



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: C. MEOLI, J)

CRIMINAL CASE (MURDER) NO. 32 OF 2015

(Formerly Nakuru Criminal Case (Murder) No. 65 of 2013)

REPUBLIC.....PROSECUTOR

-VERSUS-

CECILIA WARUGURU MURIITHI.....ACCUSED

J U D G M E N T

1) The Accused person was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars state that between the night of 30th June and 1st July, 2013, at **King'ori Estate, Maai Mahiu, Naivasha**, she murdered **Susan Wanjiru Kihiu**. She denied the charges.

2) The prosecution case is as follows. The deceased was aged about 22 years at the time of her death and was a student at the University of Nairobi. In the material period she was on vacation and employed at a firm owned by **Peter Chege Kabura (PW6)** who was a friend of one **Simon Kibarabara** the Accused's husband. The Accused and her husband resided at King'ori estate Maai Mahiu and were neighbours to **John Kihiu (PW1)**, the deceased father, then a widower. The two families were on friendly terms, and **PW1's** daughter had previously related well with the Accused.

3) It appears that of the five daughters of **PW1**, the deceased visited the Accused and/or related with her more closely. At the same time the deceased also related with the Accused's husband, visiting his offices and communicating with him frequently.

4) On Friday the 28th June 2013, the deceased travelled from her place of work at Nairobi to **Maai Mahiu** in the company of **PW6**. They met with **Simon Kibarabara** and proceeded to view some property and thereafter went for refreshments. The deceased and Accused remained together as **PW6** left Maai Mahiu at about 7.30pm.

5) On the next day, the 29th June, 2013 the deceased visited the Maai Mahiu office of **Simon Kibarabara** and shared a meal with among others his employee known as **Mercy Nyawira Mwangi (PW9)**. The following day, Sunday the 30th June, 2013 the deceased accompanied her sisters including **Lucy Wangare Kihiu (PW2)** and **Mary Nyambura (PW5)** to Full Gospel Church, Mai Mahiu. After church the sisters were joined by the family house servant **Susan Njeri Ndungu (PW3)** and all proceeded to a restaurant known as GMT Guest House that was co-owned by **PW1** and his relatives. The intention was to have lunch.

6) According to **PW2, PW3** and **PW5**, their lunch orders took some time. The deceased was becoming impatient and having eaten the first ready meal, left the party saying that Accused had called her to go to her home to view some boutique merchandise. Before she left, the deceased and her sisters agreed on arrangements to notify the deceased when they got back home as the deceased was due to return to Nairobi later that day. The deceased allegedly left at 4.00pm. There is evidence that the deceased communicated severally with the Accused prior to and on the afternoon of 30th June, 2013.

7) After lunch, **PW2, PW3** and **PW5** left the restaurant to return home. They arrived at about 6.00pm. As agreed earlier with the deceased they tried to contact her to confirm they were back home. Several phone calls made by them to her number went unanswered, and eventually the phone did not ring. **PW5** then rang the Accused to inquire on the whereabouts of the deceased. The Accused denied receiving the deceased at her home. The deceased never came home that night and on the next day her family purposed to make inquiries with friends. Before the sisters could go out, however, the body of deceased was found in an open field not far from the home. It bore stab wounds and burns. Police were called to the scene.

8) **SP Chelimo (PW8)** and **PC Charles Njiru (PW4)** visited the scene, took photographs and took away the body. After the body had been removed, **PW5** spotted the Accused and together they went into **PW1's** home. On further questioning by **PW5**, the Accused admitted communicating with the deceased on 30th June, 2013. The Accused then left the home and stayed away.

9) Police thereafter visited and searched the Accused's house. They also called for call data from Safaricom Limited in respect of the telephone lines used by the Accused, the deceased and **Simon Kibarabara**. The data was produced by **Daniel Khamisi (PW10)**. The call data revealed location and constant communication between the 3 people in the material period and on the fateful date. The Accused was eventually charged.

10) When placed on her defence, the Accused elected to make a sworn statement. She called four witnesses, namely, **Naomi Wambui Njiraine (DW1)**, **Margaret Nduta Njenga (DW2)**, **Lucy Wangari Mwangi (DW3)** and **William Kiriungi Nganga (DW4)**. The gist of her defence is that in 2013 she resided with her husband **Simon Kibarabara** at King'ori estate Maai Mahiu where she also ran a provision shop and MPESA business. The deceased was a friend and neighbour; that the deceased visited the Accused's home often in the company of her sisters. That on the morning of 30th June, 2013 she attended a nearby church returning home at 1.30pm. She later left to supervise some carpentry work at her shop and thereafter proceeded for lunch at **Gebuga** hotel, also close by.

