



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL CASE NO. 46 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**AMINA SHIRAZ YAKUB.....ACCUSED**

**RULING**

1. The accused AMINA SHIRAZ YAKUB is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 of the Laws of Kenya

The particulars of the offence are that;

**“ On the night of 26<sup>th</sup> day of July, 2015 at Amani Villa, Watamu Township within Kilifi County, the accused jointly with another not before court murdered JIMMY PALURAM JAGATRAM BABURAM( The deceased)”.**

2. The accused person was arraigned in court on 11<sup>th</sup> October, 2010, where the prosecution applied and the court ordered for her to be taken for mental assessment and deferred plea taking. It is also worth noting that the accused person already had counsel to represent her. On 13<sup>th</sup> October, 2016, the accused was informed of the charge against her and all the information thereof read to her and she pleaded “NOT GUILTY” to the offence of murder.

3. The trial commenced on 19<sup>th</sup> April, 2017, with the prosecution being led by Mr. Monda, and the defence by Mr Ahmed Nassir and Mr. Magolo while the family of the deceased was represented by Mr. Maru. The prosecution called a total of eighteen (18) witnesses and closed their case on 8<sup>th</sup> March, 2019. At the close of the prosecution case, the issue for determination then becomes whether the prosecution has established a prima facie case to warrant the accused person being placed on defence.

4. The parties were granted leave to file written submissions in support of their different stands on the said issues. The defence filed their written submissions and a bundle of authorities on 26<sup>th</sup> June, 2019 and supplementary affidavit on 30<sup>th</sup> July, 2019 respectively. The defendants on the other hand filed their written submissions on 12<sup>th</sup> July, 2019. And on 9<sup>th</sup> October, 2019, the parties highlighted the said submissions to court.

5. Briefly, the prosecution’s evidence is that the deceased, JIMMY PALURAM JAGATRAM and the accused AMINA SHIRAZ YAKUB were husband and wife having solemnized their marriage on or about 2012. It was said that the accused person had a child by the name L from her previous marriage and then had two children namely, J and M with the deceased.

6. The family lived in Spring Valley in Westlands, Nairobi. The deceased was a business man prior to his death and so was the accused person in her own right. Further, it was the prosecution’s evidence that between 21<sup>st</sup> and 27<sup>th</sup> July, 2015, the deceased and the accused person arranged to spend a family holiday at Medina Palms Resort in Watamu and so they travelled there with their three children and two maids, hereinafter referred to as (Pw2) and another by the name Penina. They booked themselves at the Amani Villa of the said Resort.

7. That in the course of the holiday, the family arranged for a barbeque dinner at the poolside of the said villa on the 25<sup>th</sup> July, 2015. They were allocated a chef by the name Melvin and a waiter by the name Leonard while one Ashraf Hassan ( hereinafter referred to as Pw5) was the overall supervisor. That in the course of the evening, the family was joined by an American by the name Jacob ( herein alleged to have been accused person’s accomplice). After the children and the maids had had their there dinner, the deceased, the accused and the said Jacob are said to have been left drinking a certain champagne by the name Lanson black label which they drank until it ran out of stock at the hotel by 1.00am. The hotel waiters, Pw5 and Pw who had been waiting on them reported off duty at about the same time and by morning, the deceased was no more as he had died.

8. The deceased’s body was flown back to Nairobi where a post mortem examination was conducted by DR NDEGWA P. M, a

pathologist who formed an opinion that the cause of deceased's death was drowning due to brain oedema and that a chronic kidney disease was significant. He produced the post mortem report he filled in regard to this as Exhibit P2. The deceased was buried.

9. It was the prosecution's evidence that investigations were conducted into the cause of the deceased death and the accused person subsequently arrested and charged with the offence of murder contrary to Section 203 of the Penal code.

10. Under Section 203 of the penal code, the offence of murder is defined as follows:

**“ Any person who of malice aforethought caused death of another person by an unlawful act or omission is guilty of murder”.**

From the definition, the following ingredients require to be established, and subsequently proved by the prosecution arise ;

- (a) the death of the deceased, and cause of it;
- (b) the deceased's death was caused by an unlawful act and or omission by the accused;
- (c) that in causing the deceased's death, the accused person had malice aforethought.

11. At the close of the prosecution's case, and with regard to the ingredients that constitute the offence of murder, this court is required to determine whether, from the evidence that has been adduced, a prima facie case has been made out, sufficient enough, to warrant the accused being placed on her defence.

