



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO 9 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

RICHARD ITWEKA WAHITI.....ACCUSED

JUDGMENT

1. **Richard Itweka Wahiti**, the Accused herein is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The information particulars are that between the 3rd November 2014 and 5th November 2014 in Kiambu County, with others not in court, he murdered **ENN**. The Accused denied the charges and was represented by Dr. Sungi. The prosecution, through ten witnesses presented the following case.

2. The Accused person had been an employee of the deceased herein, **ENN** alias **N** for some years as at the material date. He was a farmhand responsible for tending the employer's chickens and cows among other manual duties in the home. He was accommodated in a quarters close to the deceased's house on the same compound. The deceased was a recent widow but had adult children who lived elsewhere. She however lived with her two minor grandchildren, namely, **IN** and **WN** (the children of the deceased's daughter **SWN (PW5)** both aged below 10 years at the material time. The deceased also accommodated in a separate room within her compound, a teenage nephew or grandchild named **PW (PW1)** who at the material time was a student in a local school. **PW1** cooked his own meals in an external kitchen shared with the Accused, located within the home.

3. Prior to the material period, the deceased was in a love relationship with one **K**, who would occasionally visit her home. In the period preceding her murder, the deceased had confided in her best friend and her sister that the Accused was exhibiting jealousy and unhappiness about her male friend and had also helped himself to her personal items such as underwear and jewelry.

4. The deceased was in the company of her said best friend **Jane Muthoni Wainaina (PW2)** on the Saturday preceding her death, which must have been 1st November, 2014 and not 31st October as **PW2** erroneously asserted in her evidence. The two attended a *chama* (social club) and spent the night in **PW2's** house, the deceased leaving on Sunday morning to return to her home. This must have been 2nd November and the previous Saturday the 1st November 2014.

5. On 3rd November, 2014 (a Monday) **PW1** who was on his way home from school met the Accused at about 6pm, close to the home. The Accused allegedly informed **PW1** that the deceased was not at home, had left her phone there and instructions for **PW1** to feed the deceased's chicken. On reaching home, **PW1** found that the keys to the deceased's house were with the grandchildren and on opening, found her phone inside the house. The deceased did not come home and **PW1** arranged for the two grandchildren to spend the night with him in his room.

6. On 4th November 2014 **PW1** went off to school but on return in the evening got alarmed that the deceased had not returned home. Using the deceased's phone, he placed a call to **PW2** who asked to speak to the Accused. The witness (**PW2**) acted immediately, and mobilized other women, including the deceased's sisters **JW (PW3)** and **MW (PW9)**. Together the women went to the home of the deceased and searched the compound for the deceased. Meanwhile, the Accused was away and having waited for his return until 11.00 p.m. the search party called the area Chief **Francis Kimani Migunda (PW4)** who directed that a missing person report be made at Kiambu Police Station and for the search to resume on the next day, the 5th November 2014.

7. On the next day the search resumed in the morning. Several persons including **PW1,2,3,4** and **9** participated. At one point **PW3** questioned the Accused. He claimed the deceased had left home and left her phone in the verandah. The Chief (**PW4**) also came and interrogated the Accused before arresting him taking him away to the police station. In the course of the search, **PW2** decided to go to the incomplete stone house under construction within the compound. She noted the presence of many house flies, a cat inside the incomplete structure and a foul stench. As the grill door to the house was locked the women put one grandchild through the window grills asking her to poke with a stick around the building sand that was heaped in the sitting room.

8. As the child complied, what seemed to be a human part was exposed. **PW4** was called back. He instructed that the scene not be

disturbed. Presently, he returned to the scene in the company of police officers, including scenes of crime personnel. The door was opened and the decomposing, mutilated and partially burnt body of the deceased was dug out of the building sand. Some pieces of human flesh were strewn around the room. Police searched the Accused's house and recovered a blood stained pink T-shirt (**Exh.4**), a piece of the blood-stained mattress (**Exh.5**), deceased's jewelry (**Exh.11**) and a panga and axe (**Exh.7**) from a pit latrine in the compound. The deceased's phone (**Exh 1**) was surrendered to the police by her family. The scene was documented and the body removed to the mortuary.

