



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 63 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

MARCEL JUMANNE DALANCE.....ACCUSED

JUDGMENT

INTRODUCTION

1. Faith Vicky Owuor was a student at Jomo Kenyatta university of Science and Technology (JKUAT), one of the premier universities in Kenya. Her parents were working and living in Kisumu City and as any loving parents they secured for her accommodation in one of the many private hostels around the campus called ALPHA HOUSE at Juja Town within Kiambu County.
2. As is typical of any young lady, granted freedom for the first time, away from the watchful eyes of parents and older siblings, she hooked up with the accused, who was also a student at the campus and not only did they become lovers, he moved into her room which they shared.
3. The love affair or friendship was known to the deceased mother PW2, though she had not met him. The deceased sister **PW9 NESSIE FLAVA AWUOR OWINO** was a loving older sister had known the accused since 2013 as her sister's boyfriend. The two young lovers were in their first year of study.
4. The deceased had her best friend "a homie" from Kisumu, since High School, called MILDRED, who was her sounding board whenever she had challenges, and it is Mildred (PW3,) who would have the misfortune, of breaking the news of the untimely death, to the parents of the deceased, through their daughter, after the accused called her with information of her death, which he wanted to be passed on to her parents.

PROCEEDINGS

5. The 10th of July, 2014, a date which the parents of the deceased will not forget very soon, started as any other day for her. She was attending class while living in room 105. That night the deceased was on chat (texting), with her best friend **PW3 MILDRED AWANDO NEKESA**, who was by then a 4th year student, at the university of Nairobi, studying B-com- Finance option and the deceased in their chat, told her that she had a physical confrontation with the accused and according to her, the tables had turned on him, and they were done. She then sent to her a text message, to the effect that the accused wanted to kill her. This was at 10.00 p.m. which was the last time she communicated with the deceased.
6. At the other end of the city, between 5-6 p.m., **PW1 JAMES MUSEJA**, another student at JKUAT and a resident of Alpha House Room No. 103, met with the accused while he was going downstairs, to the meter box to recharge his electric supply through token system. He went back to his house and was peacefully asleep, until 1.00 a.m., when he was woken by cries, screams and wailing for help, only to find people at Room 105, occupied by the accused and the deceased at that time. Among the many people at the scene, he recognized the caretaker and a neighbour called Joel Kuli. They all assisted in putting out the fire using water.
7. It was PW1's evidence that when he met the accused, he was going up the stairs while, the witness was going down the stairs. He further stated that when the fire broke out, he joined about four other people, who were trying to put it off, who included the accused and that by the time the police officer arrived at the scene, the fire had been put off. It was his evidence that electricity was switched off from the main switch.
8. **PW2 PC JAPHETH KIPRUTO** testified that he received a cellphone call at 1.30 a.m. on 11/7/2014, from CPL MWANGANGI, who informed him of the fire at ALPHA House. He proceeded to the scene in the company of PC BIRECH and PC NYAMITA, where they met

PC Mwangangi Omurogongo, the caretaker, and the accused outside the house. They were taken to the Room 105, where they saw the body of the deceased, burned beyond recognition together with household items at the bed. They called the scenes of Crime Personnel who processed the scene and took photographs which were produced in court as exhibits.

9. PW11 CPL. MWANGANGI. E. stated that, upon receipt of information of the fire from the OCS, she rushed to the station, where she met the caretaker of the building, who told her that the accused had reported to him having left his girlfriend in room 105 at Alpha house. They proceeded to the scene, which was in total darkness, as the electricity had been disconnected. The accused and the caretaker then led them to the room, but the accused refused to enter into the room. The accused told him that he had left someone in the room making tea. When he entered into the room, using a spot light, he saw the deceased body on the bed, completely burned. He decided to preserve the scene, awaiting scene of crime officers, to process the same.

