



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 110 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

MARGARET KANYATTA KINGARU.....1ST ACCUSED

EUNICE KARIMI KIBUNJA.....2ND ACCUSED

RULING

Introduction

1. This is a ruling on a submission of no case to answer for the charge of murder contrary to section 203 as read with 204 of the Penal Code. The Particulars of the Offence as set out in the Information dated 26th November 2018 were that the accused persons “on the night of 23rd and 24th October 2018 at Githongo Market at Meru central within Meru County at unknown [time] jointly with others not before the court murdered Joseph King’aru Nkoroi.”

The Prosecution’s case

2. The prosecution’s case as related to the court in the opening address by Prosecution Counsel Mr. Maina, “is that on the night of 23rd October 2018, at around 2100hours, the deceased left his home in the company of his wife, the 1st accused to visit the 2nd accused who is said to be his mother in law. On the following day, 24th October 2018, at about 0545hrs, the 1st accused raised an alarm that the deceased was missing since she had checked his room and could not find him there. The deceased was later found dead at River Riji with a deep cut on the throat. The accused persons were the last people seen with the deceased when alive. We shall be relying on circumstantial evidence and call 15 witnesses.”

3. Both accused persons pleaded not guilty to the charge and the matter proceeded to trial, the prosecution calling a total of 12 witnesses to prove the charge.

Issue for determination

4. The issue for determination is whether on the evidence presented by the Prosecution there is established a *prima facie* case to warrant the calling of the accused to make their defence. As the Court of Appeal for Eastern Africa held in **Ramanlal T. Bhatt v. R.** (1957) EA 332, 335 such a *prima facie* case is established being “one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.” Where no *prima facie* case is established, a trial Court is under a consequential duty, as held by the Court of Appeal for East Africa in **Murimi v. R.** (1967) EA 542, to acquit an accused for, in the words of the court, the Prosecution has “failed to make out a case sufficient to require the accused to enter a defence”.

5. The duty of the court at this stage, therefore, is to consider the sufficiency, or otherwise, of the evidence presented by the Prosecution to prove the charge. In the High Court, this duty has statutory underpinning in section 306 (1) and (2) of the Criminal Procedure Code [sections 210 and 211 make similar provisions for the Magistrate’s Court], which provides as follows: -

306. Close of case for prosecution

1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

2) *When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.*

6. The court has considered the evidence presented by the Prosecution to establish whether a *prima facie* case has been established against the two accused persons herein. As held by a two judge-bench in *Festo Wandera Mukando v. R.* [1976-80] 1 KLR 1626, 1631 (Chesoni, J. (as he then was) and Trevelyan, J):

“Where a submission of “no case” is rejected, the Court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then it is an end to the case or the count or counts concerned.”

See also *Kibera Karimi v. R* (1979) KLR 36 and *Archbold’s Criminal Pleading, Evidence and Practice* (2006 ed.) at p. 468.

7. Because of the verdict it has reached on whether there is a case to answer in this case, the court is required by the authorities to give full reasoning.

The Evidence

8. The Prosecution relied on circumstantial evidence, which for completeness of record in view of the verdict of the court is reproduced in full hereunder.

PW1

9. PW1 was Joseph Mbaabu. His testimony was as follows: -

“I am the above named. I hail from Katheri Village of Kiriri Sub-location of Imenti Central. I am a small businessman. I recall on 23rd October 2018, I was working at my place of work. In the evening I went to see uncle as he had been unwell. I went at about 8pm. I found his wife, his child and 2 other small kids. I asked the wife where the husband was she directed me to another room where he was eating. He told me he was recovering. He told me he had spent the day in the home of Karimi. I took tea and before 9.00 p.m, I left. I found the 1st accused holding the door. She told me that she and the husband were going to the 2nd accused house. I questioned how they could do so and yet the husband was shivering from cold as he had not fully recovered. I told her to go the following day.

When I am at work I sleep at Githongo. I went there. At 5.46 a.m the following day, I received a call from my Auntie, the 1st accused Margaret Kingaru, who informed me that my uncle was missing. She told me to go to her home. I did not go at that time. I left my place at about 6.05 am. Where I sleep at Githongo is just behind my uncle’s house (the deceased). I went to my uncle’s house, the deceased. I knocked the door and his daughter Gatwiri opened the door for me. I found the wife of the deceased walking around the compound. She told me that the husband was missing. That when she woke up and went to the deceased’s house, she pushed the door and it opened. That the deceased was not in. When I went there, I found the bed to have been the same way it was as I had left it the previous night. There were no signs that it had been slept on. She asked me to go and see if he had gone to his rural home at Katheri. When I went to his rural home, I did not find him. I started looking for him in the farm. I went back to his market home at Githongo. I asked the 1st accused to go and report at the police. She declined on the basis that 24 hours had not yet elapsed. I then decided to go and report the incident with Luka Muthuri at Githongo Police Station. Luka is his elder brother. When we reported the police questioned why the wife was not reporting the incident. They declined to record the incident and told us to go up to 5 pm and if by then he had not been traced, we return. I met Mutua a cousin to the deceased who told us that at about 9:00 am, he had spoken to the 1st accused who had told him that the deceased had just left the house. At about 10:00 am, the 1st accused received a call and gave it to me. The caller told us that the deceased was at Gatimbi. We went there and found that he was dead. The body was lying in the water facing down. I, my brother Kaimenyi Peter and Mutua went to Githongo Police Station. At the station, the police asked why the wife was not there to report. Mutua went for her. She came and went to the scene. The police came with the scene of crime officers and took photos. The body was removed to the Meru Hospital Mortuary. I later went and made my statement. I had known my uncle since my birth. He is the one who brought us up. Before his death, he had divided his property. Margaret is the wife to the deceased. Eunice, the 2nd accused is an in-law to the deceased.”

Cross examination

“I know the 2 accuseds. I have known them since 1977. It is about 40 years. I have never heard my uncle the deceased fight with his wife. But I recall that when the uncle got a child with another woman, they fought with the 1st accused. The family has ever sat once in respect of that child who has since been taken by the deceased as his child. I have nothing to show that there was any family meeting. I have never heard of any dispute between the uncle and his mother in law, the 2nd accused. I told the 1st accused not to go with the deceased to the 2nd accused’s home. This is because my uncle was not feeling well. He had told me that he had been with the 2nd accused the whole day. The statement to the police should be read to me to see if I did not tell the police what I have told the court.

(Statement read) I note that I did not tell the police that the deceased had told me he had been with the 2nd accused the whole

day. I signed the statement. The hotel that I lodged by name Prestige Lodge is behind the deceased's market home. The deceased was living in his hotel known as Kingkat Hotel. There is a door at the rear of Kingkat which opens to Prestige Lodge. I received a call from the 1st accused who informed me that the deceased was missing. I always go round to go through the front door of Kingkat Hotel. The 1st accused told me the rear door was open. I concluded that the bed had not been slept on because I found it the same way it was when I left the previous night. The room was neat and as I had left it the previous night. No door was broken. It showed that he left the house willingly and not by force. There seemed to have been no commotion.

The 1st accused told me that they had gone to see the 2nd accused at night. It is the 1st accused who told me that probably the deceased had gone to his rural home. (Statement to police read to the witness). It does not state that it is the 1st accused who told me to go and check if the deceased had gone to his matrimonial home (rural home). I went with Mwiti from the market to the matrimonial home. It is not true that I should have been investigated for looking for the deceased in his matrimonial home. I was driving that is why I did not use the route where the body was found. It was far that is why I decided to drive there. Mochungu came and found us in the deceased's home. He told me whoever finds any news first should inform the other. When we came back to Kingkat hotel, I found the 1st accused and 2 other ladies. I do not know why the said tenant ladies did not record their statements. I see my statement I indicated that I heard Mega FM report about a missing person. (Statement read to accused). I stated that I first arrived at the deceased's brother's home (Luka) that from the way he responded I knew Joseph was not there.

I woke up Luka, when I asked him whether the deceased had gone to his matrimonial home, he answered he had not gone there. I went to Mutua's home. A post mortem was carried out. I accompanied my nephew who works at Meru Level 5. He was not an independent pathologist. It is not true that I insisted to have an independent pathologist. When the 1st accused informed me that the deceased was missing I asked her what she wanted of me. It is not true that I told her that I was at Katheri on the way coming. The phone recordings should be taken to prove that fact. I did not go to the Githongo DCIO to claim the deceased's motor vehicle. I know the 2 accused are charged with the murder of the deceased. I did not see any one of them kill the deceased. I do not know who killed the deceased.”