9. Back at the police station a thorough search was conducted on the Accused. He wore a white pair of inner shorts (**Exh.3**) which appeared to have blood stains. The short was taken as an exhibit. The investigating officer who made these recoveries is **PC Ochola (PW10)** while the scene was documented by **CPI. Frank Anunda (PW8)** After the body was taken to the mortuary, a post mortem examination was conducted by **Dr. Njeru (PW6)** on 6th November 2014. The examination revealed that the body's upper and lower limbs were amputated. It bore a partially burnt cloth ligature over the mouth, had lost the left upper limb stump and both lower limbs. It had 2nd to 3rd degree burns on the entire surface. The digestive and genito-urinary systems were decomposed and the head bore a fracture in the temporal region, with oozing brain material on the fracture site. **PW6** concluded that death was caused by multiple injuries due to blunt force trauma with 2nd and 3rd degree burns.

10. The blood sample taken from the deceased's body, the Accused's white short (**Exh.3**), a blood sample from the Accused, his pink T-shirt (jumper) (**Exh.4**); piece of mattress (**Exh.5**), panga and axe (**Exh.7**) and a sample of blood from the deceased's son **PN** were escorted to the government analyst for examination. The analysis was carried out by **Henry Kiptoo Sang (PW7)**. His findings were that exhibits 3 and 4 were moderately stained with human blood, and that while the piece of mattress (Exh. 5) was stained with human blood, it did not generate DNA profiles and Exhibit 7 (axe and panga) did not have any blood traces. Further the DNA profile generated from the Accused's shorts (Exhibit 3) and the jumper (T-shirt) recovered from his house Exh.4) matched with the DNA generated from the blood sample taken from the deceased.

11. Having been placed on his defence on 2nd November 2017, the Accused filed a motion one year later (on 2nd November 2018) seeking to recall the investigating officer for further cross-examination regarding collection of DNA evidence in this case, the blood sample taken from the Accused. The application was premised on Section 146 of the Evidence Act. The court disallowed the motion, reserving its reasons.

12. The main reasons for rejecting the motion were firstly, that it came a whole year after the prosecution had closed its case, and without any explanation for the delay. Secondly, on the face of the motion, the affidavit and arguments of the Accused, it was not clear to the court why the defence wanted **PW10** recalled and why the questions intended to be put to him were not canvassed with him on 19/6/17 when he testified. It was not enough in my considered view for the defence to assert that the Accused was charged with a serious offence. That he was entitled to a fair trial cannot be disputed, but the onus lay with the defence to satisfy the court that there was justification for the exercise of the court's discretion under Section 146 of the Evidence Act. The defence was reticent as to the specific DNA evidence whose collection it was proposed to question **PW10**. If as it appears from the obtuse references to Sections 122A, C to D of the Penal Code made in the motion and submissions, the DNA evidence contemplated is the blood sample taken from the Accused, no significant finding was made by **PW7** in regard to the Accused's blood sample, and hence the Accused was not prejudiced by the fact of the collection of the said sample by whoever did. For these reasons, the application was found to be without merit and dismissed on 7.3.19.

13. On 6.6.19 the Accused took the stand and gave sworn testimony. To the effect that he started working since 2010 as a farmhand employed by the deceased at her homestead. His duties entailed tending the cows and chicken as well as the farm. He was accommodated on the farm. The employer a widow, had adult children and two grandchildren, the latter living with her. That the employer/employee relationship was good. In 2013 the deceased started spending nights out of home and relating with male friends whom she would invite to her home. This conduct allegedly caused friction with her in-laws. The deceased would allegedly spend up to a week away from home without informing the Accused. He however carried on with his duties at such times.

14. He testified that on the last Saturday when the deceased left home he was left behind working at the deceased's home. On the next day he rose early and noted that the door to the deceased's house was padlocked on the outside. He milked and fed the animals before going to visit his girlfriend. He remained at his girlfriend's place until 9.30 p.m. but upon return at the deceased's home, noticed that the deceased had not returned. He continued with his duties on the following day, not knowing that the deceased had gone missing. He said that he was not anxious, given the deceased's previous similar absences.

15. On Wednesday (that would be 5.11.14) he learned from the Chief (**PW4**) that the deceased was missing and he was placed under arrest. At the time of arrest, he wore working clothes and white underwear. He requested permission to change and when allowed, threw his working clothes into the incomplete house in the compound. He was later to learn of the recovery of the body of the deceased. He denied that any of the deceased's property was in his house or that his white shorts/underwear had blood stains. He testified that while in police custody, a police constable escorted him to Kiambu Hospital for the extraction of a blood sample, to which he submitted.

