained in custody awaiting further investigations. The accused later confessed to committing the murder. He produced the grey iPhone, deceased's ID card, Redmi Phone and inventory of recovered items as Exhibits 2A, 2B, 2C and 2D.
45. When put on his defence the accused person testified as DW1 and gave an unsworn testimony. He stated that he was a photographer/cinematographer working under the name and style of Lizer Photography. He confirmed that he used to live with the deceased in Noble Breeze Apartments in Chebisaa's area. According to him, they had spoken about and agreed to move out of the premises because he had begotten a son and wished to move in with his fiancée. They had also agreed to meet up in Mumias during the Christmas holidays. The deceased proceeded to Mumias as he stayed behind to cover an event where he had been hired. After he covered, he went back to their house with movers who carted away his property to his father's house. PW1-Ramsey, his cousin, helped him moving out the household goods. He also admitted to the fact that neighbors (PW7 & PW14) initially stopped them from carrying the items away but that was resolved after the deceased okayed the process. After that, he went to Mumias where he spent the holidays with the deceased and his "adopted" parents. He went to his rural home in Siaya then returned to Mumias so that he can travel back to Eldoret with the deceased. In Eldoret, they decided to usher in the new year at a club within town. The deceased made reservations with his sister who works in one of the night establishments in town. They started partying in The Bak club, moved to Kettle House where they drank alcohol. The festivities were then moved to Tamasha Bar & Lounge where they met up with the deceased's half-sister. At the entrance, the deceased became furious with him for hugging female friends. Inside the club, they met with Dennis and Patricia (PW4 & PW5) and had drinks with them and took photographs of themselves while clubbing. He yet again bumped into a female acquaintance of his and hugged her, something that seemed to further infuriate the deceased. Together with Dennis and Patricia, they decided to call it a night, he therefore hailed a cab that took them home. Dennis and Patricia were the first to alight from the vehicle then the cab driver took them home. Because they were inebriated, he assisted each other to get to the house. As they were going up the stairs, the deceased kept on vocalizing his displeasure at what happened in the club, specifically why he was fraternizing and was so cozy with female acquaintances. When they got to the house, he placed the deceased on a couch and covered him with a duvet. He then slept on the carpet next to him. He said that at around 8 o'clock, he got up then went to look for his phone but did not bother to wake the deceased because he knew that the deceased would eventually wake up. At this point, he remembered that at around 0400, they had another argument about what had happened in the club. He left the house and sat in the stairs for a while then resolved to go to a friend's house. The following morning, he went to check up on the deceased but found the gate locked. After that



he headed to Dennis and Patricia's house where he charged the deceased's phone. They asked about the deceased and he informed them of the fight they had in the morning. He was bleeding and they gave him something to arrest the bleeding. He then left for town where he bought another phone. He spent the rest of the day at his parent's place and in the evening went to check on the deceased and found the door locked. He decided to call the deceased's "father" (PW11) to notify him about Edwin going missing. He went to several clubs in town hoping that he would bump into the deceased but that was in vain. The following day, he used his duplicate key to gain access into the house but did not find Edwin, the deceased, at home. The house had a terrible smell which he assumed to be from their dog that they had left unattended to for 10 days.

46. He later asked his brother (PW3), his cousin (PW1) and a common neighbor (PW2) to help him carry away the rest of the household good. He then notified their caretaker (PW8) of the intention to terminate the lease, He confirmed that he hired a vehicle from PW10 to use in transporting the household goods. He also confirmed that he bought the metallic box produced in court but totally refused that he bought it from PW9. He insisted that it was purchased from a woman whose shop is near PW9's shop.
47. He later learned from friends, that Edwin's body had been discovered in Kapseret area. This, he says, disturbed him so much that he found himself unconscious. He notified the deceased's father and when he came to Eldoret, they went to the morgue to identify the body. He was later arrested over the matter.
48. DW2: QUINTER ZAWADI testified that she had known the accused and the deceased for a while. During the time she lived in Kenya, they were neighbors. She testified that in the morning of 01/01/2023 at around 0400HRS, the accused came to her house while appearing to be distressed. She inquired what was bothering him to which the accused told her that he had disagreed with the deceased. He stated that he wanted to stay away from him till he calms down to avoid further confrontation. In the morning he left to an unknown place. She did not know what he had done prior to his visit and neither did she know where he had been. She confirmed that she had not recorded a statement with the police and had not notified any person in authority that the accused had spent the early morning with her.
49. That marked the close of the Defence case.

### **Prosecution's submissions**

50. Senior Prosecution Counsel made final submissions urging the court to find that the prosecution had proved its case beyond reasonable doubt against the accused, Jacktone Odhiambo alias Lizer. The prosecution's case rested primarily on circumstantial evidence surrounding the death of Edwin Kiprotich alias Chiloba.
51. Following the principles established in Anthony Ndegwa Ngari v Republic [2014] eKLR, learned counsel outlined the essential elements requiring proof in a murder case: the fact of death, causation by unlawful act or omission, the accused's commission of the unlawful act, and presence of malice aforethought. Notably, two elements were uncontested - the fact of death and the cause being asphyxiation due to smothering.
52. The prosecution relied on the test for circumstantial evidence as articulated in Japhet Morara v Republic [2019] eKLR, which requires that circumstances be cogently established, point unerringly toward guilt, and form a complete chain excluding any other reasonable conclusion. This principle was further reinforced by Martin Kimeu v Republic [2002] eKLR, which emphasized that circumstantial evidence must point irresistibly at the accused's guilt to the exclusion of all others.



53. Learned counsel meticulously constructed this chain through various witnesses' testimonies: PW14's account of hearing the deceased's cries for help after entering their house with the accused; evidence of the accused purchasing and transporting the metallic box where the body was discovered; DNA evidence linking both parties to items in the box; and vehicle tracking data placing the accused at the location where the body was abandoned. The prosecution highlighted the accused's shifting explanations about the foul smell in their residence as further strengthening this circumstantial chain.
54. On the critical element of malice aforethought, the prosecution drew upon *Adbuba Guyo Wayo v Republic* [2015] KEHC 2238, which establishes that strangulation inherently indicates an intention to cause death or grievous harm. The deliberate and systematic nature of the killing involving three socks being successively forced down the deceased's throat and securing a piece of jeans around the mouth and nose demonstrated, in the prosecution's submission, an unequivocal intention to cause death.
55. The accused's defense, presented through unsworn testimony, detailed events of New Year's Eve 2022, including social activities at various clubs and an argument over his interactions with female acquaintances. However, the prosecution contended that this account failed to explain the compelling chain of circumstantial evidence linking him to the murder.
56. Based on this comprehensive presentation of evidence, the prosecution urged the court to return a verdict of guilty as charged, arguing that the circumstantial evidence formed an unbroken chain pointing solely to the accused's culpability in this homicide.

