



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 6 OF 2018[MURDER]

CORAM: HON. R.E.ABURILI J

REPUBLIC.....PROSECUTOR

VERSUS

CALVIN OMONDI OMOLLO.....ACCUSED

JUDGMENT

Introduction

1. The accused person **CALVIN OMONDI OMOLLO** herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on the night of 25/12/2017, the accused, jointly with others not before court murdered one **AO**. The accused who was represented by an advocate pleaded not guilty. The prosecution called eleven witnesses in support of their case which is summarised herein below.

Prosecution Case

2. **PW1 Simon Onyango Olwendo** testified that on the 26/12/2017 at about 4.am he received a telephone call from a village elder Mr. Were who informed him that an incident had happened at Hawinga next to the Anglican Church where a girl had been killed. PW1 proceeded to the scene where he found a lady dead, half naked and next to the road, facing up. It was his testimony that he did not see any visible injuries on the dead body. At the scene, he found a huge crowd gathered and one Gideon Onyango surrendered a red shirt and a Nokia phone which he claimed that he had wrestled from someone fleeing the scene where the deceased was found lying. He further testified that through family members of the deceased who were present at the scene, they tried calling the deceased's phone but that although her phone was on and ringing, they could not find it so they examined the recovered Nokia phone, called several numbers to no avail then called the number of one Odhok whom PW1 tricked and the recipient Odhok revealed to PW1 that the phone in question belonged to one Calvin from Sirinde. He further testified that he then called the area Assistant Chief of Sirinde and briefed him and he subsequently proceeded to Sirinde. Together with the Assistant Chief, they arrived at the home of the accused Calvin at 5am where they found 3 men, Calvin, his brother and his cousin, but only took Calvin into custody after he identified himself. He further testified that Calvin did not respond when queried as to the ownership of the T-shirt found at the scene of crime and that the other two young men surrendered their phones to PW1 and his team, one of which was of the Techno model. He further stated that on being shown the Tshirt, the two young men stated that the T-shirt in question belonged to Calvin.

3. PW1 testified that on asking Calvin where he had found the Techno Phone, he told them that he had picked the Nokia phone at Hawinga the day he lost his own phone. He further testified that Calvin subsequently confirmed that the phone picked at the scene was his, a fact that was corroborated by the two boys after which Calvin was taken into custody and escorted to Uranga AP post.

4. PW1 further testified that they were informed that one Janet was with the deceased on 25/12/2017 so they went to pick her at her home in Hawinga where they also found a crowd and upon showing the crowd the 2 phones, one Nyasiaya, the deceased's sister confirmed that the Techno phone was the deceased's phone and that she knew its PIN and she subsequently opened it only for them to realize that it had no SIM card.

5. He further testified that he then went to Uranga AP Post and found Calvin who gave them a SIM card from his pocket which Nyasiaya was able to unlock after which he handed over all the exhibits to the CID officers from Siaya Police Station. He identified the accused as Calvin.

6. In cross-examination PW1 stated that he went to the scene of crime, on an open area next to a church, at about 4.00 am where he found a huge crowd of over 50 people had gathered. He further stated that he was handed a black Nokia Phone which had a sticker at the back written charging. He stated that he found the accused at his home not at the scene a distance of about 1½ kilometers. PW1 stated that he recovered a

Techno phone which was given to him by one of the boys who was with the accused in the house where they were found sleeping.

7. **PW2 Gideon Ismail Onyango** testified that on 26/12/2018 at around 1.30am, he had escorted his uncle Tobias after celebrating Christmas at his home when he heard screams of a lady ahead of him saying Uuuwi!! Uuuwwi!! and another person, a man, telling the person screaming 'ling ling' (in dholuo) by a man saying 'keep quiet keep quiet'. He stated that the person screaming was a lady.

8. He testified that he had a torch so he switched it off as he feared being identified by the people as he walked towards the scene which was about 30 metres away. He further testified that when he reached the scene and saw light at the shops, he saw a lady lying near the Anglican Church and he shone the torch and saw three men, one standing beside the lady, another near her head and another one appeared to be raping her. He testified that the lady's legs were wide open and as the men saw him, they escaped but a phone fell down so he picked it.

9. PW2 testified that the lady was already dead and as he stood beside her, he noticed that her trouser had been pulled and left on her leg and that she was facing up lying on her back. He testified that he recognized her as **AO**, his cousin. He testified that he stayed beside the body as he believed the people would return to pick their phone and after about 7 minutes, he saw one person returning looking scared. He testified that he confronted the man who revealed that he was known as Calvin and worked at Kojema. He further testified that a struggle ensued as he questioned Calvin and in the process he held onto his clothing. That the person then removed his Tshirt in a bid to escape and the Tshirt remained with PW2. He stated that he struggled with the said Calvin for about 8 minutes in bright light and he identified the said Calvin.