16. He asserted that he knew nothing of the presence of the deceased's body at the home or even her death and that had he been involved he would have fled. The Accused called his father, **Stephen Wahiti (DW1)** as a witness. Apart from confirming that the deceased worked for and lived in deceased's home, the witness stated that he had never received any complaints regarding his son's work. He did not know anything concerning the dates and events material to the case.

17. In closing submissions, the defence argued that the prosecution had failed to prove its case to the required standard. Restating the prosecution evidence and citing legal authorities including **Nzuki v R [1993] KLR 191**, **Sawe v R [2003] KLR 364** and **Ernest Abanga alias Onyango v R C.A No. 32 of 1990**. The defence submitted that circumstantial evidence relied on by the prosecution did not meet the legal threshold to justify a conviction. And further that, motive an essential element in cases based on circumstantial evidence, was not established. For this proposition the defence cited the decision in **Libambula v R [2003] KLR 683**. Further, the defence, while conceding the unlawful death of the deceased was of the view that the prosecution had failed to sufficiently connect the Accused with the death.

18. For his part, the Director of Public Prosecutions (DPP) reiterated evidence on the sour relations between the deceased and the Accused prior to the deceased's murder, as proof of malice afterthought and motive. Pointing to the evidence of the Accused's presence at the scene

of offence and his unexplained possession of items belonging to the deceased, the occurrence of the murder at the deceased's home, the DPP asserted that the circumstantial evidence in this case unerringly pointed to the Accused's guilt. He relied on the decision of the High Court in **R v Nyamawi Munga (2005) e KLR**.

19. The court has considered the evidence by the prosecution and defence and the respective submissions. Certain basic facts pertinent to this case are not in dispute. There is no dispute that in the material period, the Accused was by the deceased and accommodated in quarters within the homestead of the deceased. The Accused's duties involved tending the farm and the animals reared therein, including cows and chicken. The deceased lived in her own separate house in the compound with her two minor grandchildren, the children of her daughter (PW5).

20. Further, it was not in dispute that at the material time, the deceased was widowed but had a relationship with a male lover described as **K**, who lived in a different location, but would occasionally visit the deceased's home. On the compound of deceased was an incomplete stone house which was under construction. It is not in dispute that the deceased left home on Saturday 1st November, 2014 for her own social engagements and spent the night of 1st November 2014 (erroneously stated by PW2 as 31st October 2014) at the house of her friend PW2, departing for her own home on 1st November, 2014, a Sunday. By the evening of 3rd November, 2014 however, she would not be located at her home or with friends and relatives.

21. On 5th November, 2014 her decomposing, charred and severely mutilated body burnt was discovered inside the incomplete house on her compound, by friends and relatives who had gathered at the home in search of her. The body was buried under a mound of building sand inside the said structure. The cause of death was blunt trauma injuries to the head and severe burns. That the deceased died a violent death from unlawful acts is not in dispute. Secondly, from the severity of the injuries documented in the post mortem form, it is evident that whoever inflicted these injuries on the deceased intended to cause death or grievous harm. Thus malice afterthought as defined in Section 206 of the Penal code is self-evident.

22. The key question for determination is whether the Accused herein is the person who, of malice afterthought, inflicted these injuries on the deceased. Admittedly, the prosecution case against the Accused person primarily rests on circumstantial evidence. It is not uncommon for legal practitioners to attack and deride circumstantial evidence in criminal cases, almost suggesting that it has little probative value or at the best, rate such evidence as weaker, in comparison to direct evidence.

23. In the case of **Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR**, the Court of Appeal had this to say on this point:

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

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

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

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

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

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.

(see also **Sawe v Republic (2003) e KLR** and **GMI v R Cr. App. No. 38 of 2011**).

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.

(see **Teper v R [1952] ALLER 480** and **Musoke V R [1958] E.A 715**). In **Dhalay Singh v Republic, Cr. App. No. 10 of 1997**, this court reiterated this principle as follows:

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

25. In this case, four key strands of evidence tend to connect the Accused with the death of the deceased. These are the Accused's alleged jealousy or animus elicited by the fact that the deceased had entered into an amorous relationship with a male friend, one **K.**; the location of the deceased's body on its discovery as well as the Accused's presence in that compound in the material period; material evidence collected from the Accused's person and his alleged dwelling by police; and the conduct of the Accused on the day or days proximate to the disappearance of the deceased.