10. They thereafter removed the body of the deceased and went with the accused to the police station to record his statement. The accused initially told him that he could not trace the mobile phone of the deceased, but when he interviewed PW3, she told him that the mobile phone the accused had, belonged to the deceased. When he confronted the accused with the said information, he stated that the deceased mobile phone had burned in the fire, only to later confirm that it belonged to the deceased. He further testified that the accused had told him that he had left the deceased making tea, yet the electrical kettle was not on and the *meko* (6-kg gas) cylinder had not exploded.

11. From the investigation, he linked the accused to the offence, because the same had informed him that the deceased mobile phone had burned, yet he had it in his possession, the text messages between the deceased and PW3 to the extent that the accused wanted to kill her and the fact that the watchman had seen him moving up and about the house. Further the body of the deceased was also found lying flat, without making any effort to escape from the fire, making him conclude that she was dead by the time she was burned.

12. In cross examination he stated that the deceased and the accused had differences in their love affair, as there was allegedly another man called Ahmed, who had come from Dubai, but they did not investigate the possibility of his involvement in the crime. He confirmed that it was the accused who alerted the people of the fire. He ruled out suicide because if one sets herself on fire, there would be some attempted movements or struggle.

13. PW12 CORP ERICK MUGENDI, a scene of crime officer visited the scene and took photos of Room 105 where he confirmed that there was a gas cylinder which was not burned, the body of the deceased was under the bed burned beyond recognition.

14. PW4 BEN KIMAYIO RONO a safety Engineer with KPLC, visited the scene on 14/7/2014 to verify whether the fire was caused by electric fault. The room was a small cubicle, which had a bed structure, completely burned and the wardrobe partially burned. He noticed that the bulb holder was missing. The meter box at the ground-floor was intact, the extension socket outlet inside the room had been partially burned, the wall with socket breaker had smoke, the iron box was not in use and the cables shared with room 106 were not affected. He concluded that the cause of the fire was not electrical. He stated that having ruled out the cause to be electrical fault, he could not tell what caused the fire.

15. PW3 MILDRED AWANDU NEKESA, was the last person to had spoken with the deceased via sms (text messages) at ten p.m. At 12.30 a.m. she tried calling the deceased but her phone was off. At 2.30 a.m. the accused called her and informed her to inform the parents of the deceased, that she had been found dead in her room, she called the deceased sister and gave her the number the accused had called her from. She confirmed that the deceased and the accused had known each other since 2012 while in High School, but started dating in 2013. At some stage that night, the deceased had told her about her planning to leave the accused and at 9.30 p.m. told her through text message that they were fighting and the accused wanted to kill her.

16. She further confirmed that the deceased had an ex-boyfriend called Ahmed, with whom she was supposed to visit her the following day. She stated that during all the time, she was chatting with the deceased, the accused was present with her and that they were talking about Ahmed and that the accused and the deceased had a physical fight that day.

17. PW5 CLARIS AKINYI OKENO, the mother of the deceased identified her body and stated that she met the accused together with his father, who identified him as the boyfriend of the deceased. **PW6 GEORGE OWINO** was present when the body was identified for purposes of post mortem, which was conducted by **PW7 DR. EUNICE MUGWERU,** who confirmed that the body had extensive burns, involving the entire body and formed opinion that the cause of death was complications of severe burns. It was her evidence that it was difficult to tell whether there was any struggle before death, since all the soft tissue had burned, but did not affect the internal organs. She stated that the deceased must had been alive before the burns, since there were burns in the respiratory system.

18. PW8 INSP. JOHN MUTINDA NYAMAI, analyzed the mobile phone data records and communication thereon and confirmed the communication between the deceased and PW3 on the material day, to the effect that the deceased mentioned to her, that the accused wanted to kill her. **PW9 NESSIE FLAVA AWOUR OWINO,** confirmed having received a phone call on 11/7/2014 from PW3, telling her to call the accused, which she did and the accused informed her that he had gone to bring supper for the deceased and when he returned he found the house on fire, with the deceased burned beyond recognition.