10. In cross-examination, PW2 reiterated his testimony in chief.

11. **PW3, Raymond Opiyo Nyandiwo** the Assistant Chef at Kaugangi Udenda sub-location testified that on 26/12/2018 he was in his house at around 5.00 am when he received a call from his boss Simon Onyango, the Chief of South West Alego location who directed him to Hawinga where he found a deceased person lying on the ground. He further testified that the Chief had earlier asked him if he knew Calvin and he told him that he knew him from Sirinde as he had previously handled a dispute where Calvin and his brother had demolished the toilet of an old lady. He further testified that on arrival at Calvin's home he showed his superiors the house of Calvin which they entered and found Calvin with his brother and a cousin. He testified that Calvin was arrested and taken away. He identified Calvin in court.

12. In cross-examination, PW3 stated that he knew Calvin and that he did not find him at the scene of crime but found him, where he normally slept, at the grandmother's place. He further stated that he did not enter the house where Calvin slept.

13. **PW4 SOO**, a brother to the deceased testified that on 26/12/2017 he was at home sleeping when he received a call from his friend Simon who informed him that a lady who resembled PW4's sister, A, had been found near the Anglican Church and that she had fainted. He testified that it was around 2.00 am and he immediately woke up his mother with whom they proceeded to the scene where they confirmed that it was Ann his sister. He testified that she was half naked, her trouser removed and on one leg only and that near the scene, he found one "Ngala" who gave him a **black Nokia phone** calibrated "**Kali**" which 'Ngala' thought to be Anne's phone as he had picked it from the scene. He stated that he tried to call his sister's number but the Nokia phone was not responding although his sister's phone was ringing after which he gave the Nokia phone to the Chief who was at the scene.

14. PW4 testified that he then called his father who was in Mombasa and told him what had happened and later, his father called him saying a suspect had been arrested with a phone belonging to his sister Ann after which the police arrived and picked his sister Mary to go and confirm if the other phone recovered with the suspect belonged to Ann.

15. PW4 testified that they went to Uranga AP Camp where he found a suspect in the cells whom he saw giving a Safaricom SIM card to the police. He further testified that he had not known the suspect before and when the SIM card was inserted in the phone, as he and his sister Mary knew the PIN for Mary's phone, being 5313, it unlocked the phone.

16. In cross-examination, PW4 stated that prior to seeing the accused at the police station, he had never known him before. He stated that his sister had a Techno phone though he could not verify how long she had owned it. He testified that he was with Ann on 25th December 2017 as he escorted her to Hawinga Market where she worked as a salonist.

17. He further stated that he did not know if his late sister had a grudge with anybody or if she had a boyfriend who had bought her that Techno phone 2 days prior to her death or even whether she used to go to night clubs. He stated that his late sister used to return home latest by 8pm.

18. **PW5 Janet Atieno** testified that on 25/12/2017, she was at Hawinga Centre alone in a saloon and that after work, she decided to go home and prepare to return for entertainment but before she left at 8.30 pm, the deceased Ann who was her blood sister, arrived and found her in the saloon and told her to accompany her to Oduor Resort at Kanyaboli for a big soda. She further testified that after taking the soda, she suggested that they go to some club called Apondi Oriji but the deceased proceeded home to check on her children.

19. PW5 further testified that she left the deceased at Kanyaboli Resort at about 11 pm but that she was okay as she used not to partake any spirits while PW5 remained dancing at Apondi Oriji until when she received information that a girl had been killed at Hawinga and later learnt that it was her sister.

20. In cross-examination she stated that she did not know the accused person nor had she seen him before.

21. **PW6 ROM** the deceased's father identified the deceased's body to the doctor who performed the postmortem.

22. **PW8 Dr. Dickson Mchana Mwaludindi** performed an autopsy on the deceased's in the company of Dr. Omondi on the 5/1/2018. He testified that the body was identified by ROM- PW6 and RAO family members of the deceased.

23. Dr. Mwaludindi testified that 10 days had lapsed since the death and that externally there were marks of a previous autopsy done as well as 2 minor bruises on the left elbow. Internally, the neck had bruises on the left side below the skin with bleeding in the muscles, fracture of the bone on the front of the neck (hyoid bones) on the left side with bruising on muscles around it, there was froth in the airwaves, whereas under the womb, she was not pregnant nor was there any evidence of trauma arising from a forced entry. He noted that on the head, the main findings were in the brain where there was bleeding under the cover of the brain involving the forebrain and back brain extending backwards. He opined that the cause of the death was severe head injury due to blunt force trauma following manual strangulation.