Re-examination

“Prestige lodge and Kingkat Hotel border each other. They are separated by only a road. It is the 1st accused who should tell us who made the call to tell us where the body was. When we received that call I was with Mutua, Luka another woman whose name I do not know and the 1st accused. When we were discussing on the night of 23rd October, 2018 he told me that he had been at the 2nd Accused's home the whole day. I have lived in Githongo for five years. I did not hear any report from Muga FM regarding the incident. When I received the call at 5.46am of 24th October, 2018 I was at Githongo at Prestige Lodge. I have known the 1st accused since 1977. I have no grudge with any of the accused.”

PW2

10. PW2, Luka Muthuri testified as follows: -

“I am the above named. I hail from Katheri West, Kathiranga East Sublocation, Githongo, Imenti Central. I am a farmer. I recall on 24/10/2018 at about 5pm. I was at my home. I was woken at about 6 am by Mbaabu PW 1. He told me, he was looking for one of their own by the name Joseph. I then went to the deceased's home at Githongo. I found the wife to the deceased, 1st accused. I asked her about her husband. On the 3rd question, she responded that he had gone missing. Then PW1 came and they began to converse. It is then that I discovered that they had been at the 2nd accused home the previous night. Those who were there are Margaret, Susan Gatwiri (a child to deceased) and the deceased. It is then I asked the 1st accused what had taken them to 2nd accused's home that might have led to the deceased's disappearance. I had entered the deceased's room and found that his bed had no blanket. I later learnt from the Post Mortem that the deceased had been killed. We looked for the deceased but could not find him. Then someone called the 1st accused who handed the phone to PW1. Then PW1 told Mutua to wake up and follow him. I was left with the 1st accused. I asked her why the two had gone. She told me that my brother was a Riji River. I then left the 1st accused and followed a road towards that river. I met PW 1 and Mutua coming from the scene and they told me that the body of the deceased was lying at the river. We then went to the police. They came at the scene and took photographs. The body was removed to the Meru Hospital mortuary when PW 1 and Kaimenyi went to pick a blanket from the 1st accused to take the body to the mortuary, she refused to give them. They had to buy one themselves. I saw the body at the river. I see the photographs showing how the body was at the scene. These are the photos taken at the scene. These are the photos taken at the scene (MF1 1 (a) to (j) Margaret is 1st accused and Karimi 2nd accused (Points at accused).”

Cross-examination

“After the postmortem, the doctor said the deceased was killed elsewhere and the body taken to the scene. (Shown the postmortem report, witness states:) I was there at the mortuary when the doctor said so. When I was making the statement, I had not known the findings of the doctor. I made my statement on 5/11/2018. The postmortem was carried out on 29/10/2018. I have not lied. It is time that Margaret refused to give PW1 and Kaimenyi a blanket to carry the body of the deceased. I told the police about it. I do not know why the police did not include it in my statement. I have not come to frame the 1st accused. I know the blanket was purchased. The deceased was my brother. The 1st accused was his wife. The deceased had 2 wives. The other wife went back to her home. As at the time of his demise he was only married to the 1st accused. I cannot recall when they got married. They have never separated. They have never fought. What surprised me is what has brought me to court today. It will be lying to say that they have ever fought. The deceased had given birth to a child known as Emmanuel Muriungi with another woman. That is the other wife. She was the 2nd wife. 1st accused is the deceased's wife. The 2nd accused is Karimi. She is our in

law. Karimi is the one who brought up Margaret (1st accused). I have never heard anyone threaten the deceased's life. I never saw any of the accused's kill the deceased. I said that the two should know how the deceased died as they were the last to be with him when he was alive.”

Re-examination

“I cannot recall the years the deceased was married to the 1st accused. The deceased's matrimonial home borders me. What I have said is what I have seen. I have never seen the deceased fight with the 1st accused. The deceased had Emmanuel Muriungi with another woman. The woman was his house girl. The 1st accused knows about that child.”

PW3

11. PW3 was Stanley Mutua who testified as follows: -

“I am the above named I hail from Katheri Central, Kathiranga Sub- Location. I am a farmer. I recall on 24/10/2018 I was at home when Luka Muthuri and Mbaabu visited me (PW2 & PW1). It was about 9 am. I called the deceased at about 9:00 am as we had agreed with him to meet. The wife picked it up and told me it was her. I asked her where the deceased was. She told me that he had gone out. I asked her if he had told her that we had plans to visit him that day she told me to continue and go there. I told my brother Patrick Kimathi and sister Josephine Nkatha and Priscilla Nkoene Mugambi. The deceased had been sick and we were to visit her on that day and pray with him. At around 10 am as I had entered my vehicle to leave my compound, I saw a vehicle come in. I had Luka the brother to deceased and Mbaabu. They asked me if the deceased had come to visit me. I told them I had called him but his wife informed me that the deceased had just stepped out. They asked me if the wife had not told me that the deceased had gone missing. We then left for the deceased's home at Githongo Market. When we arrived, I asked the wife how comes the deceased was missing. She confirmed that it is true he was missing. She told us that they slept at night but when she woke up at 5am she went to put off security lights when she realized he was not in his room. I questioned her how the deceased could have left the bed where both were sleeping and she could not hear. She confirmed to me that they were not sharing the bed or room. She took me to the deceased's room. I saw the bed was undisturbed as if no one had slept thereon. I asked her why he had not told me that the deceased was missing when I called her earlier. She showed me the car keys, money and phone the deceased had left behind. At around 11:00am I picked the wife in my car to take her to the police station. Later I learnt that a call had been made and reported that the body of the deceased had been discovered River Riji. I went to the scene. The vehicle could not reach there. The wife refused to accompany us to where the body lay. I later recorded my statement at Kariene Police Station. The wife of the deceased is the 1st accused (points at 1st accused.) I cannot tell how the two related during their marriage.”

Cross-examination

“I do not know who went to report the missing of the deceased. PW1 and PW2 came at about 10:00am to my home. When I called the deceased it was about 9:00a.m. It is the 1st accused who picked the call and told me the deceased had left his phone behind. Since she knew how close I and the deceased were she could not have hidden from me that the deceased had gone missing. They had started looking for him before 6 am and it was now 9:00am. It depends on the relationship that I had with the deceased. She agreed that we proceed and go on with the visit as arranged. Margaret the wife knew how close I was to the deceased. It is not true that she distrusted me and that that is why she did not disclose to me that the deceased had gone missing. I don't recall the 1st accused telling me why she was not living in the same room. I was surprised with that arrangement.

When I entered the deceased's room the bed was well spread. I saw the bed before 11:00am. I cannot tell if the bed had been spread. If the bed is spread. I can know if one had slept on it. It is because one can see that the beddings are disturbed. The room was not disturbed. Even I saw his money, car keys and phone on the table. If he had been removed by force, the room would have been disturbed. I cannot tell if the deceased was called by someone to go out. The door was intact. I had known the deceased and his wife for so long. I had not heard of them having any major difference. I have not heard of the deceased being threatened. I know the 2nd accused as the Auntie of 1st accused I heard the deceased and 1st accused went to the 2nd accused's home. I am not aware if the deceased and 2nd accused had any differences. I know the deceased's home ie Kingkat Hotel. I know the accused. I did not see the two kill the deceased. I do not know who killed the deceased.”

Re-examination

“What I know is that the deceased were staying okay. I was surprised to note that they were sleeping in separate rooms. The room was intact. It did not show that anyone slept in that room. I called at around 9:00 am when I was told the deceased had left. I called him on his phone.”

PW4

12. PW4 was Emmanuel Muriungi King'aru who testified as follows: -

“I am the above named. I hail from Katheri location, Abothuguchi Division. I am a driver and electrical technician. I am a son of the deceased. The only son born out of wedlock. I joined the family of my father in 2000 after circumcision. I was received well but after 3 months wrangles arose up. I joined secondary school then. Because of the wrangles I moved out and went to live with Luka Muthuri, my uncle. I did not have a specific house in my father's home. After school I went to stay in rented premises. My dad took me for driving. I started taxi work and got married. I continued to hustle until 2014 when my father called me and

told me to join my sister at Chuka in her business. But again issues arose. In early 2018, he called me and told me that he wanted to bless me with what the grandfather left behind. He divided the land into two portions. He charged the names at KTDA for tea. He told me my other sister to occupy the other half of the land if he was not there. We grew close and he gave me his vehicle reg. No KCM 440s, A Sienta Toyota. I worked with it for 1 week, then he called me and told me to leave it because of family issues. On 14/10/2018, he called me on phone and told me to call his brother Luka Muthuri and one of the Laters son, Kimathi. We attended a meeting at Karimi's place (2nd accused). In attendance were Kanana Kendi, Gatwiri (sisters). Luka (brother) Patrick (son of Luka) Kiogora (brother as cousin to 1st accused) 1st accused, Mburugu (a brother to 1st accused) and his wife and myself. The agenda was sharing of Dad's properties. He said that one part of parcel at Katheri be divided into 2 since I was a man now, I live on the empty place. Where there is no structure. That regarding the rest of the property he was to write a will. The meeting ended well. On 21/10/2018 I made a family visit to my father (deceased) as he was feeling unwell. That is the last time I saw him. On 23/10/2018, he called me regarding fertilizer issues. It was about 10 am. On 24/10/2018. I received a call from PW1 to meet him at Githongo Matatu stage when he asked me If Dad was at my place. That surprised me as my father has never been to my place. He told me that he had been informed that my father had gone missing, we started searching for him. I looked for him up to Meru Town. It is then I was informed that my dad was in Githongo. I saw his body at River Riji. He had told me that when all the siblings were to finish college, he would settle me. There was no problem when I was given the land. But when he took back the vehicle, I realized there was a problem. Within 3 weeks, things changed i.e return of the vehicle, the family meeting on division of property then his eventual death. The 1st accused was my father's wife. The family meeting took place at 2nd accused's house. I later made a statement with the police."