12. This court finds no better starting point than looking at the applicable statute as well as case law on what constitutes a prima facie case. What constitutes a prima facie case has not satisfactorily been defined in our statute (written) Laws. Section 306 of the Criminal Procedure Code, is the point of departure and it states as follows:

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

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

(3)If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence.”

13. From these provisions, it is clear that the phrase “prima facie” is neither mentioned nor defined.

14. However, the test as to whether the prosecution has established a prima facie case was prescribed by the court of Appeal in the case of **RRAMANLAL TRAMBAKLAL BHATT VRS REPUBLIC ( 1957) E .A 332**, which has been cited with approval in the case of **REPUBLIC VRS KELVIN OGOLLA ANYANGO (2019) e KLR** as follows:

**“It may not be easy to define what is meant by a “prima facie case,” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could not convict if no explanation is offered by the defence”.**

15. In a persuasive authority decided by a Malaysian court, the case of **PR VRS DATOSERI ANWAR BIN IBRAHIM NO. 3 OF 1999 2 CLJ 215** at page 275, Augustine Paul J made the following observations;

**“ A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence, must be such that, if rebutted it is sufficient to induce the court to believe in the existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence”.**

16. In the above cited case, the Federal Court of Malaysia also delved into discussion on what a prima facie case is and set out guidelines for the trial court at the close of the prosecution's case as follows;

**“(i) The close of the prosecution case, subject the evidence led by the prosecution in its totality to a maximum evaluate,**

carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from the evidence if the evidence admits of two or more inferences, then draw the inferences that is most favourable to the accused.

(ii) Ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I /prepared to convict him on the evidence now before me? If the answer to that question is YES, a prima facie case has been made out and the defence should be called. If the answer is NO, a prima facie case has not been made out and the accused should be acquitted.

(iii) After the defence is called, and the accused elects to remain silent, then convict.

(iv) After defence is called, the accused elects to give evidence, then go through the steps set out in *May v Public prosecutor (1963)* (ML J 263). In our Kenyan situation, the trial court should proceed by calling the accused to defend himself by electing on any of the steps laid down under section 306 (2) as read with section 307 of the Criminal Procedure Code."

17. My findings on whether the prosecution has established a prima facie case against the accused to warrant her being placed on her defence in this case will be based on the above highlighted principles.

Furthermore, Section 107 (1) of the Evidence Act, Cap 80 of the Laws of Kenya provides that:

**"Whoever desires any court to give judgment as to any legal right on liability dependent on the existence of facts which he asserts must prove these facts exist".**

18. In criminal trials, the burden of proof is always on the prosecution. A trial court is therefore enjoined by law to determine whether at conclusion of the prosecution's case there exists a case discharging that burden of proof. In the instant case, the glaring question to be determined is whether the evidence that has been adduced by the prosecution's witnesses can be a basis upon which the court convicts the accused person if she opts to exercise her constitutional right as prescribed under Article 50 (2) (1) of the Constitution, that :

**("2) Every accused person has the right to a fair trial, which includes the right;-**

**(i) to remain silent, and not to testify during the proceedings"**

19. On the issue of fact of death of the deceased and the cause of his death, it was the evidence of Pw1, BRIGADIER DAVID BABURAM and YODIT BABURAM, parents of the deceased together with their son OBRIEN BABURAM (Pw4) that on 26.7.2015 at about 6.30 pm they received information that the deceased had died. They flew to Malindi on the same day where they found the deceased's body wrapped in a white sheet at the Airport. They flew the body to Nairobi where it was taken to the mortuary. On 27.7.2015, post mortem examination was performed on the body of the deceased and it was cremated on 29.7.2015. Pw4 learnt of his son's death from the waiters at the hotel where they were staying.

20. Pw5, Pw6 Pw7 went to the scene at Amani Villa where the deceased was lying unconscious. Pw5 even tried to resuscitate him by mouth to mouth CPR as a 1<sup>st</sup> aider then called for the CPR machine. They also arranged to call for paramedics who also tried to resuscitate the deceased but in vain. They then took him to Watamu Hospital where Pw15 indicated that he examined the deceased and saw he had no signs of life. Pw18, DR NDEGWA conducted the post mortem examination on the body of the deceased on 27<sup>th</sup> July, 2015 and from his findings he concluded that the deceased had died as a result of drowning. He submitted their evidence as Exhibit P2. From this analysis, there is sufficient proof with regard to the fact of the deceased's death and the cause of it, which has not been rebutted. 21. The next issue is with regard to the issue of whether the deceased's death was as a result of an act or omission by the accused. The deceased, it has been established died as a result of drowning. The question then becomes, did the accused person cause the deceased to drown or did she fail to prevent him from drowning?