24. In cross-examination, PW8 stated that there were marks of a previous autopsy as this was a repeat autopsy and that it was very unlikely that the injuries were caused by a fall. He further stated that as the body had been embalmed, they could not have gotten a positive test of alcohol.

25. **PW9 MAO**, the deceased's younger sister testified that 26/12/2017 at about 3 am, she was awoken by her brother SOO who was inquiring on the whereabouts of Ann and PW9 replied that she did not know. She testified that later that morning, she went to the scene of crime near the Anglican Church where people were screaming and she saw her sister's body lying on the ground facing up and naked.

26. She testified that when the deceased left home the previous day, she had worn a black trouser which had now been removed in one leg and left on one leg while her white skin tight and pant had also been removed and left on one leg. She testified that she was called at the police station to identify the deceased's phone as she jointly used it with her late sister and so she knew its PIN which she keyed in and the phone was unblocked. She stated that she did not know the accused prior to her sister's death.

27. In cross-examination, PW9 stated that she did not know if the deceased had a boyfriend or if the Techno phone was bought for her by her boyfriend despite telling the police in her statement that she had a boyfriend. She testified that the deceased had a Safaricom line and phone before but it got lost and that is when she bought the Techno phone 2 days before her death.

28. She further reiterated that she had never seen the accused before her sister died and that she first saw him at the police station. She further stated that the deceased used to return from work by 6 pm and that on the day she died was when she stayed out late.

29. **PW10 Kevin Oduor Okoth**, a surveyor from Bungoma testified that on 25/12/2017 at around 6pm, he was at Kanyaboli Resort with his uncle Silas Okoth (Daddy) when he met the deceased Ann Atieno Owuor at around 11 pm through one Betty who was his neighbour, as they were dancing. He testified that after some time, the deceased said that she wanted to return home so that she could rest and wake up early to open the salon to which he told her not to go alone that late but wait for her friends but that she insisted on leaving so he decided to escort her up to near her home.

30. PW10 testified that it was past midnight when they reached near Hawinga Primary School and they branched off on to a big road where they used a torch light. He testified that after walking for some minutes some 3-4 people appeared and confronted him. He testified that one had a panga and as the deceased had the phone torch off, he couldn't recognize them. He testified that he could not tell the make of the phone that Ann had because he did not torch the phone.

31. He further testified that when the people confronted him with the panga, A took off towards her home whereas PW 10 retreated and took off. He testified that he lived in Bungoma but had gone for holidays on invitation and was barely 24 hours at the Resort area.

32. In cross-examination, PW10 testified that when he escaped, he went back to the Resort, met his uncle and told him that he had been attacked after which they left. He stated that his home was some distance from Hawinga Area. He described the deceased as an outgoing and happy lady and that he spoke to her for a few hours.

33. **PW11 No 239529 APC Seth Abok** of Uranga Police Post testified that on 26/12/2017 at about 4.00 am he received a telephone call from Samwel Olwengo, the area Chief, telling him that a girl had been found dead at Hawinga area. He testified that he left with his colleagues and proceeded to the scene where they found a lady lying on the ground, naked, and who appeared raped. He testified that a certain young man called Gideon appeared and told them that he heard noises on the road so he went to the scene and lit his torch and identified the deceased as Ann and further that he hid besides the road after identifying the girl lying down and called the deceased's family and that a certain boy returned to the scene, they struggled and the boy left behind his red T-shirt during the struggle.

34. **APC Abok** further testified that Gideon also recovered a Nokia phone from the scene thinking it belonged to the deceased and handed it to the brother of the deceased and the latter handed it over to the area Chief from which APC Abok and his team tried getting contacts to get its owner and subsequently ended up at the accused's home where they searched and found a Techno phone which on asking the accused whose phone it was, the accused stated that he picked it from Hawinga. APC Abok further stated that the accused gave him the Techno phone's SIM card from his [accused person's] pocket. He testified that he handed over the suspect to Siaya Police Station for further investigations and later recorded his statement at Siaya Police Station.

35. In cross-examination, PW 10 testified that the red T-shirt he recovered from Gideon belonged to the accused and that he recovered the Nokia phone at the scene. He stated that at the house of the accused, they found three people. He further stated that they also found a Techno phone under a mattress and only arrested the accused. In re-examination, APC Abok stated that he found three men in the room and only arrested Calvin because his phone was found at the scene of crime.