Cross examination

"I was given half land. One of the other children of the 1st accused had been given land. We are six children of our father. I was given because I was a man and married. The other sisters were given assets. Mr. Gichunge has the will. The others were given other assets. In the family meeting, the deceased said that he had given me my portion, the others had to wait. I received the call from PW 1 when I was in my rented house. It was about 8:00 AM. It is when I reached the stage at Meru that I was told by a stage Clerk that the person I was looking for was in Githongo. At that time, his vehicle was parked in front of a Sacco where it was ordinarily being parked. I do not know who parked it there. In the family meeting, there were so many matters which we discussed. It is then that he took the vehicle from me. He asked if I could pay the loan for that vehicle. I declined. One of my sisters offered to pay that loan and my father gave that vehicle to her. 1st Accused is my step mother. I was born out of wedlock. I am now 32 years. Not until I came to my father's home that my being brought up issues between my father and the 1st accused. My father never discussed his issues with his brothers. My father educated me. I do not know that the 1st accused paid my fees. The last time I saw him was a Sunday when I went to visit him. He spoke to me on 23/10/2019 during the day. I never saw anyone kill my father. He never had any outside threat."

PW5

13. PW5 was Susan Gatwiri who testified as follows: -

"I am the above named from Githongo, Abothuguchi East. I am a business lady. I have my own hotel at Githongo. I recall the 23/10/2018 I was at our home in the evening, I was with 1st accused (my mother) Chan Avrii (my niece) and my daughter 7 months old. It was about 7:30 pm when I was taking supper. The other room which was my parents' bedroom was occupied by my father. At about 8:30 PM, he came and told my mother that my father should not go to my grandmother (2nd accused) because he was feeling unwell. The 2nd accused was not feeling well. At 9:00pm, my father, my mother (1st Accused) and Chan Avrii went to my grandmother's home (2nd accused) I was 17 years old. At 10pm, I heard them return. I was in my room (witness unstable). The following morning, I woke up and met my mother calling my grandmother. She told her that my father was missing. I took my child and took it to Githongo hospital. Later I learnt that my father was found dead. When I woke up, I went to my father's room. I found his belt on the floor, the bed was unkept, on the table was car keys, phone and money. I picked the phone to go and check whether there were any received calls, missed calls or even messages. I found that there was nothing. Everything was deleted. The door was not broken.

The 2nd accused's house is about a 10 minutes' walk from our home (Kingkat Hotel). My room was next to my parent's room. My parents used to live in the same room. But 3 days before, the girl who was taking care of Avrii Chan had gone away. My mother went to stay in Chan's room. (witness evasive) The vehicle is parked about 3 plots away. I did not go to the scene where the body of my father was recovered. From our home to my grandmother is about 500m. From Kingkat Hotel to Riji River is about 200M. From Riji River to my grandmother's home is about 800M. Kingkat hotel is at the middle between my grandmother's home and Riji River my grandmother's home is the opposite direction. (witness refuses to explain the proper directions of grandmother and Riji River). I have lived in Kingkat for over 15 years. It has a boundary wall. It has two gates one to the front and the other to the rear. There are no guards there. It is an eight (8) roomed hotel."

Cross examination

"I was at home on 23/10/2019. Chan Avrii goes to school. She was PP1. Not yet in school. My mother went to sleep with her because her caretaker had left. PW1 came to visit us that day at night. My father was in the bedroom at that time. I did not hear what they were discussing. He left my father in his bedroom. He told the 1st accused not to go with deceased to the 2nd Accused's home. He did not tell her why. They went and came back. I was in my room. I heard my mother tell Chan they go to sleep. The deceased called me and told me goodnight.

When I woke up between 5 am and 6 am I found my mother calling my grandmother. Before then my father used to wake up at 5 am to go to his taxi business. But then because he was not feeling well he was walking up late. On the night of the said 23rd

October, I did not hear any commotion. The rear gate is for our use. The hotel has 8 rooms. The other rooms are occupied by the tenants. The rooms occupied by the family was Chan's room, Dad's and mom's and my room. Both us and the tenants we use the same exit at the rear.

I do not know the exact place where the body of my father was recovered from. The grandfather's home is towards the south of our home. The distances I gave are those on the main road. The relationship between my mother and father were good. When they left to go to the 2nd accused, they were in good terms. I did not hear them quarrel. My grandmother and father related well.

Prestige lodge is behind our hotel. There is direct access from that hotel to our home. PW 1 told us he was going to sleep at Katheri I came to know he slept at Prestige Hotel. The vehicle was packed at Times U Sacco I went to Githongo Hospital to see if my father had gone there as he was feeling unwell. The data in my fathers' phone, I found the same deleted. I checked and did not see any communication for 23/10/2019. It was unusual. It is the reason I suspected that they were deleted. My father looked disturbed the previous day but I thought it was because he was feeling unwell. I did not see anyone kill my father."

Re-examination

"Chan is my elder sister's sister. My sister was not there. I could not sleep with Chan as I had my own child. When my father and mother went to Eunice they used the vehicle. Before that day he had not been feeling unwell. The previous night he went to Eunice's place. I was suspicious that he was missing on 24/10/2018 though it was nearby 6 am because he was under medication.

I have known PW1 throughout my life. He never used to come home. He started to come home beginning August, 2018. He is a son to the sister of my father. When PW1 came on 23/10/2019 he found us in Chan's room. The gate used to be closed from inside. My dad used to have the keys for the gate. They were with the car keys. They were on his table.

When I went to his room, the bed was not made. It was unspread. It was as if it was slept on. I stated that prior to his death he looked disturbed because he was quiet. From Kingkat Hotel to where the body was recovered is about 200 metres. The gate was open. The lock was locked at its place. The keys were with deceased and a tenant mama Salome. The tenants use the rear gate. I now state that the front gate key is kept by us in the Kitchen. The keys that I referred to which my dad had and mama Salome is for the front gate. We use the back gate. That is the one we found open.

PW6

14. PW6 was Charles Kiogora Kiugu who testified as follows: -

"I am the above named. I hail from Kakuroene Sub-location Meru Central Sub county. I am a teacher. I know the deceased. He married my cousin in 1977 so we were very close. I was with the deceased on 17/10/2018. He called me to go and make a will in the office of Gichunge Advocate. That is the last time I saw him between 1 and 2 pm. We were in that office witnessing the will. There was no problem at the time of the writing of the will.

On 22/10/2018, I went to Nairobi at the supreme court. I took my Auntie, the 2nd accused to hospital in Nairobi. She had a case before the Supreme Court. On 23/10 2018 I went to school after which I slept. On 24/10/2018 about 6 am, I received a call from my auntie, the 2nd Accused who informed me that the deceased was missing. I was in school at the moment. I went to the residence of the deceased. I found the 1st accused who showed me where the deceased was supposed to be sleeping. I then proceeded to the 2nd accused's home. I brought her to the home of the 2nd accused. I went back to school at about 7:30 am.

At about 11:00 am I heard that the deceased's body was found about 300 metres from his residence in a river. I went there. I saw the body lying down face on the stream. I could not identify the body at that time. At 2 pm, I received a call informing me that the body was that of the deceased. The body was taken to the mortuary. I only went to his residence in the evening. I never saw any blood or injuries on the body. The 1st accused is my cousin who the deceased married in 1977. When he called me on 17/10/2018 to witness the will, I did not notice any problem. There was a problem in the family of the deceased. On Saturday 13/10/2018, I went to take the deceased to hospital at Githongo sub county hospital. I took him back home and told him that I will check on him the following day 14/10/2018 Sunday after service. On 14/10/2018, after service I went to his residence. I found him with the 1st accused and a daughter by the name Susan Gatwiri. He told me that he wanted to have a meeting of his family. He called for his son Muriungi whom he sent to his (deceased's) brother by the name Luka Muthuri. Luka raised his son Muriungi. After they came, the deceased told us to go to the 2nd accused. We went there and the meeting took place. He told his children that he was to make a will. That he will set out his assets and it will be in an advocate's office. He had already shown Muriungi where he was to build. He had been shown his land. The others had not. This meeting is the one which led to the writing of the will of 17th October, 2018. He did not inform the other children what he was to give them in the proposed will. Only Muriungi. I do not know if there was anyone who was unhappy with the arrangement by the deceased."