22. The accused has been charged with murder, the allegation being that together with another (the other person being the American by the name Jacob) murdered the deceased.

The prosecution called a total of eighteen witnesses to tender evidence in support of their case. Out of the said eighteen witnesses, only one witness gave evidence that he witnessed the accused and Jacob, the American murder the deceased. It was Pw12, (E.W.N), who testified as a protected witness. He testified at the scene where the deceased died so he could replay to court what he saw happen.

23. According to Pw12, he was on duty as a guard at the Median Palms Hotel on the night of 25.7.2015 from 10.00pm and had been assigned the back side area by Pw7, SAID DZOMBO, the security supervisor. He said that as he was patrolling the area after taking over duties from a colleague, he found the guests at the Amani Villa had a barbeque party set for them by the pool side with drinks displayed at the veranda. He identified the people at the Barbeque party as a guest known as JIMMY, the deceased; AMINA, the accused person and another JACOB including a waiter by the name LEONARD and a manager called ASHRAF (herein referred to as Pw5). He then said that the waiter left between 1.00 and 2.00 am, leaving Pw5 with the guests, but he also left later.

24. Pw12, said that the three guests were left to continue with their party and at about 5.00am, he heard a sound of water and people which prompted him to move close to the fence separating Amani Villa and the part of the beach, and peeped. He said that he saw one guest in the water in the pool and the other two were trying to push him into the water with one holding him on the shoulders while another was holding him on the stomach. He said he stood near the pavement of the pool and saw these people had reached the end of the baby pool which is a stretch of the pool protruding close to the veranda at the main door to the Villa. That when the accused person, who was still pushing the

deceased into the water saw him, she called out to him, and sought for his assistance. He moved close to them, and saw the accused standing on the first step of the pool. The deceased was lying in water with his head facing the villa and Jacob went and sat on the chair next to the veranda. Pw12 said that he got hold of the deceased under the arms and together with the accused pulled him out of the water and laid him on the veranda at the edge of the pool.

25. Pw12 went on to state that what surprised him is that the accused went to assist the white man who was injured on the forehead by wiping it with a towel instead of the deceased. And when he asked her what was wrong with the deceased, she told him to leave him alone as he had taken so much alcohol and needed to rest. That she also told him that it was her family and he should leave her alone. She then told him that she needed spirit or dettol for the injured guest. This is when he went to collect the 1<sup>st</sup> Aid kit from the security office at the main gate and on return found Pw5 had arrived at the scene with another kit and was attending to the deceased having finished with the white man who was now sitting on a chair on the main veranda. He also said there was enough light from the security lights in the garden, beach, the fence and gate.

26. When cross examined, it will be noted that Pw12 remained silent when asked why he had remained quite and yet he had witnessed a murder happen. He then responded by saying that the accused had threatened his life and he feared. He admitted that he did not mention the same to his immediate boss, Dzombo, (Pw 7), the supervisor, Peter (Pw 6) and Pw5 and yet he had no problem with either of them. He also admitted that he did not tell the officer who recorded his statement that he saw the accused and Jacob pushing the deceased into the water and neither did he tell him about his fears and worries.

27. He further admitted that what he told this officer was that he had seen the deceased drowning and the accused was trying to assist him when she called out to him to assist her. He further said that he did not talk to the accused or any other guest after this incident. It came out that Pw12 recorded his first statement with the police on 29<sup>th</sup> October, 2015. He then made a second statement on 27<sup>th</sup> February, 2016 and lastly recorded another statement on 22<sup>nd</sup> June, 2017. He conceded that he recorded three statements with the police which were different and does not deny that in each one of them, he gave different versions of the facts of the incident. He also admitted that in each statement he made a declaration that he was telling the truth.

28. It also came out that he indicated in his last statement, that after meeting Pw5, he confirmed he was not safe but denied he was aware that Pw5 looked for him after meeting with the deceased's father. (Pw1). It is worth noting that Pw12 never mentioned to his boss at the hotel or the police that the accused threatened his life. He also never told court what influence the deceased had over him, for him to feel threatened by her. Infact, he produced no evidence of the alleged threats.

29. This being the case, this court is tasked with the duty to weigh the previous statements made by Pw12 against his oral evidence in court so as to decide whether or not it is reliable and whether the truth has been told, despite any shortcomings in his evidence. It was the prosecution's submissions that Pw12 was a direct eye witness whose account of the incident is in tandem with the post mortem report and should prove that the accused and Jacob caused the deceased's death.

30. According to the defence counsel in their submissions, Pw12's evidence is peddled with falsehood, contradictions and hence unreliable since he recorded three different statements with the police, all of which differed in terms of timings, dates and incidences. They stated that the said witness' testimony is therefore weak and cannot be relied upon by the court.