36. **PW12 James Makobi** an employee of Safaricom Ltd in Nyanza and based at the Kisumu Office Liaison office testified that he was requested by the DCI Siaya Sub-County office vide letter dated 10/1/2018 to assist in investigations to provide information on call data records for mobile phone No. 0719xxxxxx. That on 20/1/2018 he processed the request by generating call data request from 1/12/2017 upto 25/12/2017. He stated that the mobile number was registered in the name of AO ID No. [...]. He stated that he had the detailed call data record showing communication with the queried number, imei number and subscriber details. The said details available were upto 25/12/2017 at 15.31 hours. The imei number is 358927070153940. He produced Data records as PExhibit 2(a) and Certificate under the Evidence Act dated 27/1/2020 as PEx 2(b).

37. In cross examination by Mr Ochanyo Advocate on behalf of Mr Ariho counsel for the accused, PW12 stated that from 15/12/2017 the Simcard may have been used by a phone which was not authentic. He also stated that the request did not cover when the phone was registered by the owner.

38. **PW13 No. 236998 Inspector Sammy Ndungu** attached to DCI Headquarters as a Forensic Examiner testified that he formerly worked at DCI Siaya County and that he was the Investigating officer in this case. He recalled that on 26/12/2017 at around 5 am, a murder incident was reported by the Chief of Uranga location vide OB No. 8. That he was on duty so he was tasked by the DCIO to proceed to the scene at Hawinga in Uranga. On arrival, they found a female adult lying on the ground in a long trouser half way put on but no pants on. He did not see physical injuries. Relatives were present and identified the deceased as Anna Atieno Owuor.

39. The Chief and other members of the public said they had recovered some exhibits namely a red Tshirt (MFI 1) and a black mobile NOKIA phone IMEI No. 356012083083688. The exhibits had been handed to the Chief by a witness who allegedly confronted the suspect at the scene. PW3 was also informed that the phone was found at the scene and were pursuing its owner. The scene was secured and photographed by Scenes of Crime Personnel and the body was escorted to the mortuary at Siaya.

40. PW13 was later called and he went back to Uranga where he collected the suspect who had been arrested and he had injuries on toes, hands and on the nostril. The suspect told PW 13 that he was Calvin Omondi Omollo. PW13 took him to the police station and Siaya Hospital where he was treated and a P3 form assessed the injuries as harm. On asking him how he sustained the injuries he told PW13 that he had been injured on the material previous night on his way home.

41. PW13 recorded statements of those witnesses who were with the deceased on the previous day and night which was a Christmas day. He discovered from the witness statements that one Kevin Oduor is the one who had accompanied the deceased from the Kanyaboli Resort but he was not familiar with the area. That he had escorted the deceased and on nearing her home, three people emerged from darkness and confronted the deceased and Kevin. That the deceased ran towards her home as the witness Kevin freed himself and ran away. The following day he learnt of the death of the deceased.

42. PW13 testified that Gideon Onyango is the one who said that he confronted the suspect at the scene and saw the deceased lying on the ground and identified her, and that as he struggled with the accused, the accused left behind his red Tshirt. That Gideon also recovered a mobile phone which had fallen on the ground and he notified the deceased's relatives. He stated that when the Chief arrived and saw the mobile phone which was on, he opened the phonebook and saw the name of Odhok who was called and he led the Chief to the accused person's home where he was found with 3 others. The accused was then found in possession of a phone belonging to the deceased. The Chief and others arrested the suspect and detained them at Uranga. He stated that the deceased's phone was Techno (MFI 3) IMEI Number 353288097403087 and SIM Card S/No. 89254021014056795068 was found to belong to the deceased.

43. PW13 stated that on conducting the post-mortem, the doctor established cause of death to be strangulation. On reviewing statements of witnesses and recovering exhibits, they decided to charge the accused with Murder. He identified the accused in court and produced the Red Tshirt as PEx No. 4, Black Techno Mobile phone as PEx No. 3 and a Black Nokia Phone as Pexhibit No. 5.

44. On being cross examined by Mr Ariho counsel for the accused person, PW13 stated that When he arrested the suspect, he found him with some injuries and so he took him to hospital and he was treated and issued with a P3. He added that he was not present when the accused was arrested. He stated that no DNA tests had been done on the red Tshirt and that PW2 told him that he recognized the accused but that there was no identification parade. He asserted that the Techno phone belonged to the deceased. He stated that he had no records linking the Nokia phone to the accused person.