19. PW13 STEPHEN NGANGA MWANGI, the caretaker of APLHA House, confirmed having seen the deceased inside the house at 5.00 p.m. and at 6.00 p.m. saw the accused along the corridor of the house. At 1.30 a.m. the accused went to his room and asked him to assist him put out fire in room 105 and when he asked him whether the deceased was in the room, he answered that she was not. At the room the door was not closed and the lights were on. When he looked inside the room, he noticed that he fire was only on the bed, where the body of the deceased was. It was his evidence that there was no problem with electricity on the material day.

20. when put on his defence, the accused testified on oath and stated that on 10th July, 2014 at 3.00 p.m., he together with the deceased reported to the caretaker, of the electrical problems, they were experiencing in their room, who called somebody to look at it. After the power issue had been looked at, they stayed in the room up to 6.00 p.m. when a friend of the deceased called Desma joined them. They thereafter left together at 7.30 p.m. with the accused going away with a friend of his called Byron, where they were joined by Malcom, for a

drink at Kwamwangi place. At 8.00 p.m. he returned to the room for his ID Card and found the deceased in the room.

21. He returned back to his friend and they were together up to 1.00 a.m., when he returned to ALPHA house, where he met the watchman and when he opened the door, he was met with a thick smoke, causing to raise an alarm as he went to the caretaker's room, as people responded to the alarm, he was asked whether there was anybody in the house, to which he responded that he did not know. He then rushed to the room and saw the body of the deceased. He proceeded with the caretaker to the police station to make a report and came back with police officers.

22. He then called a sister of the deceased who was also his friend. He confirmed the text messages between him and the deceased, where the deceased was asking him to offer an apology, for having stayed at his other girlfriend's place which he did. He stated that though they had their differences, the same was of minor nature and that the said fire was caused by electrical fault.

23. On cross examination, he stated that on the material day, they had left the house together, but the deceased went back alone. He stated that he returned to the house at 8.00 p.m. and left again and returned back at 1.00 a.m., when he was met with the smoke coming out of the room.

24. **DW2 OTIENO BYRON OKOTH** stated that he had gone to visit the accused, who was his friend at 3.00 p.m., whom he found with the deceased and one Desmark and they were together up to 5.00 p.m., when they all left the room, but parted ways with the deceased and her friend Desma, while the boys went to the club, where they were up to 10.00 p.m. when they parted ways. He confirmed that, when they were leaving the house occupied by the deceased and the accused, the caretaker had an electrician who had come to check on an alleged electric fault at the house. He confirmed having left Juja for Nairobi West before the fire.

25. **DW3 LIONEL ADENDE MUMACHIA**, confirmed having been invited by the accused to his place at 4.00 p.m., where he found him with the deceased and DW2, they were together up to 5.30 p.m., when they left for drinks, leaving the deceased and her friend back in the house. He stated that while in the house, the lights could flip and when the water heater was turned on, the light would dim. He therefore advised he accused that the house was not safe to stay at.

ANALYSIS AND DETERMINATION

26. To succeed in a case of murder, the prosecution is under both legal and evidential duty, to prove the following elements of the offence: -

- a) The fact and cause of death
- b) That the death was caused through an unlawful act of omission or commission on the part of the accused person
- c) That the said unlawful act of omission or commission was committed with malice aforethought "mens rea"

27. What constitutes malice aforethought is statutory defined under Section 206 of the Penal Code as follows: -

- a) An intention to cause death of or to do grievous harm to any person, whet her that person is the person actually killed or not.
- 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 interference whether death or grievous bodily harm is caused or not by a wish that it may not be caused.
- c) An intention to commit a felony.
- d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

28. The fact and the cause of death of the deceased was not disputed. Almost all the prosecution witnesses and the accused in his defence confirmed the death. PW1 who was a student together with the deceased and the accused and a neighbour at ALPHA house, confirmed that there was fire from Room 105 and he assisted in putting it off, after which he saw the burned body of the deceased. **PW11 CPL MWANGANGI** together with **PW12 CPL MUGENDI** proceeded to the scene where they confirmed the fact of the death upon receiving a report from **PW13 STEPHEN NGANGA MUNGAI**, the caretaker of the building. **PW5 CLARIS AKINYI OKENO** the mother and **PW6 GEORGE OWINO** identified the body of the deceased who was burned beyond recognition, through the gap between her teeth and height and confirmed her death.