11) At 3.00pm, she boarded a motor bike which took her to **PCEA Church** Maai Mahiu to attend a pre-wedding party. She arrived at 3.20pm and noted a missed call from the deceased. She did not call back but instead sent a text message promising to call the deceased later. She said that the deceased had requested her some two weeks earlier, while visiting to order for her a handmade beaded purse like one the Accused had. They spoke on phone on 28th June, 2013 and 29th June, 2013 the Accused informing the deceased that the purse had been made.

12) Thus on 30th June, 2013 while seated at **PCEA Church** she sent a text message inquiring when/how the deceased would visit her home. The deceased replied and the communication ended at 4.00pm. The Accused left for home at 5.30pm, making a purchase at the kiosk of **DW2** located next to her house. A relative, **DW3** was in the home. The Accused made supper and remained at home. At 7.00pm **DW4** visited her to supply milk and her husband came home at 7.30pm. Then **DW4** returned and left on an errand with the husband returning at 11.00pm. She identified several calls she made to **DW2** and **DW3** on that date. She learned of the presence of deceased's body at a ground close-by on early on the next day as she did her chores.

13) She went out to confirm the report and saw people converged at a scene close by. Shortly, she met with **PW3** and **PW5** and followed them to their home. When she returned to the home the following day she got alarmed because the conduct of the deceased's family towards her and left, never returning. She asserted that while she was aware that her husband knew the deceased, she did not know they had an affair.

14) She stated that she believed the two collaborated in real estate business, as her husband engaged in that business, while the deceased acted as a broker. That one transaction between the two had resulted in her husband losing some money to fraudsters who were arrested and charged. That the deceased was a key witness in the case and the fraud suspects had also been arrested in connection with the murder of the deceased before being released. She admitted that **PW5** had called her on the night of 30th June, 2013 inquiring on the whereabouts of the deceased, and further questioned her on the day the body was found. She stated that she had neither seen nor spoken to the deceased on phone on the 30th June. She denied even having disagreed with the deceased or being involved in her death.

15) **DW1** testified that she was a tenant of the Accused's husband in the material period at a premises at Maai Mahiu, and was engaged in making beaded purses, two of which she sold to Accused who had also ordered a third for her friend. She later learned that the said friend had died and the purse given to police. **DW2** testified that her kiosk at Maai Mahiu was adjacent to the Accused's home, giving her a good view of the entrance to the said home. She testified that she was at her kiosk all day on 30th June, 2013. She saw the Accused arrive between 5.00pm to 6.00pm and having bought some items entered her home. She knew the deceased as a customer and she learned of her death subsequently. She was arrested by police and detained for some time.

16) **DW3** is the niece to the Accused who allegedly was residing with the Accused and her uncle (Accused's husband) in the material period at Maai Mahiu. Her testimony was that on 30th June, 2013 the Accused left for church at 10.00am while the uncle and his child remained at home. At 3.00pm the uncle took the child out leaving her behind as the Accused did not have house keys. She had gone as far as Maai Mahiu town when the uncle ordered her to return home. She arrived at 4.00pm and stayed there until the Accused returned at 6.00pm. The uncle came home later and left with a friend. She slept at 9.00pm. She too was arrested after the death of the deceased.

17) **DW4** testified that he was a milk vendor at Maai Mahiu and the Accused was his customer. He used a motor cycle to make deliveries. His evidence was that he delivered some milk to the Accused on 30th June, 2013 at 7.30pm and on his way out, met and stopped the Accused's husband to request his help to take his wife who was due to deliver to hospital. He called the Accused's number at 8.30pm and after closing his shop drove one kilometre to the home of the Accused. He parked his motor cycle and was then driven to his home to collect his wife the trip to hospital, returning at 11.00pm. His wife delivered on the next day.

18) The defence submissions emphasise the circumstantial nature of the evidence in this case. The defence took the position that the prosecution evidence was insufficient to support a conviction. Reliance was placed on several authorities, including the decision of the Court of Appeal in **Joan Chebichii Sawe -Vs- Republic [2003] eKLR**.

19) The court has considered the entire evidence on record. There is no dispute as to the basic facts of the case. Including, the fact that the deceased's family lived close to Accused's home and related as friends; that the Accused was well known to the deceased; that the Accused's husband also related with the deceased; that the deceased worked in Nairobi but had travelled to Maai Mahiu on the weekend starting Friday the 28th to 30th Sunday. That prior to these dates especially around those days, communication was exchanged between the Accused and deceased on one hand, and the deceased and Accused's husband on the other.