Defence case

45. Placed on his defence, the accused person gave sworn testimony and stated that he was Calvin Omondi Omollo a resident of Uranga Area, Siaya County. That he works in Jua Kali. He denied killing the deceased or even knowing her or having ever interacted with her. He denied owning or having ever been in possession of a red t-shirt, or a phone. He stated that on the material night of 26/12/2017, he was at home sleeping when the Assistant Chief went and told him that he was looking for Kevin and told him that they had work for him. That they led him to the Police Station, slapped him until he bled from the nose. He was placed in the cells at Siaya Police Station and taken to hospital where his urine was taken as specimen. That he was assaulted and taken to court after one week.

46. The accused stated that he was shocked to hear that he had killed the deceased. He pleaded innocence stating that he was rotting in the jail yet he never committed the offence. He stated that none of the exhibits belonged to him. He denied that the red T-shirt was his. He also denied that the phones Techno and Nokia belonged to him. He denied being subjected to any identification parade at the police station.

47. He stated that he was arrested at his home and that he was with another person. On the phone allegedly recovered at the scene of crime, he denied that it was his. He denied knowing anything to do with the death of AAO. He denied that he was found in possession of the phone of AAO. He also stated that when he was arrested, he no blood stained clothes nor any injuries on his body and that he only nose bled after being slapped by a police officer. He also denied knowing any of the prosecution witnesses who testified against him.

48. On being cross examined by Mr. Okachi the Senior Principal Prosecution Counsel, the accused person reiterated his testimony in chief that he was from come from Siaya, Uranga- Kaugagi village. He denied knowing Kaudenda. He stated that Raymond Opiyo was his Assistant Chief and that he had known him for about 1½ years. He denied knowing Simon Onyango Orwende or Gideon Onyango. He stated that on 25/12/2017, he was at home in the evening with his father Alexander Omollo but that he used to sleep in a separate house and that that night he slept alone. He denied ever owning he stated that in his life he had never used a mobile phone.

Submissions

49. The accused person's counsel filed written submissions urging the court to find that the prosecution had not proved its case against the accused person beyond reasonable doubt and to acquit him and set him at liberty. Counsel framed the following issues for determination by this court:

1. *what caused the death of Ann Atieno Owuor?*
2. *Whether the death of the deceased was caused by unlawful acts or omission?*
3. *Whether the accused committed the unlawful act which caused the death of the deceased?*
4. *Whether the accused had malice afore thought?*
5. *what remedies are available to the accused person?*

50. Addressing the issues flagged out, counsel argued issues one (1) and two (2) together.

1. *What caused the death of Ann Atieno owuor?*
2. *Whether the death of the deceased was caused by unlawful acts or omission?*

51. According to the accused person's counsel, PW-1, PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-9, PW-10 and PW-11 all confirmed that they saw the AAO lying lifeless at the scene of crime. In addition, he submitted that PW-8 the medical doctor, a pathologist stated that he conducted a post-mortem report on the deceased who was identified by PW-6 and PW-7 who testified that from his examination, the cause of death of the deceased was severe head injury caused by blunt force trauma following manual strangulation. Counsel therefore argued that from the findings of the pathologist, it is safe to state that the cause of death of the deceased was caused by an unlawful acts or omission.

52. On issues three(3) and four (4) as argued together-

3. *Whether the accused committed the unlawful act which caused the death of the deceased?*
4. *Whether the accused had malice afore thought?*

53. Counsel submitted that there was no eye witness hence the evidence available as against the accused person is purely circumstantial. He submitted that for circumstantial evidence to stand, the chain of events must be corroborative and supportive of each other to sustain the charge of murder. Further, that where there could have been any eye witness who could have had a faint collection of the events as they happened, and the perpetrator is not well known to the witnesses, then a formal identification parade ought to be conducted to properly identify the perpetrator so that the chain of evidence of the prosecution is proper, coherent firm and strong to be able to secure a conviction. He also submitted that in the event that there is any doubt in the evidence tendered by the prosecution, then the same is to the advantage of the accused person.

54. According to counsel, in the instant case, PW2 was the first person at the scene of crime and that he narrated that the unfortunate incident happened at about 1:30am. He told the court that on the material night, he was from escorting a one Tobias after they were from a drinking spree of alcohol and that it was dark and that he did not clearly tell how he knew the accused person personally as he could not easily identify him whether by name or particular features.

55. It was submitted that there was no formal identification parade for PW2 to properly identify the particular perpetrator that he met on that fateful night, and that he could not tell who the other two (2) assailants were. Further submission was that the accused denied owning the red T-shirt (**exhibit 4**) yet the prosecution did not adduce any scientific forensic evidence of any DNA samples to match the accused person to the ownership of the red t-shirt.