31. However, before drawing into such conclusion as indicated above, this court is mandated to find out whether there is any truth in the evidence of such witness despite the shortcomings that have been pointed out in the said evidence. And the only way to do this is to find out if the said testimony is corroborated by any other witness (es) evidence, especially those who were present at the scene when the incident happened.

32. This takes me to the analysis of the evidence of Pw5, ASHRAF HASSAN, which in this case is close to the evidence of Pw12. He testified to court that he worked at the Medina Palms Resort as a Food and Beverage manager. He also told court that the deceased, who he kept referring to as JIMMY PAL, and his family were guests at the hotel at the time and that it was not the first time for them to stay there. According to him, the family was among the VIP clients of the hotel.

33. Pw5 acknowledged that on the material day, on request of the deceased, a family barbeque party was organized at the Amani Villa pool side where they were staying. He stated that after dinner, the children and maids left for their rooms to sleep leaving the deceased and his wife, Amina (now accused herein) who then ordered for two bottles of champagne. He served them and when they finished them the deceased ordered for a third bottle of champagne. He said that when he brought it, he found that they had been joined by another man called JACOB. That he inquired who the man was and the deceased told him that he was Amina's (accused) friend, who she had invited to join them.

34. It was his evidence that the deceased also invited him (Pw5) to join them in the party but he declined. The deceased also invited the waiter. It was further evidence of Pw5, that the deceased ordered and they consumed all the 6 bottles of champagne which were in stock at the hotel. He said the deceased insisted that Pw5 looks for alternative supply, even from an outside source. He said that efforts to get other or alternative supply of the Champagne were in vain since all the shops were closed at the time their stock ran out.

35. Pw5 went on to state that by the time he went to sleep, which was between 2 to 2.30 am, the deceased, accused and Jacob were still partying at the verandah just besides the pool at their villa. Ashraf told court that he had just slept for an hour when he was called and informed that someone had been injured at the Amani villa. He rushed there and found the deceased lying while facing up on the pavement to the main entrance whose door was wide open, with his legs hanging on the edge of the pool. He saw Jacob with a deep cut above his left eye brow with blood stains on his T- shirt. That on asking the accused who had met him when he got to the scene what had happened, she told him to proceed with the 1<sup>st</sup> aid and stop the wound on Jacob from bleeding. He attended to Jacob's wound but asked the accused person if the deceased was ok, to which she responded upon the third inquiry that he was just sleeping because he was drunk.

36. He said that Jacob too was deeply asleep as he did not react when he applied first Aid to his cut wound. That after finishing with Jacob, Pw5 said he moved to attend to the deceased, whom he called out to but, he did not respond. He tried to turn his head, or tap his cheek, but he was unresponsive. He then put his hand to his mouth and felt his pulse on the hand and legs but there was nothing. He then began to do mouth to mouth CPR and then called for the CPR machine, which he also applied. Pw5 stated that he asked the accused if the deceased had any health problem and this is when she told him that he had health problems and was not supposed to drink.

37. On cross examination by the defence counsel, Pw5 like Pw12 admitted having recorded three statements. He enumerated that he recorded the first statement at a Mosque in Hurlingum, the second one at the Jamia Mosque and the third one at Malindi police station. He also admitted that when he recorded his first statement, he deliberately left out the question that he had been asked to find out from the security guard if he had seen anything. He explained that, he was not under any pressure then but he was under pressure when he recorded the one with the police because they had kept calling him.

38. Pw5 told court that Pw12 was manning the villas while the other watchmen whose name he did not know was manning the beaches. He said that they could see each other well and also had a good view of the villa despite there being a big tree on the beach. Pw5 also admitted that he did not see what happened to Jacob and neither did he see the deceased drown. He also told court that he only saw, the deceased when he was lying on the pavement but did not see any evidence of a struggle or physical injury on the deceased's body.

39. He first denied and then admitted that he knew the accused had recorded in her statement that he had supplied cocaine to the deceased and they wanted his response. He said that this made him feel bad but denied that it affected him since he had not done this. However, it clearly came out that it is after this that he recorded his second statement with the police, where he became more elaborate.

40. Pw5 also agreed that he met the deceased's father, Pw1, before recording the 3<sup>rd</sup> statement and escorting Pw12 to record his statement with the police. He further explained that he resigned from his job at Medina resort because the hotel management were forcing him to say what he did not see. He also, like Pw12, admitted that the three statements he recorded gave different versions of the incident and they were a contradiction of each other.