#### **Accused's written submissions**

57. The accused person through learned counsel Mr. Mathai filed written submissions dated 25<sup>th</sup> November 2024 in agitation for his acquittal. The submissions challenged the prosecution's reliance on circumstantial evidence and addressed the three key ingredients of murder that must be proved beyond reasonable doubt. The submissions, which extensively analyzed case law on the standard of proof in criminal matters and the application of circumstantial evidence, are summarized as hereunder.
58. Learned Counsel submitted that the prosecution's case rested entirely on circumstantial evidence, having called 22 witnesses. He extensively cited the case of *Abanga's alias Onyango vs Republic* (1990) eKLR, which established three crucial tests for circumstantial evidence: the circumstances must be cogently and firmly established, should unwaveringly point toward the accused's guilt, and cumulatively form an unbroken chain leading to the inevitable conclusion of the accused's guilt.
59. Mr. Mathai highlighted significant inconsistencies in the prosecution's evidence, particularly regarding the metallic box central to the case. While prosecution witnesses described seeing a "darkish metallic case," the evidence at the crime scene revealed a dark green metallic box. Additionally, counsel pointed out that no prosecution witness placed the accused at the scene where the metallic box was discovered.
60. Drawing from *Stephen Ngulu Mulili vs Republic* [2014] eKLR and *Miller v Ministry of Pensions* [1947] 2 ALL ER 372, counsel emphasized that the burden of proof lies squarely with the prosecution to prove their case beyond reasonable doubt. He argued that the prosecution failed to demonstrate that the accused was the only person with the deceased when Denis and Patricia alighted from the taxi, noting the taxi driver's absence from the witness stand.
61. Counsel further relied on *R vs Taylor Weaver and Donovan* [1928] Cr App R 21, highlighting that while circumstantial evidence can be compelling, the prosecution failed to meet the required standard in this case. He pointed out that the government chemist's findings were samples allegedly collected from an empty house.



62. In conclusion, learned counsel submitted that the prosecution had not proven malice aforethought or met the required standard for circumstantial evidence. He therefore prayed that the accused be acquitted under Section 215 of the Criminal Procedure Code, as the prosecution failed to prove the murder charge beyond reasonable doubt.

### **Analysis and determination**

63. This being a criminal matter, the burden of proof in all the elements of offence against the accused person lies with the prosecution. *The Constitution* of Kenya in Art. 50(2)(a) expressly states that every accused person is presumed innocent until the contrary is proved. That contrary is purely the duty of the prosecution presenting both direct or indirect evidence accompanied with any physical or documentary evidence in support of discharging the burden of proof of beyond reasonable doubt.

64. In any criminal charge, there is a rebuttable presumption that by the Director of Public Prosecution making a decision to charge an accused person(s) for any offence on any of the Penal laws in Kenya which power is exercised under Art. 157(6) & (7) of *the Constitution*, there is prima facie evidence inconsistent with his/her innocence which right is constitutionally protected and guaranteed under Art. 50(2)(a) of *the Constitution*. This prove of existence of facts is what is provided for in the legislative scheme under Section 107(1), 108 and 109 of the *Evidence Act*. As way back in 1876, learned author Thomas Starkie in “A practical treatise of the law of evidence,” observed:

“What circumstances will amount to proof can never be matter of general definition; .... On the one hand, absolute, metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt; .... On the other hand, a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest....”

65. It is settled in law that the existence or non-existence of the facts in issue or not in issue to secure a judgment over a given criminal case is essentially the burden of the prosecution. Conversely, there is no burden laid upon the accused person to prove his/her innocence except in exceptional circumstances which may fall within the provisions of Section 111 of the *Evidence Act*.

66. The starting point on the concept of proof beyond reasonable doubt of the existence or non-existence of facts in issue in a criminal charge is to disapprove the presumption of innocence, which is a constitutional imperative accorded to every citizen of Kenya and those within our borders whose domestic law also has a direct or indirect application. The emphasis of proof being an evidential burden is at all times vested with the state through the Director of Public Prosecution as a Constitutional organ in Art. 157 with the mandate to commence, prosecute or terminate any criminal charge against an accused person. The seminal issue here is that an accused person even when arraigned in a court of law is to be treated as an innocent person until the state has proved his/her guilt beyond reasonable doubt. In fact, the law contemplates that an accused does not have to give or call any evidence in answer to a criminal charge to establish his/her innocence. This is a very high standard which must be met by the state and is the same standard I would test the cumulative evidence adduced on the elements of murder facing the accused person in this trial. It is not a question of persuasion but of certainty that both direct and circumstantial evidence point to the culpability of an accused to the offence of homicide constituting the death of the deceased. In this respect, it has always been an anxious moment in consideration of these instances in the light of the standard definitions as stipulated by Lord Denning in the Miller case as what mode of measurement for the intensity of human belief to arrive at proof



beyond reasonable doubt metrics. The truth is, no one has invented or discovered a legal barometer for trial judges across this country applying evidence at different scenarios and exercising discretion to make a finding that existence of a particular fact proves the element of the offence beyond reasonable doubt. In my experience, the short answer on exercise of discretion is always a matter of evidence both oral, documentary, physical within the purview of direct and circumstantial evidence required to overcome every possible doubt as to the non-involvement of the accused person before that particular session judge.

67. This is the position taken by the court in the locus classicus case of *Woolmington –v- DPP (1935) AC 462* at pp 487 where Viscount Sankey, L held:

“But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence. Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

68. The question also arose in the *Miller -v- Ministry of Pensions (1947) 2 ALL ER 372* at 373 where Denning, J (as he then was) stated:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’ the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

69. On a charge of murder, the prosecution has to prove the following essential ingredients:

- i. The death of the deceased Edwin Kiprotich Kiptoo alias Chiloba
- ii. The death was unlawfully caused
- iii. The death was caused with malice aforethought
- iv. The accused person participated in or caused the death of the deceased

70. This case is purely built on circumstantial evidence whose features are deducible from the following authorities: In the case of *R v Hillier (2007) 233 A.L.R 63*, *Shepherd v R (1991) LRC CRM 332* the courts observed that:

“The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant’s guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant’s guilt is proved beyond reasonable doubt. It is not the individual stand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built



not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence.”

71. In our local jurisdiction too, the test on this class of evidence is put similarly in the judgment of the court in *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, where the court said the following 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.’”

72. In the Court of Appeal, their Lordships in the case *Abang’a alias Anyango v Republic* Cr.A.32/1990 laid down the law in the context of the following statements:

“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) These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- (iii) The circumstances taken cumulatively should form a complete 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) KLR 366.)