26. In **Neema Mwandoro Nduzuya v R [2008] e KLR** the Court of Appeal reiterating the probative value of circumstantial evidence and the attendant duty of the trial court, stated that:

“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R v Taylor Weaver and Donovan (19280 21 Cr. App. R. 20). But circumstantial evidence should be very closely examined before basis of a conviction on it.

27. In its earlier decision in **Mwangi and Another v Republic (2004) 2 KLR 32**, the Court of Appeal exhorted that:

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge”

See also **Regina v Exall and Others)1866) 176 ER 850** emphasizing the view that all pieces of circumstantial evidence ought to be viewed as individual strands of a cord which when combined together, constitute a rope.

28. In this case, the court proposes to deal with the identified key strands of evidence together as they weave into one another. The fact of the discovery of the deceased's body buried under a heap of building sand in a house under construction in her compound on 5th November 2014 is firmly established by the evidence of eye witnesses **PW1, PW2, PW3, PW8** and **PW10**. The scene was documented through photographs taken by **PW8**. The testimony of witnesses present at the recovery and the photographs indicate that the deceased must have been killed in one of the rooms annexed to the house of the deceased. (see photographs Nos. 6, 7, 12, 13 and 14 of **Exh.9(a)**). The photographs indicate a room in which was found a blood-stained mattress. Moreover, the body itself was also in the same compound, lying in the house under construction which is a stone's throw away from the deceased's house and the annex rooms.

29. The particular room where the blood-stained mattress was found, was according to **PW10** occupied by the Accused during the material period. That the room was habited is evident from the beddings (mattress and blanket etc) sandals and clothes captured in the photographs **Exh. 9(a)**. I shall be reverting later to the recovery of items allegedly made therein, including the pink jumper or T-shirt (**Exh. 3**) which was found to have traces of blood from the deceased. Significantly, photos taken in the deceased's house [**Exh.9(d)**] and the evidence of **PW10** do not indicate evidence of any struggle having taken place therein, or marks of blood or of burning. Suffice for now to say that, it appears that the murder was committed in or close to the room with a blood-stained mattress as the victim apparently came in contact with the mattress and T-shirt in question, based on the analysis by **PW7**.

30. The next consideration is that the body of the deceased was in the incomplete stone house just metres from the suspected murder site. The body was mutilated, and limbs packed in a gunny bag, after it had been apparently burned. Thereafter, it was buried in the heap of building sand in the living room area of the incomplete structure. It would appear that from the alleged room of the murder, the body was moved to the incomplete house under construction. Witnesses **PW8** and **PW10** testified, and this is well captured in the photographs, that pieces of human flesh and parts as well as charred clothing were found strewn in the said house.

31. In the photographs is a pile of firewood stacked next to a wall. By one wall in one of the rooms is what appears to be the remains of an extensive fire, evidenced by ashes and what is clearly charred pieces of wood. Seemingly, after attempts to burn the body did not succeed completely, the burnt and mutilated body was buried under the building sand stored in the sitting room of the house under construction. The evidence by **PW2, 3, 8** and **10** is that the body was fully covered under the mound of sand, some of which was visible at post mortem per the evidence of the pathologist (**PW6**). The images of the body while lying in the sand and the removal process are in the photos No.43 - 46 (of **Exh.9c**).

32. The photos capture a high mound of sand over the site where the body was exhumed, clear evidence of concealment. Further, the charred body was itself wrapped in multiple layers of charred clothing/ fabric and what appears to be a blanket, from the head down to what remained after the limbs were sewn off. The limbs were packed in separate gunny bags and were equally charred. Pictures of the exposed body reveal extensive burns, exposing internal organs such as intestines. The body is evidently bloated. According to **PW6**, all the limbs had been amputated and the body decomposed. It is therefore evident that the person or persons who murdered the deceased, subsequently dismembered her body and attempted to burn it up, failing which he/they hid the body and parts thereof by piling a heap of sand over it.

33. It is not disputed that the deceased went out on Saturday the 1st November, 2014. According to **PW2**, the deceased having spent the night in her house left for her home on the next day, Sunday the 2nd November 2014. While **PW1** did not specifically state when he last saw the deceased prior to 3.11.14, the finding of her body in the home and other surrounding evidence suggests strongly that the deceased had returned home by 3.11.2014. **PW1** testified that the deceased often notified him of her absence from home, which is believable because **PW1** got alarmed when the deceased had not returned by 4.11.14 and called **PW2**. Despite this testimony, at no time did the defence suggest to **PW1** that the deceased had the habit of leaving home, unannounced, for days on end.