41. The evidence by Pw5 and Pw12 provides for instances where a witness may be cross - examined on a statement previously made by them. Under Section 153 of the Evidence Act, provision is made for cross examination of a witness as to previous statements made by them. It provides as follows;

**“ A witness maybe cross examined as to previous statement made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being provided, but if it is intended to contradict a witness by a previous written statement, his intention must, before the writing can be proved, be called to these parts of it which are to be used for the purposes of contradicting him”.**

42. Under Section 163 of the Evidence Act, ways in which evidence of a witness can be impeached is provided for as follows;

“ (1) The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the court, by the party who calls him;-

(a) .....

(b).....

**(c) by proof of former statements, whether written or oral, in consistent with any part of his evidence which is liable to be contradicted”**

43. By their oral admission when being cross examined by counsel for the accused person, Pw5 and Pw12 admitted that they recorded three statements each, in respect of this case, in which they gave different versions of the incident that happened on 25.7.2015 with regard to the circumstances of the deceased's death. As a matter of fact the three statements recorded by Pw5 and Pw12 respectively contradicted their viva voce statements and hence rendered their evidence to be of little probative value and their credit-worthiness questionable.

44. This court, therefore finds it difficult to discern which of the statements of Pw5 or Pw12 bear the truth; are they the retracted statements to the police or their materially different testimony in court?

I am in agreement with the precedent set in the case of **RICHARD MUNENE VRS REPUBLIC ( 2018) e KLR**, where the court held that:

**“Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable and when proved, they must be resolved in favour of the accused person”.**

45. And in so agreeing, this court is also alive to the principle which holds that not every contraction or inconsistency in the evidence of the prosecution witnesses can be fatal to its case. It is only when such contradictions and inconsistencies are substantial and fundamental to the main issues in question, that they necessarily create some doubt in the mind of the trial court that an accused person may be entitled to benefit from it.

46. In the instant case, Pw5 and Pw12 were the only witnesses who could have had evidence that could positively identify and connect the

accused as the person who unlawfully caused the death of JIMMY PAL. However, from the above analysis of that evidence, the same is of little probative value as doubts have arisen over which of their statements is the true version of what happened subsequent to the death of the deceased.

46. In criminal trials, an accused person enjoys a presumption of innocence because the burden of proving the charge against him or her, is always on the prosecution and it never shifts; and to do so it must be beyond reasonable doubt. The prosecution, therefore, must present a water tight case that meets the threshold beyond reasonable doubt in order to obtain a conviction. From the foregoing, doubt has been raised in the evidence of the prosecution's witnesses especially Pw5 and 12 and the benefit of the doubt illustrated above operates to the benefit of the accused person herein.

47. This court appreciates that it also has a duty under Article 50 of the Constitution to protect the rights of the victims of crime and their kin (complainants). They too require to be accorded fair and just trial, and more so where their kin has lost a life and or has been subjected to torture, violence, inhuman and degrading treatment.

48. In the instant case, it is not like the court only considered the evidence of Pw 5 and Pw 12 to arrive at its determination on whether or not the evidence tendered by the prosecution is sufficient enough to warrant the accused person to be placed on defence. The court is alive to the holding in numerous cases in this country that a case of murder may be proved by either direct or circumstantial evidence to implicate the accused person..

49. There are other witnesses who the prosecution called to testify in support of their case against the accused person. None of these witnesses adduced evidence which points at the accused person as the person who together with another, caused the accused person to drown or caused the unlawful death of the deceased, JIMMY PAL. In fact some of them visited the scene long after the fact while others never visited the scene at all and were only involved in other investigations around the deceased's death.

50. However, their evidence, it will be noted, tends to point at the possible motive behind the accused persons' murder of the deceased who was her husband at the time of his death, and father to her children. It is the prosecution's submissions, that other than the evidence of their sole eye witness, they invoked this court to consider the accused persons' conduct before, during and after the incident, as pointing at nothing other than her guilt (see REPUBLIC VRS TUBERE s/o OCHEN ( 1945) 12 E.A.C.A 63).

51. From the evidence of some of the prosecution witnesses such as PW1, Pw2, Pw4, Pw5,Pw6 Pw8,and Pw12 the accused person was suspected to have been having a love- relationship with Jacob. According to the evidence of Pw4, Pw5, Pw6 Pw7 Pw8 Pw12 Pw16 and Pw17 an American by the name Jacob was at the resort and the joined the deceased and accused person at the barbeque party at the villa on that night. Pw5 told court that he inquired who the guest was and the deceased told him that he was Amina's friend and that she had invited him.