73. The prosecution in this case from the outset set to prove all the ingredients of the offence on the basis of circumstantial evidence sustainable in the given facts and circumstances that the accused person committed the offence in exclusion of any other person. Given the test of circumstantial evidence, motive also plays an important role although it might not be the predominant determining factor of the offence. As per the prosecution’s story, the complaint was lodged regarding a missing person report since the evening of 31<sup>st</sup> December, 2022 during the high and peak month of Christmas celebrations. The aforesaid information, was recorded at Langas police station as stated by PW1. In a turn of unfortunate events, screenshots of the deceased photographs were identified in the digital platform positively identified by his friends and family as the missing person. Thereafter, the matter was taken into investigations by the homicide police unit and the spot map was prepared of recording witness statements on the chain of events with the commencement date on the night of 31<sup>st</sup> December, 2022 when he was last seen at Tamasha Club while in the company of the accused person alive and enjoying his eve of the new year only for his body to be discovered on 3<sup>rd</sup> January, 2023 within Kapseret sub-county at around 1:00Pm by PW12 who apparently received the information from his own son. The son apparently had spotted a dark-green metallic box which had been dumped at the roadside and a foul smell. The witness became suspicious and promptly telephoned the police from Langas police station



to visit the scene who in turn documented the sequential events involving the death of the deceased. The seized metallic box collected from the scene of the crime was to form part of the physical evidence to unlock the cause of death of the deceased. The death of the deceased by strangulation and dumping of the dead body at the roadside was part of a larger scheme by the perpetrator of this heinous crime to destroy the evidence to hold him culpable for the homicide.

74. The investigation was completed and analysis of each of the 23 witnesses paints material facts which are clear and none breaks the link in the chain of circumstances connecting the accused person with the crime. For example, take the exposition of PW13 who testified on oath that on the fateful day of 31<sup>st</sup> December, 2022 while walking at the cashier at the Tamasha Lounge he welcomed the deceased while in company of the accused person to usher in the new year. Thereafter, the deceased and his companion the accused left the lounge and wished her the new year only to learn of his missing report and unfortunately discovery of his body stashed in a metallic box on 5<sup>th</sup> January, 2023. This story continues to unfold in a much more intriguing manner if the evidence of PW14 is anything to go by who told the court that he was aware that the deceased and the accused were in a relationship and dating for that matter. It is not in contention that the evidence of PW14 was similar in characteristics and information with that of PW7. It is also not in dispute from PW14 that on the night of 31<sup>st</sup> December, 2022, on or about 3:00Am he was playing video game at the home of one Walter when he heard the footsteps of people walking up the stairs and to satisfy his curiosity he beeped through the window and so the deceased and accused being the persons on the stair case, it did not take long according to PW14 before he could hear a desperate cry from the voice which sounded similar to that of the deceased but the same went quiet soon thereafter experiencing. The narrative on oath by PW14 did not stop there given his evidence that on 3<sup>rd</sup> January, 2023 while in the house with PW7 when he heard a loud bang from the stairs and on a prompt check, he saw the accused in the company of another man, carrying a dark green metallic box down the stairs which apparently in his observation was heavier and loaded with something. Unfortunately to his surprise on the 5<sup>th</sup> of January, 2023 the body of the deceased was discovered stashed in that metallic box positively identified as exhibit 1 in support of the prosecution case.
75. Thereafter, the other knot of significance in the chain of events curated by the prosecution, which in precise graphics of the evidence places the accused at the center of this homicide is the testimony of PW10 who identified himself as a taxi operator within Eldoret and its environment and on 2<sup>nd</sup> January, 2023, the accused well known to him, contacted him from a strange number seeking service of car hire which he later handed as requested during the telephone conversation. The motor vehicle in question being registration number KCL 299L was produced as an exhibit with retention of the photographic impressions for use as evidence before this court. This same motor vehicle was returned back to PW10 on the following day only to notice that it had a foul smell in which the accused informed him that the source of it was from the fish he was carrying in the same vehicle. This chain of events on the conduct of the accused person is also put into perspective by PW8 who was the caretaker of the apartment occupied by the deceased. It is fundamental to note that on the 4<sup>th</sup> January, 2023 it was the accused person who called him from the deceased's phone to notify him of the intention to move out of the apartment. In order for PW8 to facilitate smooth movement of the household goods from the apartment, he accompanied the accused but something strange hit him of a fousl stench from the apartment in which he was informed by the accused that it was from the stagnant water within the premises. Clearly established by the prosecution from the evidence of PW9 who identified himself as a metal work fabricator is the requisition met by the accused to be made a metallic box on the 3<sup>rd</sup> of January, 2023. However, PW9 did not have the metallic box with the specifications ordered by the accused and they had to move to the next shop where the accused pointed out the exact measure of a metallic box he wanted to transport his goods. This same metallic box was carried in a white



Toyota KCL 299L. According to PW9, the accused paid Kshs. 7,500 via Mpesa from No. 0716765064 registered in the name of Edwin Kiptoo, the victim of the murder in these criminal proceedings. Without a doubt, PW9 on being shown the metallic box which the accused purchased on 3<sup>rd</sup> January, 2023, he was able to identify it having been admitted as physical evidence marked as Exh. 1 as part of cumulative quality of evidence relied upon by the prosecution in securing justice for the victim of this offence.

76. Admittedly, the body of the deceased has been recovered, taken to Moi Teaching Referral Hospital and a post mortem was conducted on the 11<sup>th</sup> January, 2023 by Dr. Johansen Oduor, the Chief government pathologist who also at the same time extracted various samples for toxicology purposes which were later to be analyzed at the government analyst by PW15 who produced the analyst report as exhibit 4(a) and the accompanying exhibit memo as exhibit 4(b). In her testimony, the analysis of the internal body samples extracted i.e. the liver, kidney, spleen, stomach and the blood samples were not responsive of any chemically poisonous substances. The investigations went further to carry out a forensic analyst report by one PL Kweyu who in his report dated 16<sup>th</sup> February, 2024 subjected the following samples for analysis at the laboratory chemist at Kisumu being the Anal swab of the deceased, fingernail clippings, red shoe lace, one grey ankle sock, one black ankle sock and one black sock all recovered from the mouth of the deceased, a grey black boxer, a light blue jeans trouser covered around the mouth of the deceased, a red long pair of trouser, a black long sleeved top with laces beads and chains, blood sample from the cavity of the deceased, a white bedsheet, a left leg white/green sport shoe, 3 cotton wool swabs from the stair case, a sleeveless cream vest all from Noble breeze apartment, lose soil from where the body was recovered, a piece of brown canvass cloth from the sleeping couch, a piece gunny sack, two green towels, a black long sleeve trench coat, a black velvet oval hat, a grey trouser, a maroon towel, a blue jeans trouser, a red shoe lace, three cotton wool swabs all from the metallic box, Buccal swab from the accused.
77. From the evidence, the analyst made the following findings: the stains on the anal swab, boxer, red trouser and purple bed cover tested positive for seminal fluid. The stains from the boxer, red trouser, white bedsheet, piece of canvass, piece of sack swabs from the wheel chamber, torn green face towel, swabs from the box and shoe laces tested positive for blood of human origin. Based on the scientific examination, PL Kweyu opined that the Y-filer (male) DNA profile generated from the shoe lace the socks, boxer front part, jean, white bedsheet blood stained, canvass, swabs, torn towel, shoe lace and swabs are identical and match with the reference Y-filer (male) DNA profile of Edwin Kiprotich Kiptoo the deceased. In the same examination, PL Kweyu further opined that the Y-filer (Male) DNA profile generated from the anal swab, nail clippings, stains on the boxer behind part, trouser and bedsheet stained was a mixed Y-filer (male) DNA profiles of Edwin Kiprotich Kiptoo the deceased and Jacktone Odhiambo. In the same analyst report, he opined that the Y-filer male DNA generated from the seminal fluid on the bed cover, matches the Y-filer male DNA of Jacktone Odhiambo. The government analyst report dated 16<sup>th</sup> February, 2024 was admitted in evidence as exhibit 7(a) & (b).
78. Last but not least, in placing circumstantial evidence in perspective showing that the deceased was subjected to cruelty by a known person and there is no indication that he contemplated to commit suicide. The prosecution adduced evidence on oath by one PC Jonathan Limo (PW17) who works as a liaison officer with Safaricom. The evidence in both qualitative and quantitative touched on the call data records and print out of m-pesa statements for mobile number 0716765064 registered in the name of Edwin Kiprotich, he deceased in this case and 0759XXXXX89 registered in the name of the accused Jacktone Odhiambo. Undoubtedly so, PW17 confirmed from the M-pesa account that the account of the deceased was used to transact on 3<sup>rd</sup> January, 2023 where Kshs. 7,500 was sent to Badiah Ochieng (PW9), prior to the 3<sup>rd</sup> of January, 2023, the same M-pesa account transacted Kshs. 3,500/