Cross examination

"I do not know who killed the deceased. I participated in the post mortem. It was on 29/10/2018. I took the 2nd accused, Caroline and Kendi. The latter 2 were the deceased's daughters. It was at Meru Level 5. We found Muthuri (his elder brother) Mbaabu (a nephew), Muriungi the son of the deceased and another person who claimed to be a doctor. There was also a police officer. All of us identified the body except the 2nd accused. I do not know if the family had agreed to take a private Pathologist apart from the Government Pathologist. I witnessed the will in your office. I did not hear anyone complain on the will. At the signing of the will those present were the Advocate Mr. Gichunge, Charles Kiogora (myself), Peter Kirimi a friend of the

deceased and the deceased. I was not there when the body was being retrieved. The stream from where the body was retrieved is to the north of his residence about 300 metres away. The 2nd Accused's home is to the south of the residence of the deceased about 400 metres. It is opposite the directions where the body was found. The 1st accused showed me the room where the deceased was said to have slept. The beddings were disturbed in that they were open. There was no sign of commotion from the way the room was. There is prestige lodge that is behind the deceased's residence. It is separated by a 40ft road. There is a rear gate at Kingcat by which one can access prestige lodge.”

Re-examination

NIL

15. PW 6 was recalled for purposes of producing the will. He testified as follows: -

“I recall I had testified earlier on. I stated that I knew the deceased well. When he wrote the will he called me as a witness. I see this is the will that he drew. I signed it as witness number 2. I am conversant with the contents. In item numbers 6, he bequeathed his son a half of his land Emmanuel Muriungi. I do not know if the 2 accused were not happy with this particular item. I do not know if there were issues which arose from the will. I was not there when it was read to the family.”

Cross examination

“I do not know if there was any issue with will. The deceased held a meeting on 14/10/2018 a Sunday wherein all concerned attended. When he said he had given his land to his son no one complained. I am not aware when the son took possession. I see a certificate of confirmation of those who attended the reading of the will. They are set out therein. I do not know if there is anyone who had contested the will.”

PW7

16. PW7 was Caroline Kananu who testified as follows: -

“I am the above named. I hail from Tharaka Nithi. I am a teacher. The deceased was my father. The 1st accused is my mother and 2nd accused my grandmother. I last saw the deceased on 31/10/2018. I am not very sure. On 14/10/2018 I had come to visit home as usual because the deceased was sickly. I came at about 7 am. I found my parents at home. The deceased had called Muriungi to come. I went to greet the 2nd accused. At 1pm, the deceased called me and told me that they were coming to the home of the 2nd accused. He held a meeting at the home of 2nd accused. He told me not to leave before he came. At that meeting those who attended were, myself the deceased, 1st and 2nd accused uncle Kiogora (PW6) uncle Mburugu, Uncle Luka, My sister Kendi. My sister Susan, brother Emmanuel Muriungi, Auntie Mercy (wife to my uncle), My cousin Patrick. The deceased said that he had 6 children that the only one who knew where to live was Emmannuel. For the rest they will know where to live after he wrote the will. The deceased took the key for the vehicle from Muriungi and gave it to the 1st accused. The 2nd accused said that the 1st accused cannot pay the loan for that vehicle. My sister Kendi said she could pay the loan. The key was given to her and she said that she will hand over the vehicle to the deceased after settling the loan. Subsequently, I came to take the deceased to hospital with Kiogora (PW6) and a Mr. Kirimi. He said that he wanted to go to make a will. He went to an advocate to make the will. He went with Mr. Kirimi and uncle Kiogora. He came back after the will was written. He came to the hospital and after he was treated, we went home and I went to Tharaka Nithi.

I do know that the 2 accused were the last people with the deceased. I did not hear that the 2nd accused got mad about the contents of the will and decided to do away with the deceased. I saw the body in the mortuary it had injuries. It had marks on the neck, bruises on the right ear and from face. After the burial, both the nuclear and extended family went to the Advocates office, Mr. Gichunge and the contents of the will was read. Uncle Luka questioned whether Mbaabu witnessed the will. He was told that Mbaabu did not witness the will.”

Cross examination

“I do not know who killed my father. I did not hear anyone plan his death. However, for the last 3 months of his life, my father was troubled and disturbed. That was not his nature. He was a taxi business. I am aware him saying one day that he would leave the Diligence SACCO where he was a leader. I see a letter dated 18/2/2019. It is written by me and my sister Catherine Kendi. It is addressed to the In charge the office of DPP Meru. We were complaining that there was a mischievous number 0793- 668952 threatening us that we will be killed the same way our father was killed. I now state that the letter was written by Advocate Gichunge on our behalf. There was no action was taken. It was received on 25/2/2019. We do not know who called us through that number.

The relationship between the deceased and the 1st accused was good. The relationship between the 2nd accused and the deceased was also good. Even the deceased took his family meeting of 14/10/2018 to her home. I was in Tharaka Nithi the day my father was killed.

Prestige Lodge is behind our hotel. The deceased was sleeping separate from the 1st accused. On the date of the incident, my sister's child was at home. The 1st accused went to sleep with that child. The child was 5 years old. The child is going to class 2. All these I heard from the 1st accused.

There was no one who opposed the deceased when he stated he wanted to write a will. I attended the post mortem with Mbaabu, Muriungi, Kiogora, Mercy my sister Catherine. The family had not agreed for a private Pathologist. Mbaabu however said that he was to come with a private doctor. He however came with a mere Clinical Officer. The Post Mortem was undertaken by the government pathologist.

It is Mbaabu who made the report at Githongo. Mbaabu told the police that his vehicle would be [sighted] behind the hotel. The Kariene Police told us that they had a CCTV footage for the hotel. It is at Times U SACCO. The police did not tell us the footage was for what period. According to me the body was found to the East of our residence. 2nd accused's home is to the south of the residence of the deceased. If one was to go to River Riji there are 2 routes one through the hospital (the short cut) then there is a second one which is a longer route (This witness seems hesitant and unsure or does not want to tell the truth). I did not go to where the body was recovered. One of the routes is through our home.

Re-examination

"The letter was by Advocate Gichunge. I do not know the outcome of that letter. I do not know if the matter was investigated and found to be baseless. It is I and my sister who went and gave instructions to Mr. Gichunge to write the letter to the ODPP Meru."

PW 8

17. PW8 was Catherine Kendi who testified has follows: -

"I am the above named. I hail from Nakuru Koresoi North Kamara ward. I am a teacher. I know the accused. The 1st accused is my mother and 2nd accused my grandmother. I recall on 24/10/2018, at around 6:00 am, I received a call from Joseph Mbaabu who informed me that they were looking for my father. That he left at night and they were looking for him. I had left my father stressed. I was at the time at Nakuru. Later on I started receiving messages from friends condoling me. I then called my father's phone. It is my child who received it and told me to come. I made arrangements to come. At about 10 am, the 2nd accused informed me that my father had died. I came and reached home at 7:30 pm. I found a crowd of people at our home condoling us. The following day I called my twin sister PW 7 and asked her if we could go and check if the incident had been reported at Githongo Police Station. When we went there we were surprised to note that Mbaabu had already reported the matter to the police at Githongo. We were told that our case was being handled from Kariene. I never went to where the body was recovered. I first saw the body in the mortuary during post mortem. There seemed to be a visible injury on the neck. There was another injury above the left ear. I recall that on 14/10/2018, the deceased called a family meeting, He told us that it was a meeting to divide his property. He stated that whatever he was to give us we be satisfied. He was angry because Emmanuel Muriungi had failed to properly manage our father's motor vehicles. On that day he said that he was to write a will which will be disclosed after he is gone. That the only person who knew what he got was Muriungi as he had showed him his property. I went back to work. The relationship between the deceased and the accused was good. I do not know if the accused were not happy with the will. (witness evading questions from prosecution) I cannot say that there was any reaction from the accused on the will by the deceased. I came to know that he made a will. This was 2 weeks after the burial. When we went to Advocate Gichunge. The deceased did not tell us when he was to write the will. He never mentioned the name of the Advocate."

Cross examination

"I do not know if there was anyone who had a problem with my father making the will. The meeting of 14/10/2018 was held at the 2nd accused's home. It was called by the deceased. The issue was of the motor vehicle and how my brother had mis-conducted himself. The 2nd accused took the key of the Motor vehicle and gave it to me as I was willing to pay the loan which it had. No one was not satisfied at that meeting.