56. It was further submitted that as testified by PW1, from the phone which they picked from the scene of crime, they got the contact of a one **Odok** who gave them information on the whereabouts of the accused person, yet the said **Odok** was never called as a witness by the prosecution to confirm the ownership of the phone as belonging to the accused person.

57. It was further submitted that the the prosecution did not produce any records from Safaricom or airtel to confirm that the phone which was recovered at the scene of crime belonged to the accused person.

58. Counsel submitted that in the absence of incriminating evidence to place the accused person at the scene of crime and in the absence of forensic or expert evidence to link the items recovered from the scene of crime to the accused person, what is left is nothing but mere suspicion. He submitted that **mere suspicion however strong it may be can never be used as basis to convict an accused person, relying on the case of SAWE V REPUBLIC (2003) KLR 354**, where the Court of Appeal considered when circumstantial evidence can form basis of conviction and held:

“1) 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 upon any other reasonable hypothesis than that of his guilt.

2) Circumstantial evidence can be a basis of a conviction only if there no other existing circumstances weakening the chain of

circumstances relied on.

3) ***The burden of proof of facts which justifying the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence always remains with the Prosecution and never shifts to the accused.***

4)

5)

6)

7) **Suspicion, however strong, cannot provide the basis of inference of guilt which must be proved by evidence beyond reasonable doubt.**

59. Counsel for the accused person further submitted that the prosecution also adduced evidence to state that the phone (**exhibit3**) that was allegedly recovered from three men who were found in a house (including the accused person) belonged to the deceased person and that they also alleged that the phone that was found at the scene of crime (**exhibit 5**) belonged to the accused person. According to counsel, the call records obtained from Safaricom were not clear on the ownership of the said phone. He submitted that the records did not lead evidence on the distinct ownership and registration details of the sim cards that were recovered from the two phones, exhibit 4 and 5. He submitted that what was adduced in court were phones with their Imei numbers, a sim card and call records, but no receipt was produced on the ownership of the phone as belonging to the deceased (**exhibit 5**).

60. In addition, counsel submitted that there was no supportive evidence to confirm that the phone that was recovered from the scene of crime belonged to the accused person. He maintained that all the evidence adduced by the prosecution that the prosecution adduced as to ownership of the phone by the deceased were just mere suspicions and allegations which were not substantiated by tangible evidence as required by the law. He maintained that the evidence adduced by the prosecution does not meet the threshold as established in the Evidence Act.

61. Further, that none of the witnesses established malice on the part of the accused person, as none of the witnesses knew the accused and that there was no link of malice that was established between the deceased and the accused person.

62. It was submitted that the accused person denied knowing the deceased. He also denied having been at the scene of crime. Counsel submitted that the evidence of PW2 is not reliable to the extent that PW2 admitted to having been drunk on the material night hence his sense of judgment was impaired and was not able to identify the assailants that did the heinous crime of killing the deceased.

63. Relying on the case of **REPUBLIC V NICHOLAS OUMA MAYUMBA [2017] EKLR** 34, counsel submitted that the prosecution evidence was not watertight to prove all the elements of murder beyond reasonable as required by law. He urged this court to dismiss the charge against the accused and set him at liberty.

Determination

64. I have considered the evidence adduced by the prosecution witnesses, the defence proffered by the accused person and the submissions by counsel representing the accused. The main issue for determination is whether the prosecution proved beyond reasonable doubt all the elements of the offence of murder against the accused person to warrant a conviction.

65. To sustain a conviction on a charge of murder under Section 203 of the Penal Code, the prosecution is required to prove beyond reasonable doubt the following ingredients of the offence: -

a. The fact and the cause of death of the deceased.

b. The fact that the said death was caused by unlawful act of omission or commission and by the accused person - “actus reus”.

c. That the said unlawful act of omission or commission was committed with malice aforethought - “mens rea”.

66. The issue for determination in this case is whether the prosecution have established beyond reasonable doubt all the above elements of murder, to warrant a conviction of the accused person.

67. The accused person Calvin Omondi Omollo faces the charge of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the night of 25/12/2017, the accused, jointly with others not before court murdered one **AO**. The accused person denied the offence.

68. The fact and the cause of death of the deceased AAO was, as conceded by the accused person through his counsel’s submissions, proved beyond reasonable doubt by the evidence of PW1,2,4,5,9 and 11 all who testified that they visited the crime scene and saw the deceased’s body lying while facing up. PW6, the deceased’s father testified that he identified the deceased’s body prior to the autopsy and witnessed the post-mortem being conducted on the body. The cause of death was confirmed through the evidence of **PW8 Dr. Mchana Mwaludindi** who together with Dr. Omondi carried out the post-mortem on the deceased’s body and concluded that the cause of death was severe head injury due to blunt force trauma following manual strangulation.