20) There is no dispute that the Accused had intimated during these conversations that some ladies' item was available for collection by the deceased from her home, that the deceased last communicated by text message (SMS) at 16:15:35 before making the last active call to the Accused's husband at 16:20:24 at the location identified on the call logs **Exhibit 5** as **639-02-00007-01690**. The body of the deceased was on the next day found in an open field close to both the homes of the Accused and the deceased. The body bore severe injuries.

21) The court must determine whether the Accused, of malice aforethought caused the deceased's death. The fact of her death is not disputed, and even though the autopsy report marked **MFI 3** was not produced as exhibit, it is clear from the evidence by **PW2, PW3, PW4, PW5, PW8** as well as photographs of the deceased body at recovery (**Exhibit 1a - c**) that the deceased died a violent death. The body bore stab wounds on the head/neck region and the torso what appeared to be extensive scalding from burns or corrosive substances. The body was half naked as only some fragments of her body clothing remained on the body. Whoever inflicted these injuries had clearly intended to cause her death.

22) It is true as submitted by the defence that prosecution evidence tending to connect the Accused with the offence is primarily circumstantial, the key strands of which are:

- i) the alleged love affair between the deceased and the Accused's husband Simon Kibarabara;
- ii) the invitation through communication by the Accused to the deceased to her home allegedly to collect an item - purse or other such ;
- iii) the allegation that the deceased left her sisters on the material date 30th June 2013, to meet with the Accused for that purpose;
- iv) the communication between the Accused and deceased on the material date and their respective call locations as contained in telephone data from the service provider
- v) The location of the body of the deceased relative to the Accused's house.

23) In **Joan Chebichii Sawe -Vs- Republic** the Court of Appeal restated the principles applicable in considering circumstantial evidence. The Court observed that:-

“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 claim of circumstances relied on. 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 is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

This passage captures the principles pronounced in the timeless decisions on circumstantial evidence, namely **Republic -Vs- Kipkering Arap Koske [1949] 16 EACA 135** and **Simoni Musoke -Vs- Uganda (1958) EA 715**.

24) In **Musili Tulo -Vs- Republic [2014] eKLR** the Court of Appeal reiterated the need to closely examine circumstantial evidence before making an inference of guilt, the object being to ascertain whether such evidence satisfies the principles in the case of **Kipkering Arap Koske and in Musoke's case**.

25) In **Tulo's case**, the courts restated the principles as follows:-

- “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 no one else.”**

26) The Court went on to state that:

”In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the Accused and incapable of any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke -Vs- Republic [1958] EA 715 citing with approval Teper -Vs- Republic [1952] A.C. 480 thus:

“It is also necessary before drawing the inference of the Accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which weaken or destroy the inference.”

27) I propose to consider the evidence on record with the foregoing principles in mind. First of all, there is evidence by **PW1** and **PW5** that the deceased was suspected to be involved a love relationship with the Accused's husband. It is true, as the defence submitted, that the prosecution did not produce the anonymous text message allegedly sent to **PW1** warning him to counsel his daughter regarding the alleged relationship. Equally **PW5** spoke of rumors she had heard regarding the alleged affair. She did not witness the alleged incident of a physical attack on the deceased by the Accused.

28) Nonetheless, it is clear and even peculiar that the deceased related very closely with the husband of the Accused, as evidenced by multiple telephone calls and text messages exchanged between them. In a criminal case where the prosecution relies on circumstantial evidence, motive, though not essential in proving a crime, becomes an important element in the chain on presumptive proof. As stated in **Libambula -Vs- Republic (2003) KLR 683** :

“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 if it is not essential to prove a crime.”

29) In my considered view, motive is an important element to be borne in mind in this case. An examination of the call log in respect of the Accused’s husband [**Exhibit 7**] reveals the following:-

a. On 20th June, 2013 - 5 calls/messages with deceased between 7.30am and 7.46pm. Seven calls were exchanged with the Accused, most of them initiated by the Accused, the reverse being true of the husband’s calls exchanged with the deceased. The calls with the deceased also lasted long, the longest lasting over 800 seconds as compared to those with the Accused, which were brief. The longest with the Accused for that day being 23 seconds.

b. On 21st June 2013, between 7.34am and 7.56pm, nine calls, the longest lasting 44 seconds were exchanged between the Accused’s husband and the Accused. In contrast five calls were exchanged with the deceased, the latest at 7.44pm and earliest at 7.34am, and lasting 638 and 648 seconds respectively.

c. On 22nd June 2013, eight calls were exchanged between the Accused and her husband from 10.33am to 9.44pm, the longest lasting 112 seconds. The first call of the day between the deceased and Accused’s husband was 9.33am followed by a further ten calls, the last at 6.52pm, the longest taking 161 seconds.