= and Kshs. 300 sent respectively to PW10. The accused's movements were also traceable within the vicinity of the scene of the crime and subsequent recovery of the deceased body on the roadside.

79. The question then as to who is the author of the murder is traceable to the circumstantial evidence as analogously given by the prosecution witnesses for this court to make a finding that the important links in the chain of circumstances do connect the accused with commission of the offence. It is established from the evidence that the deceased and the accused person alone were living in one of the Noble Breeze apartments. On the eve of the new year, 31<sup>st</sup> December, 2022 in the wee hours of the day they were seen together both entering Tamasha for a social gathering and soon after socializing to their own satisfaction, they left together presumably to their apartment. Admittedly from the evidence, the day of the occurrence of this death must have been on that same wee hours of the 31<sup>st</sup> December, 2022.

80. I reiterate once again by way of emphasis taking the queue from the dicta in *Mulakh Raj v. Satish Kumar & Ors* (1992) INSC 105:

“In the case founded on circumstantial evidence the prosecution must prove all the circumstances connecting unbroken chain of links leading to only one inference that the accused committed the crime. If any other reasonable hypothesis of the innocence of the accused can be inferred from the proved circumstances, the accused would be entitled to the benefit. What is required is not the quantitative but qualitative, reliable and probable circumstances to complete the chain connecting the accused with the crime. If the conduct of the accused in relation to the crime comes into question the previous and subsequent conduct are also relevant facts. Therefore, the absence of ordinary course of conduct of the accused and human probabilities of the case also would be relevant. The court must weight the evidence of the cumulative effect of the circumstances and if it reaches the conclusion that the accused committed the crime, the charge must be held proved and the conviction and sentence would follow. (491 F-H, 492 A)

Undoubtedly, in cases of circumstantial evidences motive bears important significance. Motive always locks up in the mind of the accused and some time it is difficult to unlock. People do not act wholly without motive. The failure to discover the motive of an offence does not signify its non-existence. The failure to prove motive is not fatal as a matter of law. Proof of motive is never indispensable for conviction. When facts are clear it is immaterial that motive has been proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case. (498H, 499A).

81. I believe that the structure of analysis given above will guide the following conclusions with regard to the key elements of the offence of murder contrary to section 203 to bring greater order, fairness and clarity as to whether the accused person committed this offence with malice aforethought.

82. Regarding proof of death, it is without doubt that it is proved by medical evidence particularly by the post mortem report or on the other hand by pure circumstantial evidence. In the present case, there is sufficient evidence to show that Edwin Kiprotich Kiptoo alias Chiloba is dead. The post-mortem examination conducted by Dr. Johansen Oduor (PW21) confirmed the death and established the cause as asphyxia due to smothering. This was corroborated by the evidence of multiple witnesses who identified the deceased's body. This element has therefore been proved beyond reasonable doubt.

83. The next ingredient is whether the cause of death was unlawful. In Art 26(1) of *the Constitution*, the right to life is protected and guaranteed with the exception in Sub-section 3 which provides for elements of justification or excusable by this same constitution or any written law. The legal position



on the legality of death is that every homicide is presumed to be unlawful unless circumstances make it excusable. (See the case of *Gusambizi s/o Wesonga v Republic* (1948) 15 EACA It is trite law on causation of death, Section 213 of the Penal Code provides some key highlights in the code to provide a framework on how to infer that the cause of death was unlawfully caused. The accused would be held responsible for another person's death although his act is not the immediate or sole cause under the following circumstances: (a) He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death; (b) He inflicts injury on another which would not have caused death if the injured person has submitted to proper medical or surgical treatment or had proper precautions as to his mode of living; (c) He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which the circumstances appear natural to the person whose death is so caused; (d) He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death; and (e) His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

84. In this case, the evidence sequenced by the prosecution witnesses is sufficient to me as proof beyond reasonable doubt that the death of the deceased was caused by an unlawful act of the assailant. It is a death which is not excusable as it occurred under unjustifiable circumstances like the defense of self or property or is authorized by the law or under Art. 26(3) of *the Constitution*. Similarly, in the first instance, PW13 welcomed the deceased to Tamasha Lounge while in company of the accused. Soon thereafter they left for their apartment at Noble Breeze and at 3:00Am there was commotion and distress cries as alluded to by PW7 and PW14. The body of the deceased was discovered on the 3<sup>rd</sup> of January, 2023 on the roadside stashed in a metallic box. This matter became a police case to be investigated as culpable homicide and in doing so, PW21 chief government pathologist conducted a post mortem report which established multiple injuries having been suffered by the deceased. The post mortem report confirmed the death of the deceased to have been unlawfully caused by asphyxia by smothering, which is a mode of strangulation depriving the entire internal systems or organs of oxygen flow. These were part of observations made PW21 during the performance of the post mortem examination. This necessitated a further investigation by extracting various body samples and swabs for forensic analysis. The positive findings in this respect is to be found in the testimony of PW2, a principal government analyst in charge of the DNA department section at the Kisumu government chemist. The circumstantial evidence adduced by PW6, PW7, PW8, PW9, PW10 and PW14 all point to a chain of unbroken events that the deceased met his death on the 31<sup>st</sup> of December, 2022. The chief government pathologist who testified as PW21 points out in his report tendered as exhibit 6 that during the post mortem, he was able to make observations that the deceased had sustained defense injuries on the basis of trying to defend himself from the assault by the accused. There are no excusable circumstances that have been shown by the accused that the death suffered by the deceased was not unlawful.
85. The evidence reveals a calculated sequence of events leading to the deceased's death. Between December 31, 2022 and January 3, 2023, the accused engaged in actions that culminated in the death of the deceased. The testimonies of multiple witnesses (PW1-PW23) established that the deceased was last seen alive with the accused on December 31, 2022. Particularly compelling is the evidence of Patricia Nyambura Ndegwa (PW4) and Dennis Baraza Ochieng (PW5) who were with the deceased and accused on the night of December 31, 2022. The sequence of events that followed, including the purchase of a metallic box, the disposal of the body, and attempts to conceal evidence, all point to an unlawful killing. It is my finding that the accused conduct led to the death of the deceased and as evidence obtained and is relevant to prove that the death was unlawful, there were no steps taken to