Joseph Mbaabu is a distance cousin. He is the one who was the first to call me. He became very close after July, 2018. His mother is assisted to my father. I call him a 3rd cousin. His home is in Katheri in Kionyo (very evasive witness) The relationship of accused to deceased was good. The deceased used to cooperate with the 1st accused. I used to come home after every 3 weeks. My father was very stressed towards last days. He was a leader of Diligence SACCO. It is a Matatu SACCO. He was the loan Chair. There were so many meetings he was attending. Chan is my child. I gave birth on 3/8/2011. She was 6 years. Last year. She is now at my sister's place. In October, 2018 she was living with my parents and my sister Sue and a house help Susan Kangai. On the 24/10/2018, the house help was not there as a result my mother was sleeping with my child in my room. At the time the houses were occupied by tenants. Our residence which is a hotel has a rear gate. I attended the reading of the will. We were with the extended family. We were given copies of the will after it had been read to us. I had not seen it before. My uncle Luka Muthuri asked whether Mbaabu had not signed the will.

Our residence to the 2nd accused is about 400m. Her residence is to the south of our residence. The River Riji is to the west of our residence. I now change and state that the River Riji is to the north of our residence. I do not know why only the accused were arrested. The investigations were not properly carried out."

Re-examination

NIL

PW9

18. PW9 was Mercy Kiringo who testified as follows: -

“I am the above named. I hail from Kakurue sub-location, Marathi location. I am a teacher. The deceased had married my sister in law, the 1st accused I know the 2nd accused. The 2nd accused is my mother. I recall on 13/10/2018 I was in Meru Town when the 2nd accused called me but I did not pick it. I called her later and she told me to go and see the deceased in hospital. I went to hospital the same day. He was with my cousin Charles Kiogora. We passed at our home and he saw the 2nd accused and went to his home.

On 14/10/2018 at about 4pm, Charles Kiogora and the deceased came to our home. I live with the 2nd accused. He held a meeting with a few family members. The deceased informed us that he wanted to distribute his properties. That the only child of his who knew what he had was his son Emmanuel. That he was not satisfied with the responsibility levels of his son but was not satisfied. He took away the car keys from him and gave it to the 1st accused. It was however, later taken by PW8 to pay the loan outstanding on it. I did not hear anything about the will. On 24/10/2019, I received information while at my place of work that he had passed on. The 2 accused were the last one to be seen with the deceased. That is why they were charged.”

Cross Examination

“On 23/10/2018, I came out of my house and saw that the deceased, 1st accused and a grandchild had arrived and parked outside the house of the 2nd accused. They parked outside the 2nd accused's house and entered her house. My house is next to that of the 2nd accused. We share the compound I did not join them at Eunice's house. I do not know what they were discussing about. It is that night that the deceased died. After the deceased left with the 1st accused. I went to the house of the 2nd accused. I found my husband Mburugu and a niece called Mercy. They were taking tea. It is the following day that I learnt that the deceased had died.”

Re-examination

NIL

PW 10

19. PW10 was Job Kirema Kithinji who testified as follows: -

“I am the above named. I hail from Katheri. I am a businessman and a technician. I make and install CCTV. I knew the deceased as a business man in Katheri. I know the 2nd accused. She is my client. She has once given me a job. I recall in July 2018 she was looking for someone to install a security system at her home. She was directed to me by Mercy Karimi, her granddaughter. She called me to her home and she chose to put a CCTV system. I purchased the system and installed it in her home. She called me several other times to extend the system to cover other areas which I did. Later in August, 2018 she called me and told me that the pictures were not properly being displayed I corrected the problem. In October, 2018 there was a display problem. I told her since there are 2 ports for display of the picture, one for VAA (video graphic Adoptor) was not working, we use the other port HD (High Dimension Video Interface) I told her we buy the 2nd one to see how it works. On 2/10/2018, I photographed the adapter I had and sent it to Mercy Karimi, her grandchild. She told me once they buy they will call me.

On 11/10/2018, they called me and gave them the appointment of 13/10/2018. On arrival, I found that the machine was producing some sounds. When I installed the adaptor, there was no footage in the machine. I informed her about it. Even after installing the adopter, the sound did not go off. I removed, the hard disk and told her that I tried another hard disk to see if it will work. I brought one from my house and the machine started to record. Since, I was going to Kithirune I left the hard disk with her so that we send it to Nairobi. Later I received a call from the DCIO who informed me he required me at the 2nd accused's home. I cannot recall the day. Between 13th onwards the machine was not working because, the hard disc she had was 1 Tera bite while mine was 160 GB. If there was an interference, I would see the loadings in the machine. I cannot tell what the problem was.”

Cross Examination

“From 13th October the security system was not working. I cannot recall the date the DCIO called me. It is however the same day I recorded the statement. It was on 5/11/2018. I am a technician with the hard disk, if one formats it, it will not work. If there is any deletion, I could detect. The disk was not recording as it was not working.”

Re-examination

NIL

PW11

20. PW11 was James Mwitii Muthuri who testified as follows: -

“I reside at Kithiruni. I work at Githongo. I work as a secretary and officer. I work with Brenda security at Meru. In 2018, I had just been employed. I was deployed to guard Times Sacco at Githongo. On 23/10/2018 at 5:20 pm. I reported for work and found a vehicle parked outside the Bank. It was a grey Sienta KCM 4405. It belonged to Mzee Kingaru. Mzee Kingaru is the deceased in this case. I knew Mzee Kingaru for a long time about 6 months. At about 9:00pm in the night, Mzee Kingaru came and took the vehicle and went off to his hotel called King cat. From the said hotel to where I worked as a security officer it was 50 metres. Mzee Kingaru took the vehicle and went with it to the hotel. At 9:30 pm I went to eat at hotel called Mwangaza hotel. I went back to the Times Sacco after eating. I did not find anything. At about 11:00pm, I found the vehicle Sienta but I did not see who had brought it. I had been at the back of the building and when I came to the front, I found the car. At 6.00 am on 24/10, the following day I saw the wife of the deceased. I do not know her name but I knew her physically. She is the first accused (points at the accused). She tried the vehicle doors and said there was no one in the vehicle. She said it in Kiswahili language. I don't know who she was speaking to. She went back to the King cat hotel. Later I was relieved for duty and went home. I later recorded my statement with the police. I recorded my statement at CID Kariene after arrest.”

Cross examination

“I worked at Times SACCO Githongo. I know KingCat hotel. It is on the same street as the Times U SACCO. At Times U Sacco we can see the hotel KingCat, I knew the owner of Kingcat hotel as the late Kingaru and his wife. I knew Kingaru for 6 months when I worked there. I didn't know his home. At Times U SACCO, have the CCTV cameras. It was working at the time. I don't know whether investigations were done the using the CCTV record for the time. On 23/10/2018 Kingaru came alone in his car to the hotel King cat. I found the car later parked at 11:00pm. The vehicle was parked at the parking at 11:00am until the following morning. In the morning, the 1st accused came and tried to open the vehicle and I heard her say to someone there was nobody inside. After trying the door, she entered with the person whom she told there was no one in the vehicle and she went back to the hotel. I had seen her come from the direction of the hotel. The vehicle appeared okay. I did not notice anything unusual in the car. I learnt mzee had died after I went back home. I heard that he had been found at the Riinji River. I did not see who killed Kingaru. I do not know the 2nd accused. I have never seen the 2nd accused before.”

Re-examination

NIL

PW12

21. PW12 was Doctor Mutwiri Kinyua Thuraniro who testified as follows: -

“I work at Meru Level 5 as medical officer. I have worked there for the last 6 months. I have Bachelor — Medical and Surgery from, University of Nairobi. I graduated in 2014. I have worked with Dr. Riungu. Dr. Riungu is currently engaged in clinical at Meru Level 5. I have worked with Dr. Riungu in two separate hospitals for 1 1/2 years. I recognize his handwriting and signature. I confirm with the hospital and operation the report being of Dr. Riungu. I wish to produce the report of Dr. Riungu post mortem report dated 29/10/2018. The report indicates as follows: -

Joseph Kingaru

General appearance - There was clarity of a male gender well invisibles.

On the head, there were facial abrasions around the maxillary are, orbital areas and around the mouth.

In the external appearance, there was bruising around the neck and the face around the eye (orbital region).

Deep bruises around the neck with penetrating cuts consistent with blunt trauma caused by heavy object. There are abrasions around the face particularly around the maxillary area below the eye.

The two bruises were complete with incomplete not facing a complete circle probably due to post mortem bite. There is also a penile abrasion around the urethral. There is also abrasion around the fingers, hand and eye-lids.

Respiratory system had trauma to the neck with fevered trachea with attendant bruising around the skin, subterraneous tissues muscles and mucosa.

The cardiovascular system was normal. For the digestive, there was inflammation around the pylorus of the stomach (a working of the stomach). The genital system is normal. On the head, there was bruising around the frontal —temporal area and orbital regions. The nerve system was normal. The spinal column and cord were intact. The cause of death was respiratory failure secondary to blunt trauma to the contenum neck region.