34. If indeed the deceased had been away all weekend until Monday 3.11.14, **PW1** would have noticed her absence. More so as the deceased was also living with and taking care of the two minor children of **PW5**. According to **PW1** as he returned home from school at 6pm. on 3.11.14, he met the Accused who told him that “*Mkubwa*”, that is, the deceased, was not home and that she had left her phone behind, the

latter fact which **PW1** confirmed on reaching home and which he thought odd as the deceased would rarely leave her phone.

35. The witness further stated:

“Itwika (Accused) said that the deceased had told me to feed the chickens and give them water. He did not say where aunt had gone..... we parted ways. I found the kids I and W playing. One of them gave me the keys to deceased’s house. I opened and found the phone in the house....”

36. In cross-examination **PW1** reiterated this evidence. Indeed, regarding the said phone, **PW3** also stated that the Accused said to her on 4.11.14 that he had seen the deceased leave home and that the phone was “*left in the verandah*”. To **PW2** the Accused when questioned, stated that he had not seen the deceased since Monday morning, that is the 3rd November, 2014. The defence did not suggest to either **PW2** and **PW3** or even **PW1** that the deceased having left home on Saturday never returned. None of the witnesses **PW1 – PW3** were shown to have had an axe grind with the Accused, and if the statements they attributed to the Accused in this period were false, the defence did not canvass the alternative version with them to confirm or deny.

37. In particular, **PW1** a resident in the home would have been well placed to confirm whether or not the deceased returned home at all after leaving for her *chama* on Saturday the 1st November 2014. The evidence by the prosecution, confirmed by the recovery of the body of the deceased in the home and the presence of her phone at the home strongly indicates that the deceased was at home by 2nd November, 2014 and that her death, likely occurred on the night of 2nd November or on 3rd November 2014 during the day.

38. The Accused’s partial alibi concerning his absence from the home during daytime on 2nd November, 2014 therefore does not remove him completely from the murder scene in the relevant period for purposes of the case. Moreover, **PW1** was not shaken during cross-examination, reiterating his conversation with the Accused on the evening of 3rd November, 2014. It seemed unlikely that **PW1** could have made up this conversation. Given the available evidence, the Accused’s gratuitous statement to **PW1** that the deceased had gone out on 3.11.14 and left behind certain instructions for **PW1** was clearly a red herring, and false, as it is obvious that by the time of that conversation, the deceased was lying dead somewhere within the compound, but possibly concealed.

39. Who had the opportunity while **PW1** was away in school on 3rd and 4th November 2014 to murder the deceased, move it into the building under construction, set it ablaze, mutilate it and pack some of its parts in bags, while wrapping the torso with multiple layers of fabric coverings and then heap a high mound of sand over it? The murder of the deceased having likely occurred on 3.11.14, the effects to conceal it probably took that day and the 4th November 2014. This was not a transaction that took one hour but many hours, and included assembling piles of firewood and the lighting of a big fire in the house under construction. The smoke, emanating from such a fire, laced with the odor of roasting flesh must have billowed out of the doors and windows of the said house which at the time had only metal grills but no glass panes. Such smoke must have engulfed the home for some significant period on that day.

40. Admittedly, the Accused was home on the night of 2nd November 2014 (Sunday) and Monday 3rd November 2014 and by his report to **PW1**, he saw the deceased on 3rd November, 2014. He was, in his own words, carrying on with his work on the compound on that day and the next (4th November, 2014). It is inconceivable, in my opinion, given the lay-out of the compound of the deceased, that intruders came in, murdered the deceased, proceeded to dismember her body, gathered enough firewood, set the body ablaze and then wrapped the torso in multiple layers of material, while packaging some of the severed parts and eventually buried everything in a heap of building sand in the unfinished house under construction, without the Accused noticing anything.

41. The murder dismembering, burning and burying of the deceased’s body cannot have been the work of a surreptitious intruder or intruders not familiar with the home. And if indeed any of the deceased’s alleged hostile in-laws alluded to by the Accused, or her male friends had visited the deceased’s home, the Accused would have noticed and mentioned this to the police. He did not, nor did he refer to such incident in his testimony before the court. Significantly, the Accused when pressed under cross-examination was unable to give specific details including names of the in-laws who had allegedly been involved in disputes with the deceased, a matter flatly denied by **PW3** and **PW9**.