29. The cause of death was proved through the evidence of **DR. EUNICE MUGWERU (PW7)** then a registered pathologist based at Kenyatta Hospital, who conducted post mortem examination on the body and confirmed that the cause of death was a complication as a result of severe burns. The most significant part of her testimony, was that, in the respiratory system had inhalational burns in the upper air ways, meaning that the deceased was alive before her death.

30. As I have said before, at the time of this judgment, the deceased who was eventually buried by her parents, was still dead and there was no information, true or false, that the same had raised from the death by performing a Lazarus act or the son of the woman of Nain, through the power of Jesus Christ, or through the power of the later day miracle working prophets and therefore find that the fact and the cause of death were proved beyond reasonable doubt.

31. On whether the said death was caused by unlawful act on the part of the accused person; - at the close of the prosecution case, there was no direct evidence of an eye witness, who saw the accused person kill the deceased. The prosecution case was therefore wholly based on circumstantial evidence.

32. The jurisprudence on circumstantial evidence in this Country is now well settled, starting with the case of **ABANGA alias ONYANGO v REPUBLIC CRA No. 32 of 1990(UR)** where the Court of Appeal set out the principles 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 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.”

33. This was followed by the Court of Appeal in the case of **SAWE v REPUBLIC [2003] KLR 364** where the court once again set up the following principles for consideration:-

“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 of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4.

5.

6.

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

34. More recently in the case of **AHAMAD ABOLFATHI MOHAMED & ANOTHER v REPUBLIC [2018] eKLR** the Court of Appeal further reinstated the principles for consideration and jurisprudence arising therefore as follows

“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.”

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 and stated that:

“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:

(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.”

35. This court has also not been left behind, and in the case of **REPUBLIC v ELIZABETH ANYANGO OJWANG [2018] eKLR** stated as follows

“...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 get 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. There is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions, see NAVANEETHA KRISHNAN V. THE STATE BY INSPECTOR OF POLICE – SUPREME COURT OF INDIA, CRIMINAL APPEAL NO. 434 OF 2013.”

From the line of authorities on circumstantial evidence, the court has to judge 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.”

36. The issue for the court’s determination therefore is whether there were adequate circumstantial evidence adduced by the prosecution, pointing irresistibly to the guilt of the accused person: - it is not disputed that the accused and the deceased were the sole occupants of room 105 at ALPHA HOUSE. The accused and the deceased were placed together in the said room on the material day by PW3, whose evidence was that the deceased texted her and informed her that she had a physical confrontation with the deceased. It was her evidence that as at 9.30 p.m. on the material night, the accused and the deceased were together, based on the context of her text message. At 10.00 p.m. she received a text message from the deceased to the effect ha the accused wanted to kill her and when she called her at 12.30 she could not go through to her.

37. This evidence was not challenged by the accused either through cross examination or his evidence in chief, the accused then called her at 2.30 a.m. requiring her to call the parents of the deceased with information on her death.

38. PW13 also put the accused at the scene as at 6.00 p.m. later on at 1.30 a.m., the accused went to his room and requested him to go and assist in helping put off the fire, from the deceased room. When he responded to the request he found the door to the said room not closed meaning that somebody had come out of it or left it open, and that the fire was only at the bed and did not spread to other parts of the room, or to the neighbouring rooms, including room 106. When PW13 asked the accused whether there was anybody in the room, he answered in the negative.