52. Pw3, OBRIEN BABURAM and brother to the deceased, testified that he had met Jacob at the accused person's business premises where he was assisting her and she had introduced him as a friend. Pw4, one of the maids who had accompanied the family for the holiday, told court that at one time she had seen Jacob and Amina being very flirtatious on the stair case of the family house after which they took off for a weekend, leaving her to take care of the children. She said that Amina then rewarded her with Ksh 20,000 through M-Pesa (Exhibit P7).

53. Pw1, Pw2 and Pw4 also respectively testified that the deceased and the accused had had arguments over her adulterous relationship with Jacob and one such incident happened in January,2015 when the deceased fired pistol shots at the door of the bathroom where the accused had locked herself.

54. And to confirm that the deceased had been suspicious of the illicit relation between Jacob and the accused, Pw13 gave evidence in which he enumerated and submitted as evidence text messages dated between 17<sup>th</sup> and 30<sup>th</sup> January, 2015 which he had extracted from the deceased's mobile phone ( Exhibit P15 ( c )). Of worth- noting are the messages in which they allege the deceased had warned Jacob that unless he ended the relationship, he would 'strip' the accused of everything starting with the children.

55. It is was Pw1's evidence that the deceased had called him while he was out of the country asking him to send his wife back so she could look after the children since he had asked Amina to leave the house due to irreconcilable differences.

56. It was also the evidence of Pw1, Pw2 and Pw4 that the accused had given conflicting accounts of the incident that it was difficult to tell whether the deceased had collapsed, drowned or suffered an epileptic attack. They also testified that she had concealed the fact that Jacob had been with them at the barbeque party and during the incident in which the deceased died. It was Pw1's evidence that the accused person never disclosed this to him when they talked on phone and even when he came for his son's body.

57. According to Pw13 PETER KIPLAGAT CHUMA'S testimony he was requested by CIP Ngao to extract and point call logs and text messages exchanged between six 95) phones he had taken to him on 1.12.2015 Nos.0720xxxx ; 0722xxxx ,0701xxxx; 0700xxxx; 0722xxxx and another without a sim for investigations for the period of 2011 to 2015 .As a computer and celler forensic examiner, Pw13 extracted the information required and prepared a forensic report which he signed on 11.12.20156 ( exhibit P 15).

58. Pw14, DANIEL HAMISI, a data Analyst with Safaricom, was requested by the DCI Malindi to extract telephone transactions between ten (10) telephone Nos being 0722xxxx, 0720xxxx, 0722xxxx, 0701xxxx, 0700xxxx, 0710 xxxx, 0722xxxx, 0721xxxx, 072xxx ,and 072374xxxx to assist in investigations. He was requested to extract information with regard to:

(a) M-PESA registration details of all the ten (1) accounts for the period between 1<sup>st</sup> day of June, 2015 to 1<sup>st</sup> September, 2015

(b)they be provided with MPESA statements for account No 0720xxxxx for period between 1.12-0015 to 30.9.2015

(c) M-pesa Account for 0722xxxx for the period between 1.9.2015 to 30.9.2015:

(d) M-pesa statement for 072xxxx for the period between 1.1.2015 to 31.1.2015

(e) provide call data for Account Nos. 0722xxxx, 0720xxxx, 070xxxx, 0722xxxx and 070xxxx for the period between 20.6.2015 to 1.9.2015.

He provided reports in respect of all the requests that were made as Exhibits. P19, 20, 21 (a) – (d), 22, 23.

59. According to his testimony and the exhibits he produced, it was shown that the accused person and Jacob had interacted on phone about 132 times. The evidence herein also revealed that there were no telephone calls between the deceased and Jacob.

60. Pw6, I.P ISMAEL ORUKO told court that he was instructed by the DCIO Malindi, JACOB NGAO (Pw17) on 26.10.2015 to record a statement from one Baburam ( Pw1) into the circumstances that had led to the death of his son Jimmy Baburam at Watamu because he had read mischief in the whole thing. He said that Pw1 had informed him that the accused had never disclosed to him the presence of one Jacob at the barbeque party. That he also handed over to him photographs of the accused, the said Jacob and her two children in a swimming pool in Dubai and other photograph of Amina and Jacob in America downloaded from a face book account of Jacob's brother.