42. Evidently the murder, dismembering, burning and burying of the deceased’s body in my view was the work of a person who was well familiar with the home and its routines, had unhindered access in the home, adequate time, opportunity and the wherewithal at his disposal within the homestead to carry out this gory transaction. To my mind, in the circumstances of this case, this person can only be the Accused. With **PW1** away in school on 3rd and 4th November 2014, only the two minor children remained at home, and the Accused had more than adequate opportunity, to attack the deceased after gagging her mouth, and later carrying out other actions in a bid to conceal the murder. Thus, by giving false information to **PW1** as the witness returned home, the Accused’s intention was to allay any fears about the deceased’s whereabouts, and therefore buy more time to dispose of the body on the next day. And of course, since the deceased had according to the Accused left her phone at home, **PW1** could not reach her.

43. The conduct and evidence by the deceased’s family and friends including **PW1, PW2, PW3** and **PW9** completely displaces the Accused’s assertions that the deceased was in the habit of being absent from home several days in a row such being reason why the Accused was not concerned when the deceased did not return home between 1st and 3rd November 2014. On the proven facts, the true reason why he took no steps beyond misleading witnesses such as **PW1** and **PW3** and continued to stay in the home, lying to all inquirers that the deceased had left home, was to complete the process of disposing of the deceased’s body, while awaiting a good opportunity to leave without raising suspicion. This finding is well corroborated by other evidence considered below.

44. A material strand of the prosecution evidence relates to material collected by police in the course of investigations. First, was the blood-stained mattress, a piece of which was presented in court (**Exh.5**) and the blood stained jumper or T-shirt (**Exh.4**) and the deceased’s jewelry (**Exh.11**) all which **PW10** stated to have recovered from the room occupied by the Accused. **Exh.4** and **5** are captured in the photographic evidence **Exh. 9(a)**. Both exhibits had traces of human blood but DNA profile could only be generated from **Exh. 5**, and it

matched with DNA generated from the blood sample of the deceased.

45. The Accused testified that he was under arrest and not at the scene at the time these items were retrieved. While the photographs and PW10's evidence indicate that exhibits 4 and 5 were retrieved from the house of the suspect, the prosecution did not show the photographs of the room and items to key witnesses such as PW1, and PW3 not only to identify the room of the Accused and the items but also to identify the owner of the two items. That notwithstanding, the finding of these two items which bore her own blood DNA in a room close to the deceased's house, augments evidence that she was murdered in that room and later the body was taken to the unfinished structure close by.

46. In what appeared an oblique bid to explain away the blood-stained jumper (Exh.4) the Accused explained that after his arrest, he asked for permission to change his clothes he wore at the time, and that he had then flung the changed clothing into the house under construction. It appears odd that a person arrested in the circumstances he described could have the presence of mind to request to change his clothes. And if true, this may have caused suspicion that may have led PW10, upon return to the station to further inspect the Accused's underwear.

47. According to PW10, the Accused's white shorts [Exh.3] appeared to have blood stains and the witness retrieved the pair of shorts. The pair of shorts (Exh.3) was among items examined by PW7 and found to harbor DNA material matching with the deceased's blood. PW10 during his testimony reiterated his evidence on this score, and for his part, the Accused all but admitted that Exh.3 are the inner shorts he wore during arrest, only denying that the shorts were blood stained on retrieval. On the latter aspect, PW7's evidence is conclusive, and in my view more believable, given the other evidence against the Accused person.

48. There is therefore no attempt on the part of the Accused to explain the presence of the deceased's blood on his underwear. Section 111 of the Evidence Act provides that:

“(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence. (2) Nothing in this section shall— (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”

49. With regard to the deceased's jewelry, the prosecution ought to have led key witnesses such as PW1, PW3 and PW9 to connect the Accused with the room where these pieces were recovered. It was not enough for PW10 to say that these were recovered from the Accused's house, or for PW9 to identify the jewelry as her late sister's. After all, PW10 could only rely on the evidence of witnesses familiar with the home to identify the exact house which the Accused occupied while employed by the deceased even though there was no dispute he was so accommodated.