69. The only issue in dispute is whether the said death was caused by unlawful act of omission or commission and whether it was the accused person who unlawfully caused the death of the deceased AO. The evidence on record from PW1, PW2, PW3, PW4, PW5 is that the deceased was found lying dead and facing up. A part of her long trouser and pant were removed from her leg., an indication that the person who strangled her was attempting to rape her and in the process, as she resisted, he or they strangled her to death before they were accosted by some of the witnesses then the culprits escaped.as there is no evidence that the deceased could have committed suicide and as there is no defence of self-defence offered, I find that the deceased died as a result of an unlawful act.

70. As correctly submitted by the defence counsel Mr Ariho, there was no eye witness called by the prosecution to the unlawful killing of the deceased Ann Owuor. The evidence available is therefore purely circumstantial.

71. For the prosecution to sustain a conviction on circumstantial evidence, the Court of Appeal in the case of Sawe v Republic [2003] e KLR stated:

“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 upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shifts to the party accused.”

72. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof.

73. Therefore, the court has to weigh the total cumulative effect of all the proved circumstances each of which reinforces the conclusion of the guilt of the accused person and if the combined effect of such circumstances is taken to be conclusive in establishing the guilt of the accused the conviction would be justified.

74. In this case, none of the prosecution witnesses witnessed the accused person attack and or kill the deceased. PW2 testified that he was escorting his uncle home when he heard a lady screaming for help and a man who attempted to silence her. He testified that he saw 3 men surround a lady who was lying down on the ground, and on checking on her, he realised that she was his cousin A. He stated that as he neared the scene, he shone his torch on the men forcing them to flee but one dropped his phone and PW2 hid nearby to see if the person who had dropped the phone would come for it. Shortly thereafter, which was in a span of about 7 minutes, the man who was a young man returned and PW2 confronted him. He held him and a struggle ensued with PW2 asking him to identify himself and the young man told PW2 that he was Calvin then the young man ran away and left behind his red T-shirt which he was wearing and which T-shirt was identified by PW2 and produced in court as an exhibit. There was no parade identification for PW2 to identify the accused. The record for the said phone was not produced from the mobile subscriber however, from the said phone, a number was called and it led the Chief to Odhok who revealed that the phone belonged to Calvin. The Chief and others proceeded to the home of Calvin and arrested Calvin. PW2 testified that when he wrestled with the young man and asked him for the name, the suspect told him that he was Calvin.

75. The accused denied committing the offence charged or even knowing or associating with the deceased A. He denied being at the scene of the alleged murder. He denied owning the red Tshirt and his counsel submitted that there was no DNA conducted on the accused to establish whether he was the owner of the red Tshirt produced in evidence. He also denied owning any phone or using any phone in his life. He denied owning the Nokia phone which was recovered at the scene of crime. He contended that there was no identification parade and that there was no evidence that the phone which was recovered from the scene was his. In addition, he contended that Odhok whose contacts were retrieved from the recovered phone and who is said to have revealed the ownership of the phone was never called as a witness. He further contended that the said phone was never linked to him or at all as no report from the subscriber was produced to show who owned the said phone.

76. However, the prosecution evidence as adduced by the witnesses placed the deceased's Techno phone and Simcard in the possession of the accused. The sim card which was, according to PW1 and PW11, retrieved from the accused person's pocket and handed over to the arresting officer after his arrest was proved to belong to the deceased. This Simcard was positively identified by the deceased's sister M and the said witness is the one who was called to unblock the phone recovered from the accused person's house at the time of his arrest. The deceased's sister, Mary, too identified the Techo phone as belonging to her sister and that she had bought it just about two days before her death. The recovered Simcard was inserted in the said phone which the witness, Mary, stated that she used to share its use with her late sister and it opened the phone.

77. PW12 the Safaricom Liaison Officer testified and confirmed that the Simcard that opened the Techno Phone which was recovered from the house where the accused slept on the material night of 26th December 2018 at the time of arresting the accused was registered in the name of the deceased Ann Atieno Owuor. He provided her identity card number.

78. PW 9 KOO who escorted the deceased that night from Kanyaboli Resort testified that they were attacked by some three men and so he escaped as the deceased also escaped towards her home only to learn later that she was found dead.

79. In my humble view, this piece of evidence sufficiently places the accused at the scene where the deceased was found dead. Albeit there was no records to show who owned the Nokia Phone, it is that phone that led the Chief and investigators to trace the accused at his home and on tracing him, a Simcard and a Techno phone belonging to the deceased was found on him. It was therefore upon the accused person to explain how he came into recent possession of the phone and Simcard belonging to the deceased A, which he did not. I had the opportunity to hear and see the prosecution witnesses testify. I find no reason why any of them would frame the accused with such a heinous offence.