The Post Mortem is signed and dated 21/10/2018 and duly stamped. I wish to produce the same as exhibit.

Cross-examination

No questions.

Submissions

22. Counsel for the accused persons filed written submissions dated 14th July 2021. It is urged that none of the Prosecution witnesses saw the accused persons murder the deceased and that the witnesses only speculated and suspected that the accused had a hand in the death since it was assumed that they were the last 2 persons seen with the deceased. It is further urged that when relying on circumstantial evidence to secure a conviction, it is necessary that the guilt of the suspect should not only be rational inference, but it should also be the only rational inference that could be drawn from the circumstances. The cases of *Rex vs Kipkering Arap Koske & 2 Others* (1949) EACA 135 and *Simoni Musoke vs R* (1958) EA71 were cited. It is urged that before drawing an inference of the accused's guilt from circumstantial evidence, the circumstances from which guilt is inferred must be cogently and firmly established; the circumstance must be of a definite tendency unerringly pointing towards the guilt of the accused; and the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.

23. It is urged that suspicion, however strong cannot be a basis for inference of guilt which must be proven by evidence. It is urged that there were contradictions, particularly on the state of the deceased's bed and that some people spread their beds in the morning and others don't. It is also urged that there was nothing amiss in the 1st accused and the deceased going to visit the 2nd accused as concerned relatives in that the 2nd accused was from Nairobi where she had gone to see a doctor and to attend a matter at the Supreme Court. It is urged that on the morning of 24th October 2018, the 1st accused went to check whether the deceased was in his vehicle and that she was concerned for her husband. It is urged that the evidence of PW5 who confirmed that the deceased returned home on the night of 23rd October 2018 exonerates the 2nd accused.

24. It is urged that the accused was murdered but the wrong people were charged and that the Prosecution has failed to establish a *prima facie* case against the 2 accused persons.

25. Despite opportunity to do so and despite the Court granting adjournments on three occasions on 16/6/2021, 15/7/2021 and 22/7/2021, the DPP did not file submissions on the matter and must be taken to have opted to rely solely on the evidence it had presented before the court.

ANALYSIS OF EVIDENCE

26. The *Actus reus* is proved. It is not in dispute that the deceased, Joseph King'aru Nkoroi died as proven by the post-mortem report produced by PW12, Doctor Mutwiri. The cause of the death was respiratory failure due to blunt trauma around the neck region. All other witnesses who saw the deceased's body testified that he had been injured on the throat.

27. The leading decision on circumstantial evidence is *Rex vs Kipkering Arap Koske & 2 Others* (1949) EACA 135 where the Court held as follows:

“In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

28. The factors to be considered when considering circumstantial evidence were further discussed by the Court of Appeal in *Joan Chebichii Sawe v Republic*, Criminal Appeal No. 2 of 2002 [2003] eKLR where **Kwach, Lakha & O'Kubasu JJ A held as follows: -**

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on.”

29. The circumstantial evidence in the Prosecution's case is that the accused persons were the ones last seen with the deceased. PW1 testified that he went to visit the deceased and as he was leaving, he got information from the 1st accused that on the very night, she (1st accused) together with the deceased were going to visit the 2nd accused. He testified to have questioned why this was the case yet the deceased was unwell and was shivering from cold. He testified that he advised the 1st accused that they go on the following day.

30. This Court observes from the testimony of PW5, Susan Gatwiri, a daughter to the deceased and 1st accused, the deceased and 1st accused indeed left and came back on the same night. She testified that they left at about 9.00 p.m and came back at about 10.00 p.m. She testified that she lived in the same house with the two and that she heard them leave and come back. She further testified that the deceased called her that very night to wish her a good night. It is between that night and the following morning that the deceased was reported missing and later found dead at the River Riji. Going by the evidence of PW5 who actually lived in the same house as the deceased and the 1st accused, this Court finds that the factual basis upon which the strongest circumstantial evidence for the Prosecution is premised is false. It is therefore PW5 who was the last to be with the accused before his death as confirmed by her own testimony.

31. This Court has also observed that the other circumstantial evidence which the Prosecution relies on is marred with inconsistencies. Whereas PW1 claims that the deceased's bed on the following morning seemed untouched, PW5 who lived in the same house with the deceased stated otherwise. She testified that the bed was ruffled up and that the deceased's items were all over.

32. Further, PW7 Caroline Kananu, a daughter to the deceased and the 1st accused is on record that together with her sister Kendi, they wrote a letter through Gichunge Advocate to the DPP complaining about a threat they had received from a strange number, telling them that they would be killed the same way their father (deceased) was killed. These two ladies, were not said to have had a strained relationship with either of the accused persons. If the 2 accused persons were indeed guilty, the threats issued to PW7 and her sister PW8 should have been

traced to them. At the very least, there should have been some evidence of bad blood or reason for the accused persons to issue the threats. In the present circumstances, none of these facts exist. In fact, PW8, the sister to PW7 claims that in her view, she doesn't know why the accused persons were charged and that she believes the investigations were not carried out properly.

Mens rea

33. With respect to *mens rea*, some of the Prosecution witnesses pointed to the fact that the deceased had another child with a different lady, said to have been the deceased's house help. The said child, Emanuel Muriungi was a witness in the case. He said he was 32 years old and that he was received well when he was first introduced to the deceased's home with the 1st accused but after some time, quarrels started which led to him being sent to live with the deceased's brother. Most of the Prosecution's witnesses however indicated that the deceased and the 1st accused related well. This Court also considers that at 32 years of age, the news of the existence of the said child had long registered in the accused persons' minds. Unless there were any other quarrels witnessed at the material time of the deceased's death, this Court rules out that this child could have been a reason to influence the 1st accused person to murder the deceased.

34. The Prosecution witnesses also delved into the issue of division of property with the fact that the deceased called for a meeting concerning the mode of distribution of his property. A will was produced in Court which the deceased had written prior to his death. None of the witnesses testified that the accused persons were not happy with the mode of distribution of the property.

35. The other issue raised is that it was discovered that the 1st accused and the deceased, despite being married were living in separate rooms. This situation was however explained by both PW5 Susan Gatwiri and PW8, Catherine Kendi. PW8 confirmed that her daughter, Chan was living with the deceased and the 1st accused at the material time. She also confirmed that the child's nanny had recently left and that is when the 1st accused moved to the child's room to sleep with her. At the time, the child is said to have been 7 months old and it is thus not unreasonable that someone had to sleep with the child.

36. The above matters i.e the existence of a child born out of wedlock, the division of property and the sleeping arrangements in the deceased's house, are mere grounds of suspicion which cannot be used to secure a conviction. In *Joan Chebichii Sawe v Republic*, Criminal Appeal No. 2 of 2002 [2003] eKLR, (2003) KLR 364, the Court held as follows with respect to suspicion: -

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”

37. In addition, the Court observes that the Investigating Officer in the matter was not called as a Prosecution Witness. The Court granted the Prosecution a number of adjournments to allow them to call this witness. Ultimately, the Prosecution applied to close their case without calling the Investigating Officer claiming to have failed to secure his attendance, despite issuing summons. The court is thus at liberty, in accordance with *Bukenya v. Uganda* (1972) EA 549, to infer that this witness who would have confirmed the events of the incident as narrated by the other prosecution witnesses was not called because his evidence if given would have been adverse to the Prosecution's case.

DETERMINATION

38. There were no eye-witnesses to the killing of the deceased, subject of the murder charge facing the two accused persons, respectively the deceased's widow and mother in law. The DPP charged the two accused persons with the death of the deceased who was “*found dead at River Riji with a deep cut on the throat [because] the accused persons were the last persons seen with the deceased when alive,*” as stated in the opening address by Mr. Maina, Prosecution Counsel on 8/11/2019, urging that they would “*be relying on circumstantial evidence and call 15 witnesses.*”

Whether inculpatory facts were inconsistent with innocence of the accused and in capable of explanation other than that of guilt

1st Accused's conduct

39. The deceased's nephew PW1 charged that the 1st accused had on the evening of 23/10/2018 the night when the deceased died, insisted on taking the deceased who “*was shivering from cold as he had not fully recovered*” for a meeting at the 2nd accused's house and on the following morning upon discovery that he was missing from his bedroom did not promptly report the matter to the police. PW1 further alleged, which was discredited upon cross-examination, that the 1st accused asked him to “*to go and see if he had gone to his rural at Kaitheri [and] when I went to his rural home, I did not find him.*”

40. That 1st accused had gone with the deceased to the 2nd accused's home despite the caution by PW1 does not implicate her in any killing. It might have been irresponsible but that is all. Without knowing why the two had gone to see their mother, it is not possible to assess the importance of their mission and meeting, it cannot be said that the conduct is inconsistent with innocence. As regards the report to the police, why would she have reported to the police when her husband had only been missing for about three hours. He may well have stepped out, as he had done the previous night when according to the watchman PW11 at Times Sacco he had at 9.00pm gone for the car:

“On 23/10/2018 King'eru came and drove his car to his hotel King cat. I found the car later parked at 11.00pm. The vehicle was not moved from the parking at 11.00pm until the following morning.