escort him to the hospital on realization that his victim has suffered grievous bodily harm. This was a person from the evidence was intimately connected to the accused person. The accused therefore owed a duty of care to the deceased and by doing what he did on the night of 31<sup>st</sup> December, 2022, he had breached that duty of care which should be characterized as gross negligence and therefore a criminal act. I find the prosecution evidence of account of what transpired in the night of 31<sup>st</sup> December, 2022 and the discovery of the deceased body on the 3<sup>rd</sup> January, 2023 along a roadside stashed in a dark metallic box very consistent to the elements of unlawful acts of omission and commission by the accused against the deceased.

86. In all homicide cases, the aggravated murder in Section 203 of the Penal Code is fundamentally distinguishable by the prosecution establishing the element of malice aforethought under Section 206 of the Penal Code. As regard to proof of availability of malice aforethought in any indictment against an accused person, Section 206 of the Penal Code gives the following guidelines:

- (a). An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
- (b). Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may be caused.
- (c). An intent to commit a felony.
- (d). An intention to facilitate the escape from custody of a person who has committed a felony.

87. The Court of Appeal in the case of Joseph Kimani Njau v R (2014) eKLR the Court of Appeal held as follows:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test which is always subjective to the actual subject;

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a risk that death or grievous bodily harm will ensue from his act, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

88. Similarly, in Rex v Tubere S/o Ochen (1945) 12 EACA 63, the court provided guidance on circumstances from which malicious intent can be deduced:

“The weapon used i.e. whether it was a lethal weapon or not;

The part of the body that was targeted i.e. whether it is a vulnerable part or not;

The manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted, and



The conduct of the accused before, during and after the incident i.e whether there was impunity.”

89. In examining the case before this court, I am confronted primarily with circumstantial evidence. As observed in *R v Hillier* (2007) (supra), circumstantial evidence is akin to a rope composed of several strands which, while individually insufficient, when woven together create an unbreakable cord pointing to the guilt of the accused. The cogency lies not in any single piece of evidence but in their cumulative effect, creating a tapestry that tells the complete story of the crime.
90. The prosecution's evidence in this case presents a meticulously woven narrative that begins on the night of December 31, 2022. Through the testimony of Patricia Nyambura Ndegwa (PW4) and Dennis Baraza Ochieng (PW5), we see the deceased and accused together at Tamasha Bar & Lounge, sharing what would be the deceased's final hours. Their evidence paints a vivid picture of that fateful night, the deceased's state of intoxication, the shared taxi ride, and critically, the accused being the last person seen with the deceased alive.
91. The events of January 1, 2023, take on profound significance when viewed through the lens of subsequent discoveries. The accused's appearance at the residence of PW4 and PW5 with unexplained injuries and, most tellingly, in possession of the deceased's phone, marks the beginning of a series of actions that betray consciousness of guilt. His explanation of the deceased "sleeping off" the previous night's revelry stands in stark contrast to the grim reality that would later emerge.
92. The procurement of the metallic box, as detailed in the testimony of PW9, represents a calculating step in this tragic sequence. The witness's vivid description of the accused's unusual behavior during the purchase, his urgency, his confusion, his departure without negotiating price takes on sinister significance when viewed alongside subsequent events. That this same box would later become the deceased's makeshift coffin cannot be dismissed as mere coincidence.
93. The scientific evidence presented through PW22, Polycarp Lutta Kweyu, provides irrefutable physical links between the accused and the crime. The DNA analysis presents a silent but powerful witness; blood stains matching the deceased's profile found throughout the apartment, mixed DNA profiles on the duvet, and biological evidence placing both parties in intimate proximity. Science speaks where human witnesses cannot, and its testimony is unequivocal.
94. Dr. Johansen Oduor's testimony (PW21) reveals the horrifying manner of the killing of the deceased characterized as follows on the nature and dimension of all external injuries in his post mortem report admitted as Exhibit 6: one leg of jeans trouser tied around the mouth and nose (tied tightly). There were also three socks stuffed in the mouth, Central and peripheral Cyanosis, Bruise of both upper and lower lips and on the left side of the tongue, subcutaneous dissection revealed no injuries on the defence injuries, red shoe lace tied around the ankle, Bloodless neck dissection performed, bone thyroid cartilage, liver decomposing, pancreas decomposing, spleen decaying, Brain decomposing and had a feature of raised intro-cranial pressure. As a result of examination, the pathologist opined that the cause of death was Asphyxia due to smothering. In a graphic presentation in court the Pathologist further stated that an examination of the deceased, the perpetrator had stuffed meticulously the deceased's throat with socks, while at the same time a piece of jeans material was tied around the mouth spreading out to the nose.
95. This was no momentary act of passion or fleeting loss of control. The deliberate, sequential nature of the suffocation speaks volumes about the perpetrator's intentions. Each sock represented a conscious decision, each moment an opportunity to stop, each action a step closer to the inevitable conclusion of death.