30) **PW10** told the court that it is possible to identify the location of a caller through call logs, based on the communication mast that transmits his calls as the said masts have a unique codes depending on the area in which they are installed to enable phone communication by subscribers. Notably, **Exhibit 7** (call data in respect of the Accused’s husband) shows that calls made by the Accused’s husband from 20th June to 5.06pm on 22nd June, are made from within the location of Maai Mahiu area.

31) **Exhibit 7** thereafter reflects the apparent movement of the subscriber from Maai Mahiu via Escarpment, Tiekunu and Kanunga to Kiambu Exchange and eventually Barua Estate. By 6.52pm when **Simon Kibarabara** (Accused’s husband) communicated with the deceased, he was within the location of Kiambu exchange, and at 9.44pm while calling the Accused was within Barua Estate location **639-02-04068-05552**. In comparison, **Exhibit 5** (call log in respect of the deceased) shows that the deceased subscriber remained within location **639 - 02 - 00037 - 04575** Kiambu exchange between 6.26pm to 6.52pm, before moving to location **639 - 02 - 00037 - 04571** by 10:10pm. This latter location is also the location of **Kibarabara** between 6.12pm and 9.44pm on 22nd June, 2013.

32) Calls reflected in **Exhibit 5** on 23rd June, 2013 start at 10.58am at Barua Estate location 639-02-04068-05550 to 00554 at 13.07pm, at Kirigiti from 1.31pm to 1:30pm and back to Barua Estate -area code 05551. **Exhibit 7** reflects calls by **Kibarabara** early on 23rd June, 2013 started at 6.23am Kiambu Exchange at location **639-02-00037-04571** until 8:24am, moving and remaining at Barua Estate location **639-02-04068-05550 to 05554** from 11:28am to 12:30pm which corresponds with the presence of the deceased at Barua Estate locations xxxxx5550 to xxxxx05554 between 10:58 and 1:07pm.

33) On 23rd June, 2013 **Kibarabara** made 3 calls to the Accused between 7:30am and 7:34am, the latter one lasting 138 seconds. A second call at 10:00am, sms at 10:44am and 11:37, two incoming calls from the Accused at 11:54 am and 1:57pm. Apparently moving towards Escarpment, while within Maai Mahiu, the subscriber received a call lasting 98 seconds from the deceased at 7:07pm, the first call between them since the call at 6:52pm on the previous day. He also called the Accused at 7:19pm.

34) During his testimony **PW10** stated regarding **Exhibit 5, 6, and 7** that the eighth column therein reflects the area where an active call from or to members done. He stated:-

“The location info is based on actual call. MFI 5 (Exhibit 5) captures at page 1 the geographical region.....”

During cross-examination he stated:

“(Reflected) in Exhibit 5 and 6 there are several masts in (communication) in Kijabe and Maai Mahiu. Each communication mast has its own different (coverage) area and capacity. Yes if the mast of one area up to capacity the next close mast picks up the calls. Location or proximity of masts depends on population distribution.....Each mast has a location code.”

35) Based on this evidence, it appears likely that the Accused’s husband and the deceased were together within Kiambu area from evening of 22nd June, 2013 to the early afternoon of 23rd June, 2013. That appears to be the reason for the fact that unlike earlier days, only two calls were exchanged by the Accused’s husband and deceased in the two days.

36) This deduction appears more plausible, given the fact that on subsequent dates i.e. 24th, 25th, 26th and 27th June, 2013 the pattern of calls between the deceased and the Accused's husband has the same frequency, as on the dates prior to 22nd June. According to **PW6**, the deceased was in the company of the Accused's husband and himself on 28th. **PW6** testified that he had accompanied the said couple to view some property at Maai Mahiu. He joined them as they settled down for refreshments and parted with them at 7.30pm. That he had left them together. This evidence appears to be supported by the call records **Exhibit 5** and **7**.