61. Pw16 stated that he commenced investigations by first, proceeding to Watamu police station where the incident had been reported and confirmed that an inquiry had into the sudden death of the deceased had not been opened as is procedural. He also proceeded to Nairobi where he recorded statements from Evaline Nabwile Injaru ( Pw4 ). He required the post mortem report and met DR. NDEGWA ( Pw ) the pathologist who performed the post mortem examination on the body of the deceased. They did not find the report in the file but Dr. Ndegwa gave him the notes he used to fill the post mortem report ( Exhibit P2) and he recorded the statement of the doctor, who testified as Pw2. He also recorded statements from Amina, the accused and Jacob. He said that the DCIO wrote to Safricom (K) Ltd and the Immigration Department requesting for call data in respect of several telephone numbers and for travel history in respect of two passports (Kenyan and United States of America respectively).

62. Pw16, the travel history from the immigration department showed that the accused and Jacob had travelled from Nairobi to Dubai in the same flight on 20.8.2015 and returned on 27.8.2015 abode the same airline. That this also happened on 21.9.2015 and 12.10.2015, but on 30.10.2015, they travelled abode different airlines.

63. And after they completed their investigations, they forwarded the file to the office of the Director of Public prosecutions in Malindi for advice where they were advised vide a letter dated 23.3.2016 to place the matter before a magistrate of competent jurisdiction to conduct an inquest. They proceeded as instructed by the Assistant Director of Public Prosecution and issued summons to all the three who had recorded statements with the police and undertook to attend court.

64. Pw16 went on to state that he established by 25.4.2016, when he went to serve summons upon Pw1, that the accused and Jacob were living together at Nyari in Nairobi.

65. Further, Pw16 testified that on 22.6.2016 he was approached by Ashraf Hassan ( Pw5) and EWW ( PW12) and told that Pw12 had witnessed some unfolding incident on the night of 25.7.2015 which he had not disclosed to the police during the initial interrogations and they recorded further statements with this development. They again wrote to the Deputy Director of Public Prosecution and they were advised to withdraw the pending inquest proceeding at Malindi, Chief magistrate's Court, arrest the accused and Jacob and charge them with the offence of Murder. They only managed to arrest the accused as Jacob went to the United States of America and has never been back.

66. In summary, Pw16 said that it was recommended that the accused and Jacob be charged with the offence of murder because:

(a) the watchman was the last person to see the deceased, the accused and Jacob together;

(b) the watchman ( Pw12) also saw the accused and Jacob immersing the deceased into the water,

(c) there was an allegation that the deceased was under the influence of drugs but when they interrogated Dr. Gikonyo (Pw9) he told him that the deceased had been given a clean bill of health.

(d) the deceased and Jacob had problems over the accused whereby the deceased had accused his wife of infidelity with Jacob;

(e) Jacob had lied that he had been called to the barbeque by the deceased and yet he had been called by the accused ;

(f) the accused asked Pw5 to attend to Jacob who was bleeding while her husband, the deceased lay lifeless outside the pool, making them wonder if his life would have been saved had action been taken on him first;

(g) the initial investigations were not done until Pw1 complained;

(h) the accused tried to get the deceased's property within the first weeks of his death instead of mourning his death;

(i) that Sergeant Abdi Sheikh , the initial investigation officer did not carry out any investigations because he was sent for Ksh 45,000 by the accused person.

67. Pw16 said that all these circumstances point out the fact that the accused had the motive of wanting the deceased dead. It is worth noting that he did not visit the scene of incident in the course of his investigations.

68. Pw17, JACOB NGAO, formerly the D.C.I.O, Malindi police station gave evidence which confirmed what was in Pw16's evidence. He confirmed that he conducted part of the investigations, and recorded statements from other witnesses at the hotel and collected documents in relation to the incident at Medina Palms Resort. It is clear from the submissions of the prosecution that the aforementioned circumstances that were relied on by the investigating officers to have the accused person charged with the offence of murder are the same circumstances that the prosecution is relying on to establish that the accused and Jacob had the motive to want the deceased dead.

69. In considering the evidence that was adduced in totality, I find that when the witnesses were cross examined, by the defence, the veracity of their evidence was put to question. For instance, on being cross-examined, Pw1 was taken through a report prepared by Dr. RANCHOD (Exhibit P3) and he confirmed that;

- (a) the deceased had collapsed on several occasions and hospitalized;
- (b) the deceased had been advised not to indulge in drugs and alcohol;
- (c) he had no reason to doubt the findings of the medical report
- (d) he did not doubt the autopsy report prepared by Dr Ndegwa Pw2, the pathologist
- (e) the deceased had no external injuries on his body.

70. It is in evidence that Pw1 also agreed with the defence counsel that the deceased had been partying and taking alcohol against the doctor's advice. It is further, worth- noting that Pw1 was not at the scene of incident and or nearby. His evidence as to what happened on the fateful morning, was from third parties and speculations.