Further, failure to call Odhok and to avail DNA evidence of the red Tshirt and to establish the ownership of the Nokia Phone does not create any gap in the persecution's case and neither is it fatal to the prosecution case as the deceased's phone and Simcard clearly links the accused to the deceased.

80. Albeit there was no identification parade of PW2 to identify the accused, and although PW2 said that he saw the accused using bright light as he struggled with him making the accused leave behind a red Tshirt, I find no positive identification of the accused by PW2 and neither does the evidence prove beyond reasonable doubt that he owned the red Tshirt. However, I believe PW2 that he cornered the young man who identified himself as Calvin and that Calvin happens to be the accused who was found with the Techno phone and Simcard belonging to the deceased, and which properly places the accused at the crime scene.

81. Am satisfied that the prosecution evidence proved beyond reasonable doubt that the accused was involved in the unlawful killing of the deceased AO.

82. On whether the unlawful killing of the deceased was actuated by malice aforethought, from the evidence of the doctor who performed the post mortem examination, the deceased death was a result of physical strangulation. Section 206(b) of the Penal Code, states as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances

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(a)

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.”

83. In order to draw an inference whether the action by accused was accompanied with malice aforethought or not, I have read the medical research by Dr. Dean Hanley on Death by Strangulation quoted in the case of **Republic v Geoffrey Wambua Musau [2017] Eklr** where the court stated:

“In his Article Dr. Dean relying a Gonzales TA scholarly text – strangulation in Arch Pathol 15 – 55 – 165 [1933] Kelly M. Trauma to the neck and larynx (Review CRA 8 (1) 22 – 30 – 1997 observed as follows:

“The process of strangulation whether by hand or by ligature, results in blunt force injury of the tissues of the neck. The pattern of these injuries allows us to recognise strangulation as a mechanism, and to distinguish strangulation from other blunt injuries including hanging, traumatic blows to the neck, and artifacts of decomposition.....

At autopsy we can exam all of the issues of the neck, superficial and deep, and track the force vector that produced the injuries.....

In addition to the blunt force injuries of the neck strangulation produces evidence of asphyxiation, recognized as pin point haemorrhages in the skin, conjunctiva of the eyes, and deep internal organs. Immediate death from hanging or strangulation can progress from one of four mechanisms:

(1) Cardiac arrhythmia may be provoked by pressure on the carotid artery nerve ganglion causing cardiac arrest.

(2) Pressure of obstruction of the carotid arteries prevents blood flow to the brain.

(3) Pressure on the jugular veins prevents venous blood return from the brain, gradually backing up blood in the brain resulting in unconsciousness, depressed respiration, and asphyxia.

(4) Pressure obstruction of the Larynx cuts off air flow to the lungs, providing asphyxia”

84. From the above article medical terms makes it clear that the acts of strangulation as seen here is meant to kill or cause serious injury to the victim. In the instant case PW8 opined that cause of the death was severe head injury due to blunt force trauma following manual strangulation. The set of circumstances gives rise to the conclusion that in the ordinary presumption prevails that a man intends the natural consequences of his acts.

85. In the instant case, and from the evidence of PW2, that he saw three young men surrounding the deceased and one appearing to be raping her before he shone his torch light on them and they escaped, the natural inference is that the offender with others strangled the deceased after the deceased resisted being raped as she was found with her pants substantially removed and lying on her back facing up.

86. However, there was no evidence that the deceased and the accused were known to one another. The deceased's sister denied knowing the accused.

87. From the way the deceased body was found, with pants and trouser removed in one leg, and lying on her back half naked, her attackers intended to rape her but were interrupted by PW2. There is no evidence that there was malice aforethought. Malice aforethought must be proved beyond reasonable doubt. The evidence on record fell short of proving malice aforethought. I find that the prosecution has failed to

prove malice aforethought and therefore the offence of murder was not proved beyond reasonable doubt. I discharge the accused person from the Information of Murder. However, there is overwhelming evidence that the accused unlawfully killed the deceased. That being the case, ***I invoke section 179 of the Criminal procedure Code and find the accused person CALVIN OMONDI OMOLO GUILTY of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. I convict him accordingly. Sentence to be meted after records and mitigation.***

Dated, Signed and Delivered at Siaya this 15th Day of September, 2020

R.E. ABURILI

JUDGE

Accused person and his counsel Mr Ariho present virtually by Microsoft Teams. Mr Okachi SPP present. CA: Brenda