37) The call data shows that the 29th June, 2013 was also an active day for the deceased and Accused's husband. **Exhibit 7** reflects 19 calls exchanged between the deceased and Accused's husband, starting at 8:54am (longest 1296 seconds) and throughout the day until 8:24pm (latter lasting 96 seconds). This is the day when according to **PW9** the deceased visited the offices of the Accused's husband and had lunch with **PW9** and others. In contrast, only two calls were made between the Accused and her husband on that date, the longest lasting 20 seconds. The deceased was allegedly working in real estate brokerage before joining the University and during vacation worked with **PW6**. She may well have had business dealings with the Accused's husband as he was himself in real estate business, and indeed the deceased visited the office of the Accused often, ostensibly to see **PW9**.

38) However, the picture emerging from the call logs **Exhibit 5** and **7**, together with the evidence by **PW6** and **PW9** is that there was more to the relationship between the deceased and the Accused's husband than mere business. Calls and SMS exchanged frequently in this period between the deceased and **Kibarabara** began from very early morning to the night. On Sunday 30th June 2013, the deceased's call to Kibarabara was at 9.00am having been his last caller at 8.30pm on 29th June, 2013.

39) I have already alluded to the call logs of 22nd and 23rd June which place the two in the same location in Kiambu from the evening of 22nd to early afternoon of 23rd June, 2013. It surely cannot be that the deceased and Accused carried on real estate business by day and night. Business associate or not, the Accused's husband was a married man; what business was so pressing that he allowed long and intermittent phone communication with a single young lady at odd hours in the morning, night and all day, while communicating by phone rather briefly, if at all, with his wife? And although the deceased's sisters confirm that the Accused and the deceased had a friendship, it is interesting that the call logs of the two [**Exhibit 5 and 6**] between 20th and 30th June, 2013 record 3 SMS and one call on 25th June, 2013; one call on 28th June, 2 calls and an SMS on 29th June, and on 30th June, 4 SMS exchanged between 3.25pm and 4.15pm.

40) The Accused, her husband and deceased were primarily based in the small town of Maai Mahiu. Indeed according to **PW5** there were rumours in the town that the deceased had an affair going with the Accused's husband. Is it believable that the Accused did not know of the affair whether by rumour or through the constant telephonic exchanges between her husband and the deceased? I think it would be most unlikely, that she was ignorant of the matter. The Accused struck me as a relatively sophisticated and up to date lady in her late 30's or early 40's. In the material period, she was not living a closeted life as a housewife but operated a shop and MPESA business in Maai Mahiu town. Her denials are both unconvincing.

41) This court fully associates itself with the sentiments made recently by **Lesiit J**, in **R v EKK (2018)** while considering the weight to be attached to circumstantial evidence stated, and this court is as follows:

“Evidence of the surrounding circumstances to a crime is said to be the best evidence. Locally courts have taken cognizance of this fact in various decisions. In Neema Mwandoro Ndurya v. R [2008] eKLR, the Court of Appeal cited with approval the case of R v. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20 thus:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.”

42) On the remaining strands of evidence, it is undisputed that prior to the 30th of June, 2013 the Accused had communicated with the deceased, inviting her, according to prosecution witnesses to view some boutique items, and according to the Accused, specifically to collect a purse that she had asked the Accused to obtain for her. It is unfortunate and irresponsible that the police never endeavoured to obtain the text messages exchange between the Accused and the deceased, but the Accused admits pursuing the deceased to arrange to collect the alleged purse from her home. As noted earlier, this communication, albeit without content, is recorded on the **Exhibit 5** and **6** between 25th June 2013 and 30th June, 2013. **PW4** and **PW8** confirm that they were shown and collected a beaded purse, said to be the object of the communication, from the house of the Accused. The purse was not produced in evidence.

43) According to **PW2** the deceased told her on 30th June, 2013 during lunch that the Accused had called her to her house, supposedly view some handbags or bracelets. In cross-examination, she stated:-

“When the deceased came on previous Friday (28th June, 2013) she told me the Accused had insisted she goes to see some goods e.g. beauty products which she had at her home. She said these were particularly boutique goods and cosmetics. I did not hear her mention of a purse. Yes the deceased was impatient (about delayed lunch) and spent time talking and texting. She left us about 3.00pm.”

44) Referring to the earlier alleged tiff between the Accused and deceased **PW2** stated:-

“.....[R]umors were that deceased had affair with husband of Accused.....was like 3 to 4 months prior to death. When I questioned deceased she did not want to discuss. The Accused had a shop but wanted (deceased) to go to house. It seemed they had reconciled after the tension.”

45) **PW3** also stated that the deceased was in a hurry to go see some goods at the house of Accused, leaving about 4.00pm. Under cross-

examination **PW3** said that the deceased said the Accused had **“brought in some items which she would go to see.”** **PW3** however said she did not know of any tension over an alleged relationship between the deceased and Accused’s husband.