96. The movements of January 3, 2023, as chronicled through multiple witnesses, reveal a carefully orchestrated attempt to conceal the crime. The testimony of Ramsey Chebwao Simbiri (PW1) and Emmanuel Omondi Alela (PW2), when examined carefully, exposes the accused's elaborate efforts to dispose of evidence. Their accounts of handling a heavy, malodorous metallic box, coupled with the accused's implausible explanations about its contents, paint a picture not of innocent house-moving but of desperate concealment.
97. The accused's shifting narratives about the source of the putrid smell permeating the apartment, variously attributed to dog excrement, stagnant water, and a dead rat, betray a mind scrambling to construct plausible explanations for damning evidence. These contradictory accounts, given to different witnesses at different times, serve not to explain but to incriminate. As testified by PW8, the caretaker Alex Nyamweya Morimbocho, these explanations evolved with each telling, each version more implausible than the last.
98. The digital footprint of transactions made from the deceased's phone, meticulously detailed by PC Jonathan Limo (PW17), traces a path of calculated actions. The M-pesa transactions for the purchase of the metallic box and the hire of transport reveal not just the accused's possession of the deceased's phone but his use of it to facilitate the very means of concealing his crime. This electronic trail serves as a silent witness to the accused's actions in the aftermath of the murder.
99. Particularly significant is the testimony of Steve Odumber (PW14), who heard the deceased's desperate cries in the early hours of January 1, 2023. These were not, as suggested by the accused, mere sounds of a drunken argument, but rather what the witness described as "a desperate cry for help." That these cries were followed by sudden silence speaks volumes about what transpired in those dark hours.
100. The manifestation of malice aforethought and its determination in any given facts and circumstances, one has to bear in mind that it is a term of art and for one to arrive at a qualitative conclusion of its existence or absence of it for the commission of the crime of murder is on a question of mixed facts and law. That is how the former chief justices of Massachusetts in the United States of America made the following statements during their lifetime at the bench:
- “Malice aforethought in this definition is used in a technical sense including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will toward one or more individuals, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief, and therefore malice is implied from any deliberate or cruel act against another, however sudden.”
101. In addition, the Chief Justice also in later pronouncements stated that:
- “Murder is the voluntary killing of any person of malice pre-pense or aforethought, either express or implied by law; the sense of which word malice is not only confined to a particular ill-will to the deceased, but is intended to denote, as Mr. Justice Foster expresses it, an action flowing from a wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief.”



102. Likewise, the Connecticut Chief Justice in unbundling the definition of malice aforethought went on to state:

“In common speech malice usually means hatred, ill-will, malevolence or animosity existing in the mind if the accused, but in the law of homicide its meaning is much wider. Malice, as the word is used in an indictment for murder, not only includes cases where the homicide proceeds from or is accompanied by a feeling of hatred, ill-will or revenge existing in the mind of the slayer towards the person slain, but also cases of unlawful homicide which don't proceed from and are not accompanied by any such feeling. In the law of homicide, if a man intends unlawfully to kill another or do him some grievous bodily harm, such intention, whether accompanied or not accompanied by a feeling of hatred, ill-will or animosity, constitutes malice... Suppose A, intending to kill B, whom he hates, by mistake kills C, his friend, whom he loves; here he did not intend to kill his friend, and he did not hate him, but he loved him; and yet the law says he killed his friend with malice.”

103. The accused's defense, offered through unsworn testimony, crumbles when subjected to careful scrutiny. His account of events strains credibility at multiple points. His explanation of visiting DW2 Quinter Zawadi at 4:00 AM conflicts with his initial claim of leaving the deceased sleeping at 8:00 AM. Such inconsistencies, when viewed alongside the prosecution's evidence, serve not to create reasonable doubt but rather to reinforce the impression of guilt.

104. The principles governing proof of malice aforethought, as established in *Rex v Tubere S/o Ochen (1945) 12 EACA 63*, find clear application in this case. The method of killing, deliberate suffocation through multiple implements, speaks to clear intention. The subsequent elaborate attempts to conceal the crime, including the purchase of the metallic box and the disposal of the body, demonstrate premeditation rather than impulsive action.

105. The defense suggestion that this was merely an argument that spiraled out of control cannot withstand scrutiny. The methodical nature of the suffocation, the careful disposal of the body, and the calculated attempts to create false narratives about the deceased's whereabouts all point to deliberate, premeditated action rather than heat-of-moment violence.

106. The physical terrain navigated by the accused person in company of the deceased has extensively stated in evidence by PW13, going backwards to the testimony of PW12, PW11, PW10, PW9, PW8, PW7, PW6, PW4, PW2 and PW1 is prima facie totality of evidence in violation of Section 203 that the mens rea required for the offence commonly referred to as malice aforethought was the underlying motivation on the part of the accused to commit the unlawful acts essential to establish the offence of murder beyond reasonable doubt. It is clear that the accused person was not in possession of any dangerous weapon or devise capable of being manipulated in the commission of the offence but the measures adopted of using the socks, the clothing and the shoe laces of the deceased were rationally connected to the objective and intention to cause death or occasion grievous harm of the deceased person. It is sufficient to say in this matter that the DNA profile carried out by the principle chemist who produced his scientific evidence based report as exhibit 7(a), (b) and (c), the use of the accused genital organ to sexually the deceased and thereafter proceeding to manipulate the basic tools in his possession and have them inserted to the mouth of the deceased and as a consequence to completely deprive him of the necessary oxygen after strangulation by smothering is a manifestation of malice aforethought. The combined effect of the elements of the offence of murder were fully met by the prosecution as there was evidence dating back to the 31<sup>st</sup> of December, 2022 of the accused's active participation in the commission of the murder while underpinning it in the sex act which also attracts criminal liability in Kenya. The accused person framed his attack in very wide terms given the series



of activities involved of going out with the deceased for a social evening, which in itself may have culminated into taking some alcoholic drinks as implied by PW13 who was a cashier at Tamasha lounge. Thereafter, proceeding to their apartment and at 3:00Am a distress cry is heard from the same residence by PW14, and further the purchase of a dark metallic box in which to stash the body of the deceased, the packaging of the body and carrying it away in a Toyota fielder KCL 299L rented out by PW19, in a short span of time the discovery of that same metallic box being discovered at the roadside by PW12 and finally the body being taken to Moi Teaching Referral Hospital for a post mortem are fundamental questions/issues with far reaching consequences on the part of the accused person but apparently on that basis, no answers were ever forthcoming throughout this criminal trial. This offence even goes further to demonstrate actual subjective foresight of the likelihood of the unlawful acts committed by the accused person to cause the death coupled with the intention to cause that death of the deceased with recklessness as to its consequences. This is the most morally blameworthy state of mind in our system which I have come face to face with during my time at the bench.