39. Both **DW2 OTIENO BYRON OKOTH** and **DW3 LIONEL ADENDE MUMACHI**, put the accused and the deceased together in their room and left together with the accused, the deceased and her friend called “Desma” before parting ways with the deceased and her friend. It was DW2’s evidence that he was with the accused up to 10 p.m. which was corroborated by DW3. As at the close of the defence case, there remained a gap as to where the accused was between 10 p.m. to 1.00 a.m. when he sought assistance from the caretaker to help in putting off the fire.

40. When **PW9 NESSIE AWOUR**, a sister of the deceased called the accused, upon receipt of the information from PW3 of the death, the accused informed her that he had gone to bring super for the deceased and that when he returned to the house, he found the room on fire, thereby putting himself at the scene between 10.00 p.m. and the time the fire broke out. At the time when the accused spoke with PW9, it was too late for supper. It was her further evidence that when she called the accused after thirty (30) minutes, the said call was answered by somebody else. The information the accused gave to the sister of the deceased provided circumstantial evidence pointing out that the accused was not truthful.

41. The other circumstantial evidence linking the accused with the offence, was his conduct before and after the incidence. When the accused sought help from PW13, his answer to the question as to whether there was anybody in the room, was in the negative. When PW3 went to Juja to record her statement, she found the accused with the deceased mobile phone, which he had informed the police was his, which information he knew as false. This evidence was presented to court through PW11, whom the accused informed that the deceased phone had burned. It was his further evidence that when he asked the deceased whether there was somebody in the house, he stated that he had left the deceased in the house making tea thereby contradicting his earlier statement. The accused account and action clearly pointed to a guilty mind, thereby linking the chain of the circumstantial evidence connecting him to the offence.

42. There is further the issue of the deceased dying declaration, according to the evidence of PW3, when the deceased texted her on the fateful night, she indicated to her that the relationship between her and the accused was over and that the accused even wanted to kill her. This account was confirmed through the sms messages extracted from their mobile phones as follows: -

“nitakupigia stori..... Tables zimeturn Marcel n me r done 4 gud.....tumepigana.....wha....vitu simekuwa moto.....ntakuambia stori....” “anataka mpka kunia”

43. It was her evidence that she understood the deceased to be saying that she had a fight with the accused

and that the relationship between them was over and for that, the accused wanted to kill her, thereby putting the said statement with the scope of Section 33(a) of the Evidence Act, as a statement made by a deceased person relating to the cause of her death which is admissible in evidence:-

“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that persons death comes into question, such statements are admissible whether the person who made them was or was not at the time when they were made under expectation of death and whatever may be the nature of the proceedings in which the cause of his death comes into question.” (emphasis added)

44. The Court of Appeal in **PHILLIP NZAKA WATU v REPUBLIC [2016] eKLR** and reliance on dying declaration under Section 33(a) of the Evidence Act, a dying declaration: -

“Under Section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence, under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements are made by him as to the cause of his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements..... while it is not the rule of law that a dying declaration must be corroborated, the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

45. The deceased and PW3 were childhood friends having grown up in the city of Kisumu. They were ‘chatting’ when the deceased voluntarily gave her the information as regards the relationship between her and the accused at that time. The accused in his defence admitted that they had a dispute over his conduct of coming late to the house, having gone to see his other girlfriend. I am therefore satisfied that the evidence of PW3 as corroborated by the extracts from their mobile phones was truthful and that the same is admissible under the doctrine of dying declaration. PW3 confirmed that the accused was her friend too and I see no reason why she would have made up the said text message. The deceased dying declaration further proved circumstantial evidence linking the accused to the death of the deceased and irresistibly point at his guilt.

46. I have looked at the accused defence in which he attempted to raise an alibi defence to the effect that he was not with the deceased at the time when the fire broke out and that he only came back and found the room on fire. However it is clear from the evidence tendered that the accused was unable to account for his whereabouts from 10.00 p.m. when he parted ways with DW2 and DW3 and that his confirmation to the sister of the deceased that he had gone to buy supper for the deceased only to return and find the room on fire confirmed that he was together with her at the time of her death and the said account was just an afterthought taking into account the fact that the information given to the sister of the deceased contradicted the accused evidence in his defence.