46) **PW5** is the eldest sibling in the family of the deceased. **PW5** stated:

“... after her lunch Deceased declared she was going to see “Mama Shiro” - Accused. That was 4.00pm. Deceased said Accused had called her earlier to see some very smart boutique items. I did not know she was in that trade as she (Accused) kept a shop. Deceased said that she (Accused) said she had boutique items.”

47) The veracity of this witness’ testimony is validated by independent evidence in the form of the call log **Exhibit 5** and **6**. The fact that this witness using her line **0725 411 136** called the Accused at 20:24:33 on 30th June 2013 is reflected in **Exhibit 6**. And there is a reflection of her number on **Exhibit 5** at 9:37:53 to the deceased’s number, which call is shown as forwarded, with other calls to a generic number **722 199 199**. **PW5** had no reason to call the Accused late at night on 30th June 2013 if she had had no idea about the planned visit by the deceased to the Accused’s house.

48) This witness was much older than the deceased and did not have any special relationship with the Accused. She said that after several calls she placed to the deceased failed and finally the phone going off she took the next step:

“I decided to call the Accused. I rang Mama Shiro. (Accused). I asked her whether she had seen the deceased. She said she had not.....when I said she had gone there (Accused’s name) she said no and suggested she may have bounced.”

49) After the finding of the body at the open field, **PW5** said she returned home at 10.00am. She said:

“I went home. Other members of the public followed us home. Then I saw the Accused speaking with some women. I called her, and she came in and sat next to me. When I questioned her, she said that when she got the call from deceased she told her she would call her 15 minutes later because she was in a noisy place. She said she had not called her back she showed me her phone.....excused herself to go care for her baby.”

50) **PW5** denied under cross-examination that the Accused told her that the deceased had ordered a **beaded purse** and was to collect it from the Accused. Whatever item it is that the deceased was supposed to collect from Accused, it is clear that the deceased left the company of her sisters between 3.00pm and 4.00pm intending to go to the house of the Accused, upon invitation by the Accused. Clearly, the Accused neither dealt in boutique goods nor beaded purses and it is mysterious that if indeed there was a beaded purse, she would take it upon herself to pursue the deceased when the alleged maker/owner of the purse was **DW1** who lived next door to her and therefore, the deceased’s family.

51) It is also curious that having communicated on 28th, 29th and 30th with the deceased, the Accused seemingly lost interest in the matter after the last communication with the deceased on 30th June at 4:15:38. Even after **PW5** had called her in the night inquiring on the whereabouts of the deceased, the Accused did not attempt to reach the deceased by phone. And this, after dismissively answering **PW5**’s inquiry by stating that **the** deceased had likely ‘bounced’ at her house. Notably, she did not directly tell **PW5** that she was away from home on the material afternoon, and the defence did not so suggest to **PW5** during.

52) From the Accused’s call log **Exhibit 6** between the first SMS on 30th June, 2013 sent to the deceased at 15:25:04 and the last at 16:15:38 the Accused was primarily at location **639-02-00007 - 01694 Mai Mahiu** and the next call at 17:37:45 at location **639-02-00007-33491 Mukeu**, moving to Kijabe area until 19:16:05 when the subscriber apparently returned to Mai Mahiu region. Using the call data **Exhibit 6** and **7**, it is possible to approximate, based earliest morning and latest night calls, by the Accused and **Simon Kibarabara** in the material period, that the default communication mast covering the couple’s home was Mai Mahiu location **639-02-00007-01694** and on occasion Mai Mahiu location **639-02-00007-01690**.

53) This is what **PW10** asserted regarding calls/text messages to and from the Accused and deceased’s lines, based on the masts covering the relevant area. Regarding **Exhibit 5**, he stated that he traced the deceased’s communication from 14:08:29 to 16:20:24. He observed that the final outgoing call/text by the deceased was at Maai Mahiu xxxxxx01690 at 16:20:24 and that:

“This is the last active call for the account. Comparing these details with (call data) report Exhibit 6 I noted similarities on time as follows:

1) 15:25:04 - Maai Mahiu

2) 17:39:05 - Kijabe

The last communication on MFI 5 Maai Mahiu links with outgoing SMS by MFI 6 at 15:48:30. Code is the same and the same code/location at 19:16:05. Concerning the MFI 7 (subscriber) on 30th June was at Maai Mahiu at 15:23:57 hours. The account communicated with MFI 5 at 16:20:23 hoursMFI 7 was at Naivasha/Lakeview hub.....There is a corresponding movement between MFI 5 and 6. Point of activation is similar on both accounts.”