50. In this case, the element of motive is relevant. As stated by the Court of Appeal in **Libambula V Republic (2003)**

KLR683:

“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person (see Section 8 of the Evidence Act). Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.” (Emphasis added)

51. In this regard, there is evidence by the deceased's bosom friend PW2 that the deceased had recently confided in her that Accused had exhibited animosity towards the deceased's boyfriend K, at one time damaging his vehicle when the said K visited the deceased. This issue was actually first raised by the defence during cross-examination of PW2. On her part, PW3 a younger sister to the deceased testified that on 20.10.2014 while at the home of the deceased assisting her prepare meals for a function, the deceased complained her that:

“She did not have a good relationship with Itwika (Accused)...that Itwika had developed some strange and nasty behaviour for example, he would go into her house and steal her panties. She also told us that Itwika was no longer a good employee – and that he was exhibiting some signs of jealousy because of her relationship with her boyfriend. She said that on one occasion, Itwika had slashed the tyres of her boyfriend's vehicle and smashed the windscreen.”

52. This witness in cross-examination denied that the deceased had any conflict with her in-laws and that the home she occupied with her husband and later as a widow, belonged to the deceased she admitted that though aware of the fact that her sister was dating again, she did not know when that started or the boyfriend. During re-examination the witness stated that she had on several occasions advised the deceased to terminate the services of the Accused. The defence in cross-examination of the area chief PW4 and the deceased's daughter PW5 did not raise matters pertaining to a dispute between the deceased and her in-laws, something these witnesses were well-placed to shed light on. PW5 however reiterated her evidence in chief that the deceased had confided in her in 2014 that her relationship with the Accused was not doing well, and that the witness had also witnessed a theft perpetrated by the Accused at her mother's home.

53. In his evidence, the Accused claimed that since 2013 the deceased had started to spend nights and sometimes weeks away from home and would bring male friends to the home, prompting conflict with her in laws. When pressed under cross-examination to give details, the Accused was unable to give dates when he deceased had stayed away from home for long periods or names of the in-laws who confronted over her conduct, asserting however that the deceased brought different men to the home. Significantly, he did not indicate that such men had visited the home during the material period.

54. From his own account, it seems that the Accused took a keen interest in the love-life of his employer. He did not specifically deny having damaged the motor vehicle of his employer's boyfriend. That he was unable to name any of the in-laws of the deceased aggrieved by her love-life, considered alongside the unhealthy interest/animus he showed towards her male companions, suggests that he was likely the one aggrieved or jealous that the deceased was entertaining other men, rather than himself. The fact that the deceased had noticed this jealousy and her murder only a day after returning home from a night out strongly supports this theory.

55. It may well be that in a twisted way, the Accused felt spurned and rejected out of the fact that the deceased widow had taken another person or persons as lovers and not himself. And that, as the details of the murder and subsequent events show, the Accused developed a plan to punish the deceased by fatally attacking her. Based on evidence of the Accused's exhibited jealousy and alleged bizarre conduct of stealing the deceased's underwear, one must ask: did he also sexually molest the deceased? It is hard to say, but on the facts of the case, the deceased was first gagged on the mouth with a piece of cloth that remained on her until the post-mortem examination, and thereafter killed by a vicious single blow to the head which cracked her skull. What happened in between will possibly never be known. The blow to her head was so severe that it completely shattered the skull so that brain material oozed from the fracture site.

56. There is no evidence that any stranger or in-law visited the deceased in the material days and as the Accused admitted, only he and the deceased would be home during week days, giving him the perfect opportunity and access to carry out his nefarious plan. The Accused's denials are completely displaced by the prosecution evidence.

57. Upon a careful examination of the evidence, the Court has concluded that the circumstances proven in this case point unerringly to the Accused as the perpetrator of the offence herein, and admit no room for the co-existence of circumstances negating or weakening the inference that the Accused is the person who, of malice aforethought, committed the unlawful acts leading to the deceased's death; and that he thereafter set in motion a chain of events, not only to conceal the murder but also to exonerate himself. I am satisfied that the prosecution has proved its case beyond any reasonable doubt and will convict the Accused as charged.

DELIVERED AND SIGNED AT KIAMBU THIS 5TH DAY OF MARCH 2020.

C. MEOLI

JUDGE

In the presence of:

Mr. Kasyoka for the DPP

Dr. Sungi for the Accused

The Accused

Court Assistant Kevin/Nancy