In the morning, the 1st accused came and tried to open the vehicle and I heard her say to someone that there was no one inside.”

41. Indeed, PW1 himself tells of the perfectly reasonable explanation by the 1st Accused and reaction by the Police declining to record the matter until the passage of sometime no doubt to see whether the person he wished to file report on came back or was found, as follows:

“I asked the 1st accused to go and report at the police. She declined on the basis that 24hrs had not yet lapsed. I then decided to go and report the incident with Luka Muthuri at Githongo Police Station. Luka is his elder brother. When we reported the police questioned why the wife was not reporting the incident. They declined to record the incident and told us to go up to 5pm and if by then he had been traced, we return. I met Mutua a cousin to the deceased told us at about 9.00am that he had spoken to the 1st accused who told him that the deceased had just left the house. At about 10.am the 1st accused received a call and gave it to me. The caller to us that the deceased was at Gatimbi. We went there and found he was dead. The body was lying in the water facing down.”

Failure to disclose information of disappearance to deceased’s friend PW3

42. Evidence that the 1st accused did not according to deceased’s friend PW3 tell him of his disappearance when the latter called at 9.00am on 24/1/10/2018 when he had been missing since 5.45am or that she did not go to the scene upon discovery of the body or that according to the deceased’s brother PW2 did not provide a blanket to carry the body and they had to buy a blanket [never mind that this aspect of testimony was not recorded in the witness’ statement to the police] is not incriminating evidence, let alone one that is incapable of innocent explanation. There is nothing strange in telling PW3, a person outside the family that a person has stepped out when the fact of his disappearance had not been confirmed; and the shock of the news of death of her husband may explain refusal to go to the scene of his killing or discovery; and it may well be a precaution not to interfere with investigations into the circumstances of the killing in not offering a blanket which could contaminate evidence.

Whether the deceased’s bed was disturbed or slept in?

43. A lot of premium was placed by the prosecution witnesses PW1 and PW3 on evidence of the state of the deceased’s beddings on the morning of discovery of his death on 24/10/2018. PW1 said on cross-examination that –

“I concluded that the bed had not been slept on because I found it the same way it was when I left the previous night. The room was neat and as I had left it the previous night. In the previous night. No door was broken. It showed that he left the house willingly and by force. There seemed to have been no commotion.”

44. PW2 said he had ***“entered the deceased’s room and found that his bed had no blanket.”*** The missing blanket is a contradiction of the evidence of PW1 who found the bed as ***“neat and as I had left it the previous night.”***

45. PW3 said on arrival at the deceased’s house the 1st accused had taken him to the deceased’s room and ***“I saw the bed was undisturbed as if no one had slept in it.”***

46. On the other hand, PW5, and PW6 testified respectively that ***“when I woke up I went to my father’s room [and] I found his belt on the floor, his bed was unkept, on the table was car keys, phone and money”***; and ***“the 1st accused showed me the room where the deceased was said to have slept [and] The beddings were disturbed in that they were open”***.

47. As submitted by the counsel to the accused, some people dutifully make their beds upon waking up while others do not. The fact that the bed was as neat as PW1 remembered it from his visit the previous night is not inconsistent with the innocence of the accused person, and the basis for the inference of guilt is watered down by the fact that two other prosecution witnesses, PW5 and PW6 remember the bed as having an appearance of having been slept in. The Investigation Officer was not availed to confirm the investigations around the circumstances of the deceased’s death.

Separate bedrooms for the deceased and his wife 1st accused

48. The fact that the deceased and the 1st accused as husband and wife were not sharing a bedroom on the night he was killed was also emphasized by PW1 and PW3 but was completely answered by the deceased’s daughters PW5, PW7 and PW8 when in the words of the latter: ***“On the 24/10/218, the househelp was not there as a result my mother was sleeping with my child in my room.”***

49. The Court finds that these are hardly inculpatory facts and in any event they are not entirely incompatible with the innocence of the accused, and they are capable of other explanation.

Gaps in the Prosecution Evidence

50. In ***Republic v Danson Mgunya*** [2016] eKLR, the Court of Appeal cautioned about inferences based on circumstantial evidence as follows:

“Turning now to the merits of the appeal, we must reiterate that the burden was on the prosecution to adduce evidence, which would prove its case beyond reasonable doubt. In the absence of credible evidence proving the guilt of the accused, the prosecution cannot invite the trial court to convict on the basis of inferences and conjecture.

The fact of the matter is that the prosecution did a woefully shoddy job in this case. There was no witness who saw the respondent shoot the deceased. There was no evidence to link the deceased’s injuries to the appellant’s pistol.”

51. In this case, there was no evidence to connect the disappearance of the deceased from his bedroom and his subsequent discovery 200-300 metres away in a river with deep cut throat and neck injuries, and if any investigations were done they must have been shoddy as no evidence of any recoveries or persons who witnessed the offence or events leading to the killing in an area allegedly covered by CCTV and neighbourhood of hotel and other secured business enterprises in the township of Githongo Market.

52. The Court has also considered that the Investigating Officer, a key Prosecution Witness was not called to testify and as held in **Bukenya v. Uganda** (1972) EA 549, there is a presumption that his evidence would have been adverse to the Prosecution's case. The case of allegedly deleted messages on the deceased's phone as reported by PW5 was not investigated further with the relevant mobile phone service provider, and if so no outcome was reported. Also not called were PW8's husband Mburugu and her niece Mercy who were at the 2nd accused's house on the night that the deceased had visited with 1st accused and could have testified as to what transpired at the meeting. PW8 on cross-examination had said:

“On 23/10/2018, I came out of my house and saw that the deceased, 1st accused and a grand child had arrived and parked outside the house of the 2nd accused. They parked outside the 2nd accused's house and entered her house. My house abuts next to that of the 2nd accused. We share the compound. I did not join them at Eunices's house. I do not know what they were discussing about. It is that night that the deceased died. After the deceased left with the 1st accused, I went to the house of the 2nd accused. I found my husband Mburugu and a niece called Mercy. They were taking tea. It is the following day that I learnt that the deceased had died.”

In the same vein, CCTV footage from outside the deceased's the hotel was not produced, and the tenants in the deceased's house were not called as witnesses.

53. The prosecution's case clearly based on a suspicion that the 2 accused persons having been the last persons with the deceased and not being happy with the disposition by the deceased of his property by Will made on 17/10/2018 conspired and did put into effect their intention to kill the deceased.

54. This prosecution theory relies on an assumption not established by evidence that the deceased had during his trip on 23/10/2018 to the 2nd accused's home with the 1st accused disclosed his testamentary disposition by will of 17/10/2018.

55. The Prosecution also assumes that the deceased was lured to his death outside his house by persons known to him. There was no “commotion” or evidence of struggle in his bedroom or any part of his house as there was evidence that the rear gate was open and the keys to the front gate to the house were accessible to the deceased and other persons in his house as well as tenants who lived in the compound.

56. Moreover, the basis of the prosecution case that the 2 accused were the only persons last seen with the deceased was not true. The testimony of the deceased's daughters PW5 and PW9 indicated that the deceased, the 1st accused and a grandchild Chan had at about 9.00pm gone to the 2nd accused's house where, according to PW9 who lived in the same compound as the 2nd accused, there was in addition to the 2nd accused, PW9's husband Mburugu and niece Mercy, and that the deceased and the 1st accused and the grand child had left and gone back home, where they arrived at 11.00am and found PW5 and went their respective bedrooms. PW5 said:

“They went and came back. I was in my room. I heard my mother tell Chan they go to sleep. The deceased called me and told me good night.”

PW5 is one of the persons who transacted with the deceased before his death. The fact that the deceased and the 1st accused case back home from visiting he 2nd accused broke the chain of the circumstances in terms of the court decision in **Sawe v. R** supra, that:

“There must be no other co-existing circumstances weakening the chain of circumstances relied on.”

Credibility of prosecution witnesses

57. The court record has minutes by the Court (then Mabeya, J.) on the prosecution witnesses' PW5, PW7 and PW8 demeanour during their testimony who he found problematic in their evidence and variously described them as possibly “unstable”, “evasive”, “unsure” and sometimes outrightly “refusing or not willing to tell the truth.” In that state of evidence, the court is able to establish the credibility of the witnesses and the truthfulness of their testimony, and being witnesses for the Prosecution, puts in doubt the charges against the accused. The court is left guessing where the truth lay.