54) During cross-examination **PW10** stated that:-

“(Based on) Exhibit 5 and 6 there are several masts (communication) in Kijabe and Maai Mahiu. Relevant calls are made

within the same vicinity and timings. I have here Exhibit 5 at 15:25pm a call is made (Maai Mahiu mast01690) and at 15:26 Kijabe mast (639-02-00007-05575) records another call. This means that calls made quite close to both masts. Each communication mast has its own different area of coverage and capacity. Yes if a mast of one area up to capacity, next close mast picks up the calls.....proximity of masts depends on population distribution. [Referred to Exhibit 5 and 6]. Yes the calls on 30th June, 2013 show that some calls in Kijabe. Not necessary person to be in Kijabe but likely close to Kijabe mast.”

55) This evidence by **PW10**, particularly linking the last communication by the deceased within Maai Mahiu mast code **xxxxx01690** with location of transmission of the SMS by the Accused at 15:48:30 and at 19:16:05 and also communication at 16:20:24 strongly suggests that the deceased did proceed to the appointment with the Accused at her home as the deceased had informed her sister before leaving GMT Guest house.

56) This position is further strengthened by the evidence of the investigating officer CPL Muriuki (**PW11**) who during cross-examination stated that he had questioned the Accused after the murder, that she had confirmed inviting the deceased to her house to collect a purse. Further questioned on the matter **PW11** stated:

“Yes Accused did record a statement in that regard. She mentioned merchandise to be a beaded purse. Yes Accused gave an account of her movements - including visit to chama. Yes, she said she left home before the arrival of the deceased even after making arrangements. I do not recall her saying she went to meeting at PCEA Church.”

The witness also said he had never heard of **DW1** (or Mama Wangechi) the alleged maker of the beaded purse.

57) Looking at **Exhibit 5** and **6** there is a convergence of location between the deceased’s last text to the Accused at 16:15:38 and her last call at 16:20:24 at location **xxxxx01690** which is in the vicinity of the Accused’s house. An hour later the Accused’s call is located at a totally different area - **3349 Mukeu**, then moving toward Kijabe and only returning towards location **01690** Maai Mahiu at 19:16 pm. The question is what happened after 16:20pm and resulting in the deceased’s body being found early the next day, only a short distance from the Accused’s and her own home?

58) It is evident that the Accused was keen to have the deceased go to her home on the material date, and from her testimony, having invited the deceased to her house she left home after church and thereafter went to a pre-wedding party returning at night, and all the while never trying to find out if the deceased had actually gone to her house. When subsequently contacted by the deceased’s worried sister, **PW5** her glib response was that deceased must have bounced. Again, she took no step to call the deceased at that time. Further her defence through the kiosk woman (**DW2**) and her house help is itself fraught with doubt in light of the respective call logs **Exhibit 5** and **6**, showing her locations at critical moments.

59) Indeed, the Accused had admitted being home after church before going out. **DW2** and **DW3** apparently never saw her as there is no mention of it in their testimonies. **DW 2**, like **DW3** and **DW4** only testified about events after the Accused returned to her home at night or at dusk. None of them were with the Accused in the material hours of the afternoon of 30th June. Significantly, neither the guests nor the hosts of the alleged pre-wedding party at the PCEA church which the Accused claimed to have been attending at 4pm were called to testify.

60) The unexplained failure by the police to secure and produce the text messages exchanged by the Accused and the deceased in the material period and especially on 30th June, 2013 is unfortunate. Such texts could have shown light on the content of the discussion between the two women, but in the circumstances of this case, the failure does not destroy the prosecution case considering evidence by **PW 10** and the deceased’s sisters, especially **PW5**. Indeed, the reason for the said communication and fixing of appointment with deceased is admitted by the Accused.

61) The second related omission is that, having recovered the body on 1st July, 2013 the police did not collect forensic samples immediately. According to **PW11** swabbing of the home was done ten days later. The prosecution witnesses all seemed to agree that the deceased could not have been murdered at the scene of recovery as there was no evidence of a struggle or disturbance of the surrounding vegetation. Looking at the photographs of the scene and the deceased injuries, I tend to agree with that conclusion. The deceased was obviously murdered elsewhere, and most probably close by the scene and subsequently dumped at the scene.