107. It is of profound significance to mention inter alia the testimony of Peter Pfaltzgraff (PW11), who detailed his communications with the accused in the days following the murder. The accused's responses to PW11's inquiries about the deceased's whereabouts evolved from casual dismissal to manufactured concern, culminating in a feigned discovery of the murder. These conversations, when examined chronologically, reveal not genuine worry for a missing person but rather the calculating actions of one who knew precisely what had happened to the deceased.
108. The conduct of the accused in the immediate aftermath of the crime bears hallmarks of guilt rather than innocent concern. His irregular behavior noted by the caretaker (PW8), his hurried attempts to terminate the lease, and his contradictory explanations about the offensive odor emanating from the apartment all point to consciousness of guilt. Most telling was his resistance to providing the key to the back door when requested by the deceased's brother (PW7), suggesting a desperate attempt to control access to potential evidence.
109. In examining the defense raised by the accused, this court is mindful of the principles established in *Miller versus Minister of Pensions (1947) 2 ALL E.R 372-374*, where Lord Denning articulated that proof beyond reasonable doubt "need not reach certainty, but it must carry a high degree of probability." The accused's account, offered through unsworn testimony, presents a narrative that not only fails to create reasonable doubt but actually strengthens the prosecution's case through its internal contradictions and implausibility.
110. The accused's testimony that he departed from the deceased after a minor argument over his interactions with female acquaintances at the club cannot explain the methodical nature of the killing, the calculated disposal of the body, or the elaborate attempts to create false narratives about the deceased's whereabouts. His explanation becomes particularly hollow when considered against the scientific evidence of DNA profiles and the testimony of multiple witnesses who encountered him during his attempts to conceal the crime.
111. This court has carefully considered whether any alternative hypothesis might reasonably explain the series of events established by the prosecution. Could another person have entered the apartment, committed the murder, and disposed of the body in precisely the manner described? Could the accused's actions be interpreted as those of an innocent man caught in a web of unfortunate coincidences? After careful consideration, these possibilities must be rejected as falling into the realm of what Lord Denning described as "fanciful possibilities" that would "deflect the course of justice."
112. The totality of evidence presents a compelling narrative of guilt that cannot be explained away by coincidence or alternative theories. The methodical nature of the killing, the calculated steps taken to



conceal the crime, and the web of scientific and circumstantial evidence all point inexorably to the accused's guilt. This conclusion is not reached lightly, but with the weight of evidence that builds, brick by brick, an edifice of guilt that cannot be shaken by mere conjecture or speculation.

113. Drawing together the threads of this analysis, this court is confronted with evidence that speaks not of a crime of sudden passion but of deliberate, calculated murder. The prosecution has skillfully woven together direct testimony, forensic evidence, and circumstantial proof to create a tapestry that tells but one story, that of the accused's guilt. The scientific evidence anchors the circumstantial evidence, the witness testimony corroborates the physical evidence, and the accused's own actions and contradictions serve to reinforce the prosecution's case.
114. This court is mindful of the gravity of a murder conviction and the high standard of proof required. Yet, as Lord Denning articulated, while proof beyond reasonable doubt does not mean proof beyond the shadow of doubt, when evidence is so strong as to leave only a remote possibility in favor of the accused, "which can be dismissed with the sentence 'of course it is possible but not in the least probable,' the case is proved beyond reasonable doubt."
115. In the final analysis, this court finds that the prosecution has discharged its burden of proving beyond reasonable doubt all elements of the offense of murder contrary to Section 203 as read with Section 204 of the Penal Code. The death of Edwin Kiprotich Kiptoo alias Chiloba has been conclusively established. The unlawful nature of that death has been proven through forensic evidence and witness testimony. The presence of malice aforethought is evident in the method of killing and subsequent concealment. Finally, the accused's participation in the crime has been established through an unbroken chain of circumstantial evidence, corroborated by scientific proof and witness testimonies.
116. In the series of events, designed and executed by the accused prior to the 31.12.2022 culminating to the discovery of the deceased's body dumped on the roadside at Kapseret area on the 3.1.2023 this court in evaluating the truthfulness, convincingness, probative value, reliability, and credibility of the witnesses summoned by the prosecution in the strict sense an intention duly stipulated as malice aforethought under Section 206 of the Penal Code connotes the state of affairs in which the deceased met his death. What the accused really intended and decided to bring about in the commission of this crime was a prospect of violating the right to life protected in Article 26 of *the Constitution*.
117. This discussion would be incomplete without putting into perspective the last seen theory which was established by the prosecution by the evidence of PW13, PW14, PW7, PW4, PW6 in which it is crystal clear the accused substantially spent time with the deceased. On the night of 31<sup>st</sup> December, 2022, PW7 and PW14 noticed the presence of the accused and the deceased at the Noble Breeze apartment. It was expected under the circumstances in terms of Section 111 for the accused person to explain to the court how he had parted ways with the company of the deceased. These are facts within the knowledge of the accused person and the burden of proving that fact. It cannot be gainsaid that when the entire case of the prosecution hinges on circumstantial evidence, the entire chain of circumstances has to be completely proved including the theory of last seen together which was established by the prosecution. The case of *Bodha V. State of Jammu and Kashmir* (2002) 8 SCC 45 does manifest this doctrine in the following formulation as follows: "The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.



118. Thus the evidence that the accused had gone to Tamasha Lounge in the night of 31.12.2022 while in company of the deceased staying in the night and leaving in the wee hours for their apartment at Noble Breeze was never shaken by the defence. It is settled law that the circumstance of the last scene theory is complete and consistent with the hypothesis of the guilt of the accused and this court will not be wrong if it proceeds to make a finding of positively placing the accused the scene of the crime. The time gap between he accused and the deceased seen making entry to Tamasha Lounge and having walked out together they were also spotted by PW7 & PW14 making steps at the staircase towards the apartment and in a short while a distress cry identified as the voice of the deceased, also remains unchallenged. In the light of the facts of this case, and circumstances taken holistically there was no possibility of any other person meeting or approaching the deceased at the apartment which was the murder scene before the commission of the crime other than the accused person. The other singular evidence already mentioned, involves the purchase of the metallic box which became the first coffin on land in which the deceased body was squeezed and carried away without the traditional ceremony of burial rites as known in the African culture and customs. What led to this unfortunate fall out between close intimate friends is a story for another day given the fact that motive though a critical element in criminal offence was left in the realm of conjecture by the prosecution.
119. Having methodically evaluated the totality of evidence presented before this court and carefully weighed the prosecution's case against the accused's defense, and having subjected both to the stringent standards demanded by our law and Constitution, this court arrives at the inescapable conclusion that the accused, Jackson Odhiambo alias Lizer, is GUILTY of murder contrary to Section 203 as read with Section 204 of the Penal Code. The evidence speaks with such clarity and force that this court has no hesitation in entering a conviction against the accused for the brutal and calculated murder of Edwin Kiprotich Kiptoo alias Chiloba.
120. The gravity of this conviction demands careful consideration of all factors that may bear upon the ultimate sentence. Accordingly, both the prosecution and defense counsel are directed to file comprehensive submissions addressing aggravating and mitigating circumstances within fourteen (14) days from today.
121. Consequently, the matter shall be mentioned on 16<sup>th</sup> December, 2024 for sentence hearing.