Gaps in the evidence

58. There are glaring gaps in the prosecution evidence as to what transpired between the time when he deceased and he 1st accused came back home from visiting the 2nd accused on the night of 23/10/2018 to the time his disappearance was announced at 5.46am and subsequent discovery of the body at River Riji about 10.00am. Similarly, there was no evidence on the details of the meeting between the deceased and the 1st accused with the 2nd accused at between 9.00-11.00 p.m earlier in the evening on 23/10/2018, the persons at the meeting in the house of the 2nd accused apart from Mburugu the husband of PW9 and her niece Mercy who are named by PW9's testimony and any events surrounding the meeting and the CCTV footage at the 2nd accused's house had not been working since 14/10/2018 according to PW10 who installed it

Evidence in favour of the accused

59. For the 2nd accused, the evidence of PW5 and PW9 who testified that the deceased and he 1st accused had gone to the 2nd accused's house at 9.00pm and returned to their house at 11.00pm exonerates her of the subsequent murder unless it was shown that she had, within the meaning of section 21 of the Penal Code, a **common intention** to kill the deceased with the 1st accused, if it is proved she is the one who killed the deceased, or with whoever committed the killing. There was no such evidence.

60. In favour of the two accused persons, there was evidence that the relationship between the deceased and his wife 1st accused as well as with the mother 2nd accused had been cordial and no prosecution witness had ever witnessed a fight between them. Only PW4 said that the relationship appeared to change in the last few days of the deceased's life especially after the deceased gave him part of the land.

61. There was evidence, however, that the deceased had taken back a motor vehicle which he had given to his son PW4. As an aggrieved person, PW4, may have had motive as with the other beneficiaries who may have been unhappy when he deceased had given his son a portion of his land and reserved the gifting of his other property to other heirs by testamentary disposition by will which was to be prepared after the family meeting of 14/10/2018.

62. PW1, the deceased's nephew who spent the night of 23rd and 24 October 2018 at Prestige hotel just behind, and with a rear gate access to, the deceased's house, and who appeared to play a leading role in prosecuting the matter through his zealous reporting to the police, but who the deceased's daughters said had become close to the family only recently from July 2018, appeared to have a motive for he was ignored in the process of deceased's gifting of his property. The deceased's daughters PW7 and PW8 said that at their Uncle Luka PW2 had asked whether PW1 Mbaabu had witnessed the deceased's will.

63. No evidence was led on any police investigations on the matter as the Investigation Officer did not testify, the DPP indicating to court that the Investigating Officer and all other officers who had been involved in the investigations had refused to come to testify in court.

VERDICT

64. The Deceased's brother Luka Muthuri PW2 summed up the Prosecution's case purely based on suspicion when on cross-examination he said as follows:

"I never saw any of the accuseds kill the deceased. I said that the two should know how the deceased died as they were the last to be with him when he was alive."

65. It is apparent that the prosecution was preferred so that the accused persons could tell what they knew about the killing of the deceased. Even if the accused persons knew how the deceased died and they won't tell, and we can't make them tell, consistently with the cardinal principles of criminal law of rights 'to remain silent and not to testify during the proceedings' (Article 50 (i) of the Constitution) and 'to refuse to give self-incriminating evidence' (Article 50 (l)), then in the absence of independent evidence, the case against them for murder cannot be proved.

66. As Brian C.J. famously said: **"It is common knowledge that the thought of man shall not be tried, for the Devil himself knoweth not the thought of man"**. See *Winfield and Jolowicz on Tort*, (10th ed. 1975) at p.24. It is not enough to suggest that because they may have been unhappy with the gifting of half of the deceased's land to (PW4), the deceased's son from another mother, and because they may have been among the last persons with the deceased, they must be the ones who killed him. Even if the two formed such subjective **intention** to kill the deceased from such **motive**, say, to revenge the disinheritance, there must be evidence from which the act of killing may be objectively inferred in the absence of direct evidence of eye-witnesses. No such evidence was availed.

67. As far as motive for revenge on account unfavourable disposition by the deceased of his property, there was evidence from PW1, PW2, PW5, PW6, PW7, PW8 and PW9 that deceased had at the family meeting on 14/10/2018 held at the 2nd accused's house recalled a motor vehicle that he had previously given to his son PW4 and not being satisfied with *"the responsibility levels of his son Emmanuel"* had to withdraw it and give it the 1st accused and later to PW8 who could repay its outstanding loan. According to PW8, the deceased was *"angry because Emmanuel Muriungi had failed to properly manage our father's motor vehicles."*

68. From the evidence there were two other persons who had motive and opportunity to commit the offence if they intended to do so. The two are PW1 and PW5 who may have had motive because they were similarly not provided for in the disposition of the estate by the deceased at his family meeting of 14/10/2018, and had to wait and see whether the deceased would provide for them in the Will. PW1 a nephew who was with the deceased until 9.00pm when the 1st accused prepared to go out with the deceased to the home of the 2nd accused and who spent the night at Prestige hotel just behind, and with a rear gate access to, the house of the deceased. The deceased's daughter PW5 was the last person to interact with the deceased after he and the 1st accused had come home from meeting the 2nd accused. If the qualification to suspicion as the killers was having a motive and being last with the deceased and having opportunity to commit the crime, PW1 and PW5 should have been suspects. Indeed, PW5 was the last person to transact with the deceased when he was alive.

69. On the evidence, there was no commotion in the deceased's bedroom and according to his friend PW3 –

"The room was not disturbed. Even I saw his money, car keys and phone on the table. If he had been removed by force, the room would have been disturbed. I cannot tell if the deceased was called by someone to go out. The door was intact."

Could the deceased have been called out to his death by someone? Any of the deceased's family members - his nephew PW1, his son PW4, daughter PW5 apart from the 1st accused - could have called him out to kill him or to his killing. Or his business associates? There was also claims by PW7 of the deceased's troubled last months said to be from his role of chairmanship of a taxi operators' Sacco. However, remote the suggestion appeared it could not be ruled out. And there was the case of mobile phone calls to PW7 which were referred to DPP for

investigation, threatening that she and her sister PW8 “*will be killed the same way our father was killed.*”

70. There was clear pressure on the DPP to prosecute as shown when then prosecuting counsel Mr. Namiti on 4/12/2019 sought to reduce the number of witnesses and he was confronted by unnamed persons in the deceased’s family, as follows:

“Mr. Namiti

I took over the file from my colleague. Having reviewed the statements, I remain with 6 civilian witnesses and 3 experts.

Having looked at the file I want to reduce the 6 to 3 witnesses. However, the last 2 days people followed me as family members followed me and raised issues. I need time to reconsider. I need more time to interact with my witnesses so that I can do justice.

71. All the witnesses confirmed that the accused persons had good relations with the deceased and had never fought, and it can be seen from the fact that the deceased had twice held family meetings at the 2nd accused’s house. There was a clear line of antagonism between the deceased’s brother PW2, son PW4 and nephew PW1, on the one hand and the 1st accused, wife of the deceased and her mother 2nd accused and their daughters PW5, PW7, PW8 and PW9 on the other. Both sides were affected differently by the deceased’s disposition of his property at the family meeting of 14/10/2018 and by Will made on 17/10/2018 before the killing of the deceased on the night of 23rd and 24th October 2018. Any one of the affected persons or a combination of them could have committed the act of killing, or caused its commission.

72. The court finds that the DPP ought to have processed the killing of the deceased herein as an inquest into the death under section 388 of the Criminal Procedure Code, and only prefer charges upon the outcome and findings of the Inquest. The two accused persons should not have been charged without independent incriminating evidence.

73. The court concludes that the prosecution has not presented before the court a *prima facie* case to warrant the calling of the accused persons to make their defence. The Prosecution was based on suspicion, which, according to **Sawe v. R** (2003) KLR 364, no matter how strong cannot justify a conviction. There are glaring gaps in the prosecution case and consequently to put the accuseds on their defence would be to require them to fill the prosecution gaps in breach of their right to a fair trial on the principles of right to presumption of innocence until proven guilty and the requirement of proof of a criminal charge to the standard of beyond reasonable doubt. To place the accused persons on their defence would be unconstitutionally to require them to prove their innocence or to incriminate themselves by filling the gaps in the Prosecution case.

74. In accordance with the decision in **Murimi v. R** (1967) EA 542, the court has a duty to acquit the accused persons where, as here, the prosecution fails to establish a *prima facie* case. Accordingly, the court pursuant to section 306(1) acquits the 2 accused persons of the offence of murder contrary to section 203 as read with 2014 of the Penal Code.

ORDERS

75. Accordingly, for the reasons set out above, the Court makes the following orders: -

i) The 1st and 2nd accused persons are acquitted of the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.

ii) The security for the accused persons’ release on bail pending trial shall be released to the depositors.

Order accordingly.

DATED AND DELIVERED THIS 14TH DAY OF OCTOBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

Ms B. Nandwa Prosecution Counsel for the DPP.

Mr. Gichunge Advocate for the 1st and 2nd accused persons.