62) This court could not resist the strong suspicion, based on his obviously false story of a wife in labor, that **DW4** was at best a false witness and at worst, had much to hide. He clearly lied to the court in asserting that Kibarabara’s phone had a problem. Hence, instead of placing the alleged **sos** call for help for his own wife to Kibarabara, he had called the Accused. Call records of the said Kibarabara (**Exhibit7**) show otherwise: the phone and line were in use on that night.

63) The strained and contrived justification by **DW4** regarding his presence at the Accused’s home on the material night is incapable of belief. He was not with the Accused at the appointed time of meeting with the deceased. As for **DW1**, her evidence was neither here nor there. The fact that she made a purse in respect of an order by an unknown person, or even the existence of the purse or other goods only confirms that such goods were the reason for the appointment procured by the Accused with the deceased. That said, is the absence of positive forensic evidence from the home of the Accused a fatal blow to the prosecution case? I think not.

64) While nobody saw the deceased enter the Accused’s house or meet with her, based on evidence by her sisters, by **PW10** on the corresponding Accused’s and deceased’s locations at the material time, the Accused’s own conduct, and the location of the corpse, it appears likely that the deceased may not necessarily have been murdered inside the Accused’s house. Rather, that having been evidently lured towards that direction, was possibly intercepted soon after her last phone call at about 4.20pm while in the vicinity of the Accused’s house at location **xxxxx01690** and subsequently murdered at a place close to the said scene of recovery. Who else other than her own sisters, Kibarabara whom the deceased contacted in her final call and the Accused knew that the deceased was proceeding in the direction of the Accused’s house at that critical time?

65) Further, the defence suggestion that the Accused persons involved in the fraud case wherein Kibarabara lost money may have killed the deceased because she was a key witness appears farfetched. There can be no coincidence that the deceased met these persons on her way to the Accused's home, or that she had a separate appointment with them but told her sisters she was heading out to the Accused's house. The timing of the afternoon communication between the Accused and deceased, and the admitted appointment between the two does not admit a random attack on the deceased by the said fraudsters. At any rate, **PW6** and Kibarabara had both transacted with the said fraudsters and knew them. How did the fraudsters stand to benefit from deceased's death?

66) The court earlier analysed the evidence showing the existence of an affair between the deceased and the Accused's husband. It is not believable that the deceased knew nothing about it and her denial is as false as the rest of her defence. It is equally unlikely that the Accused did not know or at least suspect that the deceased had spent the evening and night of 22nd June and much of 23rd June with her husband in Kiambu. The call logs (**EXH 5 and 6**) record that the only phone communication in that period between the Accused and the deceased started after this "outing."

67) That is, on 25th, 28th and 29th June and continued to 30th June. The Accused was admittedly seeking to get the deceased come to her home, allegedly to see some goods and having so persuaded her by 300pm on 30th June per **PW5**. Inexplicably, the Accused claims to have proceeded to a pre-wedding party and seemingly thereafter lost all interest in the matter. The call data shows a convergence of locations of the Accused and deceased at about 4:18 pm --**xxx01690** --and a call at **420pm**, after which the deceased makes no further contact on her phone. An hour later, the Accused is located within **Mukeu** and **Kijabe** area where she remained until close to 7pm. The Accused's defence is patently false.

68) **Lesiit J** in her decision in **R v. Nicholas Ngugi Bangwa (2015) eKLR** relied on the Court of Appeal case of **ERNEST ABANGA ALIAS ONYANGO VS REPUBLIC CA NO. 32 OF 1990**, where the Court had observed that:

"In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect".

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available".

69) And so it is in this case; the Accused has uttered evidently false denials even of the obvious, and persisted with explanations that are clearly incredible, as to the events of the material dates. This court is satisfied upon a thorough review of all the evidence that the Accused had every motive and created the opportunity to cause harm to the deceased by luring the deceased to her death, and that, her denials and obviously false explanations are of substantive inculpatory effect in the circumstances of this case. It may well be that the Accused was not alone in the execution of the murder scheme, but she was without doubt the prime mover of the entire transaction. Not only was the deceased stabbed severally in the neck, but also her body was scalded by either a hot or corrosive substance. The Accused's clear intention being to eliminate the young university student who had evidently emerged a clear rival for her husband's attention. I do find the Accused guilty and will convict her as charged.

Dated and signed at Kiambu, this 27th day of February, 2019.

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this 1st day of **April, 2019.**

R. MWONGO

JUDGE

In the presence of:-

Mr. Koima for the State

Mr. Gichuki for the Accused

Accused - Cecilia Waruguru Muriithi -present

Court Assistant -Quinter Ogutu