### **Verdict And Sentence Imposed Against The Accused/convict**

122. The prosecution story in brief is that on the 31<sup>st</sup> December 2022 up and until the wee hours the deceased Edwin Kiprotich Kiptoo alias Chiloba was alive and looking forward to welcome the new year so that he can purpose to achieve his vision and dreams as restated by one of his key sponsors during the hearing of this case. As reflected in the evidence the closest confidant who spent time with the deceased on this material day was none other than the accused before this court. He also happened to be residing in the same apartment with the deceased person. The accused person/convict according to the prosecution had an earlier point in time enjoyed what moralists will describe as illicit intimacy with the deceased.
123. However notwithstanding that school of thought the typology of relationship of two people from the same sex or gender, strongly attracted to each other, and regularly agreeing to formally embrace the rights and responsibilities they felt should flow from and attached to that relationship is now gaining prominence including the aspect of settling down as married couples. In so far as the Kenyan Republic is concerned, marriage within our borders is a union of one man and one woman to the exclusion while it lasts of all others. In essence same sex relationship and unions are not only denied any form of legal protection they are also regarded as moral and their cohabitation ought to receive condemnation



by society and the law at large. This matter remains to dominate our juridical system even as to the questions being raised ignore the provisions of Article 27 of *the constitution* read as a whole.

124. The present sentencing hearing, arises out of the judgement of this court in which the accused/convict has been found guilty and convicted of the offence of murder contrary to Section 203 as punishable under Section 2004 of the Penal Code. From the facts of this case this was purely a case of murder not only unlawfully executed but before, during, and after the commission of the offence was premeditated by the accused convict. For the offence under this section, in spite of the constitutional and public debate on the Application of the death penalty in Kenya, it is still a lawful sentence if the legislative scheme and the Supreme Court dicta in *Muruatetu Case Law 2017 eKLR*.
125. The manner in which this murder was committed deserves the rarest of the sentence in Kenya reluctantly imposed by the courts being the death penalty. The clear landscape of what constitutes aggravating factors have been extensively submitted upon by the lead counsel for the state Mr. Mark Mugun who also participated in prosecuting the case against the accused/convict now set for sentencing. If all factors were constant, this is the appropriate sentence which could have been imposed by this court as a sign of condemnation considering the diabolic manner in which the offence was committed against the deceased. The record tells us that the accused before committing the heinous crime committed a sexual Act with the deceased which was affirmed by scientific evidence thereafter, he abused his trust of the victim of the family by strangling the deceased occasioning complete organs failure with no possibility of survival. On the other side of the weighing scale the accused/convict took the mobile phone of the deceased expended the monies in the M-pesa Account to purchase a metallic box which was used as a coffin to stuff the body for eventual disposal in the middle of nowhere alongside Kasperet road before a good Samaritan described as a young boy came across it informing his father who was now the first responder to the scene of the crime. The unchallenged facts reveal that in addition the accused while the body of the deceased decomposing in the apartment and later carried away for disposal was attending other social events involving even intimate relationships to members of the female gender using the balances of the M-pesa account of the deceased. The nature of the crime and the interests of the society in normal circumstances including the theologians who will call for this court to impose a death penalty.
126. It is also to be noted from the nominee of the victim family one Gaudencia that the deceased was brought up as the only boy child of his mother with great expectations that he would lead a purpose driven life to uplift not only his immediate family but also the generations within his lineage. That by the death of the deceased the family has been traumatized, lost their sense of livelihood and intergenerational growth of the family tree which was only traceable to his existence and guaranteed right to life both by the Creator and Article 26 of *the constitution*. According to the victim impact statement, it was the utmost duty of the accused, convict in this case to protect and preserve the life of the deceased whom they had known as one who had the heart and soul of his companion during their lifetime as they accomplished many assignments together. The victim family remains with more questions than answers as to why a close friend to the deceased will be the one to plan and execute his murder with impunity, cruelty and ill treatment beyond human endeavor.
127. This court has been invited by the accused defence counsel Mr. Mathai to look at the mitigating factors such as his age, no criminal antecedents, social economic background, the conduct of the accused both at the pre-trial and trial stages, the remorsefulness and regret a sufficient mitigating circumstances to sentencing to a lesser offence. In considering the aggravating and mitigating factors, this case falls under the rarest of the rare category of homicide cases the court has come across as underpinned by the unique circumstances in which was committed. There was no material evidence disclosing psychiatric and psychological impairment of the accused which will help the court to understand the motivation and



objective of killing his intimate friend as the witnesses laid bare the level of their relationship during the deceased lifetime.

128. It is clear from the mitigation submissions from both the defence and the victim impact statement that no sincere, or genuine remorse for the offence has taken place since the commission of this offence. What the law envisages on regret and remorse is to be found in the case of *S v Matyityi* 2011 (SACR 40) “ There is moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of ones error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia. What motivated the accused to commit the deed, what has since provoked his or her change of heart, whether he or she does indeed have a true appreciation of the consequences of those actions. `
129. The mitigating factors therefore, are insufficient to outweigh the aggravating factors of this offence. Given this strength of facts, had it been unsettled jurisprudence in Kenya, on the death penalty, that would have been an appropriate sentence to pass. I think on reflection, there has been a reluctance from both the executive and the judiciary to grapple with one issue or another and that is the place of the death penalty implementation despite the clear language of *the constitution*.
130. I think time has come an argument for and against the death sentence to be resolved. I do think all of us while we can intellectually say let us invest greater discretion in Judges but that has to be merged hand in hand with the political reality, the upsurge of murder cases, the public outcry because when all is said and done we serve them. Sometimes the public outraged with lenient sentences imposed for homicide offenders which make the entire criminal justice a laughing stock. So if it is the life sentence the country must go for in this kind of offences, it must ensure that the same is proportionate to the offence. Predictably, trial courts should be able to give deterrent sentences intended to show outrage and condemnation for the violation of Article 26 of *the constitution*. The men and women who reside within this republic ought to feel safe whether in their homes, offices, and wherever their happiness of life leads them as they number their days a right.
131. The behavior of the accused /convict is outrageous and disgraceful and should be seriously deprecated by any decent society leave alone our constitutional democracy. I will be failing in my duty as a Judge if the accused/convict is not meant to suffer for his barbaric Act of unlawfully killing the deceased with malice aforethought. It is obvious that his insatiable appetite for sex with the male gender may have motivated him to commit the offence who knows only traces of probative evidence that he did not go for the straight Acts of omission of killing the deceased but the criminal transaction was preceded by the sex Act against he deceased. Talk of torture and cruel inhuman or degrading treatment and its ingredients are all captured in the factual matrix of this case. That informs the gravity of the offence which this court is invited to impose proportionate sentence.
132. With regard to this offence the question of what range of sentence I should consider ways upon me for at extreme end, the death penalty for reason of its non-execution, occasions an inadequacy of the sentence at the other end, there are also mitigating factors read together with the policy guidelines weighing one factor after another the accused person herein is sentenced to 50 years imprisonment



with a rider of credit period for the period spent in pre-trial detention in terms of Section 333(2) of the Criminal Procedure Code. Orders accordingly. 14 days Right of Appeal.

**SIGNED, DATE AND DELIVERED AT ELDORET THIS 16<sup>TH</sup> DAY OF DECEMBER, 2024.**

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**R. NYAKUNDI**

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**JUDGE**