47. Finally, the other circumstantial evidence pointing at the accused person is the cause of fire. Whereas it was the accused account that the fire was caused by electrical fault, the evidence was contradicted by PW13 who stated that there was no electrical fault as corroborated by PW1 who confirmed that there was electricity at the building and he had to redeem his token during the day. Further **PW4 BEN KIMAYO RONI** a Safety Engineer with KPLC ruled out the possibility of the fire being caused by electrical fault.

48. It was his evidence that when he did his examination, the connection of the junction box, were without any sign of damage and that the room had shared cables with room 106 which was not affected while the main switch to the room were working and had only been switched off by the caretaker. It was his conclusion that whereas he could not establish the cause of fire, electrical fault was ruled out thereby displacing the evidence of the accused in his defence. It was further confirmed that the fire was only at the bed where the deceased body was and that the meko gas cylinder in the said house had not been affected by the fire.

49. From the evidence tendered before the court, it was only the accused who was very sure that the said fire had been caused by an electric fault, which account DW2 attempted to corroborate, but the accused account cannot stand against the evidence of PW4 who confirmed that the extension socket outlet inside the room was burned but the outlet was not burned which I understand to mean that the fire did not come from the outlet. It is also not possible for the fire to have selectively chosen the bed where the deceased body was unless the same was deliberately stated.

50. Further, PW7, the Doctor who performed post mortem examination stated that the burns were caused on the accused while she was alive and according to PW11, the accused had alleged that the deceased had been left in the room making tea while the electric kettle was not on. It was further his evidence which I believed that the deceased had been burned by the same since she was found lying flat and did not make any effort to escape. The said witness also ruled out suicide as the deceased did not attempt to struggle.

51. I am therefore satisfied that the circumstantial evidence as stated hereinabove pointed out to the accused having caused the unlawful death of the deceased having found that his defence is an afterthought merely made up and supported by DW3 as a cover up for his unlawful act. His attempt to point to one Ahmed, the deceased former lover (boyfriend), has no merit in view of the evidence by PW3 and PW11 to the effect that he was winning the heart of the deceased back and I see no reason why the same should want her dead.

52. The final issue is whether the said death was caused with malice aforethought; - there is undisputed evidence that the relationship between the accused and the deceased was not rosy on the night she met her death. The accused in his defence admitted that the deceased had demanded an apology from him for having stayed at his other girlfriend. It was his evidence that he apologized and that they reconciled,

but that account is contradicted by the evidence of PW3 as supported through the text messages between her and the deceased to the effect that the relationship was over for good and that the accused based on that fact wanted to kill her.

53. There was also the evidence of PW3 to the effect that the deceased former boyfriend one Ahmed, had come back in the picture and that the deceased was supposed to visit her together with the said Ahmed. It is therefore clear to my mind that the motive for the murder of the deceased was as a result of love gone sour or love triangle and that in an attempt to stop the deceased from hooking up with the said Ahmed, the same caused her death in an attempt to retain the relationship and/or to let nobody else (Ahmed) have the deceased as a lover and therefore find that malice aforethought was proved beyond any reasonable doubt.

54. Further, having taken into account the cause of death as per the evidence of PW7 and the circumstances thereof as per PW3 and PW11, weighted against Section 206 of the Criminal Procedure Code, it is clear to my mind and I find and hold that malice aforethought was proved.

55. I am therefore satisfied that the prosecution proved beyond any reasonable doubt that the death of the deceased was caused by the accused with malice aforethought and accordingly find the same guilty and convict him of murder contrary to Section 203 of the Penal Code and order accordingly.

Dated, Signed and Delivered at Nairobi This 11th Day of November, 2020 Through Microsoft Teams.

.....

J. WAKIAGA

JUDGE