71. In cross examination Pw2, wife of pw1 told court that she was aware of the deceased's medical history of alcohol abuse from Karen hospital Pw3, on cross examination told court that the relationship between the accused and Jacob quantified as a business relationship since the accused operated a shop called "Very important pets" while Jacob was involved in the business of selling dogs food.

72. Pw4, EVERLYNE NABWIRE, who testified as a former employee of the deceased upon being cross examined about the reward of Ksh 20,000 from the accused person, it came out that she had a school fees problem which she had mentioned to the accused while asking her to assist her and that could have been the reason for sending her the said Ksh 20,000 via Mpesa. She also confirmed to court that she did not see what was happening outside the Villa after they had dinner and went inside with the children. One is then bound to ask, this family had gone for holiday with two maids and the other one was even their full time maid, how come she was never interrogated when Pw16 was conducting "the proper " investigations?"

73. The evidence of Pw5 and Pw12, who are the witnesses who introduced the evidence that brought in the turning point ( "new development" ) so that the case of inquest was withdrawn and the one for murder brought in has been dealt with in the earlier stages of this ruling and found to be really wanting in credibility.

74. Pw6, Peter Munyithiya, the security manager at Medina Palms Hotel confirmed to court that Pw12 entered what he witnessed in the OB at the hotel and talked to him but never mentioned that he saw the deceased being downed. This was also the evidence of Pw7, Said Dzombo, the security officer in charge at Medina Palms Hotel and was the second person to arrive at the scene after Pw12.

75. Pw13 CI Peter Kiplagat, the computer and Cellular Forensic Examiner extracted the call logs and text messages from phones which included the deceased, the accused and Jacob's and prepared a report (Exhibit P14) which he says does not contain all that he extracted. From his evidence in cross examination, while he stated that the messages he extracted were from 2011 to 2015, the only messages in the report appear to have been sent in 2011 and delivered in 2015. He said that he analyzed what he extracted and only reported on what was relevant to this case. The question then becomes, what was the parameter of deciding what information from the phone was relevant to this case? It is also worth noting that Pw 13 did not establish who the owners of the phones were and did not produce that initial report.

76. Pw10, the clinical officer who received the deceased at their medical facility at Watamu on the alleged date told court that he was called by one of the doctor's who had been treating the deceased and he informed him that the deceased had been on treatment from bacterial meningitis that was complicated by epilepsy.

77. Pw15, IP Oruko claimed that his investigations revealed the circumstances which confirmed the motive the accused had in causing the death of the deceased. He relied on evidence and documents he obtained, emanating from Pw1, Pw4, Pw5 and Pw12 but did not visit the scene of incident. It will be noted that the photographs he and Pw16, Jacob Ngao relied on in his investigations as part of the evidence against the accused could not be produced in evidence as clearly they could not be authenticated having been down loaded from a face book account of someone who was not called as a witness.

78. It is worth noting that most of the evidence relied on to arrive at the decision of charging the accused with the offence of the murder of the deceased is designed to point at a love triangle involving the deceased, accused and Jacob, which is believed to have formed the motive or reason for the commission of the offence. However, the same is based on suspicion and speculation which I find do not conclusively link the accused to the murder of the deceased. There is no conclusive evidence that the accused had any motive or reason to attack or kill the deceased or cause him grievous harm.

79. It is a well-established principle that suspicion alone, no matter how strong cannot form a basis for a conviction. In the case of SAWE VRS REPUBLIC 2003 e KLR 364, the court of Appeal held that;

**“ The suspicion may be strong but this is a game with clear and settled rules of engagement that the prosecution must prove the case against the accused beyond reasonable doubt. As this court made it clear in the case of MARY WANJIRU VRS REPUBLIC (Criminal Appeal No. 17 of 1988- un-reported) Suspicion however strong cannot be a basis for inferring guilty which must be proved by evidence” (my emphasis )**

80. Hence in this case, the suspicions against the accused person may be admittedly strong, but the evidence adduced by the prosecution falls woefully short of establishing her involvement in the crime against her. Given the contradictions, doubts, anomalies and shortfalls that have been noted in the evidence of the prosecution witnesses, and lack of concrete evidence identifying the accused as the perpetrator of the offence, I find that the prosecution has failed to establish a prima facie case to warrant the accused person being called upon to defend herself.

81. I therefore enter a verdict of NOT GUILTY and acquit the accused person under Section 306(1) of the Criminal Procedure Code of the charge of murder contrary to Section 203 of the Penal code.

The accused person is hereby set free unless otherwise lawfully held

**Judgment delivered, signed and dated this 4<sup>th</sup> day of November, 2019.**

**D.O.CHEPKWONY**

**JUDGE**