



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 30 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ASC.....ACCUSED

JUDGMENT

Introduction

ASC, hereinafter called “the accused”, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The information is framed as follows:

STATEMENT OF OFFENCE

Murder contrary to section 203 as read with section 204 of the Penal Code Cap. 63 Laws of Kenya.

PARTICULARS OF OFFENCE

ASC: On the night of 6th day of February 2015, at Boss and Joy Apartments along Suswa Road Parklands within Nairobi County murdered **SAK**.

The accused was arraigned in court first on 16th March 2015. The plea was however not taken until 1st March 2016. The accused pleaded not guilty. The delay in taking the plea was due to accused’s health. He was not fit to plead and was under treatment for most part of the intervening period between the time he was taken to court first and the time the plea was taken. He also did not have a legal counsel to represent him.

The prosecution case

The case for the prosecution is supported by the evidence of 19 witnesses. These are AMAK (PW1) father of SAK, the deceased. Court was told by HH (PW3) that he is the biological father of the deceased but PW1 adopted her and raised her as one of his own daughters. There is RK (PW2) older sister or cousin of the deceased; HHK (PW3) the biological father of the deceased; MMK (PW4) an uncle to the deceased; HAK (PW5) brother to the deceased; Stephen Shitandayi (PW6) the caretaker of the building where the deceased and the accused lived; AKC (PW7) father of the accused; TKB (PW8) mother of the accused; Moses Wanyoike Njuguna (PW9) manager at the building where the accused and the deceased lived in Parklands; CIP Laption Mbengi (PW10) the scenes of crime officer who took photographs at the scene; IP Mary Nderitu (PW11) an officer from Parklands Police Station who visited the scene; Ann Muthoni Kimani (PW12) an employee of Boss and Joy, owners of the building where the accused and the deceased lived; Lawrence Kinyua Muthuri (PW13) a Government Analyst; PC Rider Abduba Jattani (PW14) the officer who arrested the accused; CIP Alex Mwangera (PW15) a document examiner; Dr. Kisivuli Asenga Jackton (PW16) one of the psychiatrists who examined and treated the accused; SGT Frederick Warutere (PW17) the Investigating Officer; Dr. John Ngugi Gatere (PW18) a doctor who treated the accused and certified him fit to plead and Dr Oduor Johansen (PW19) the pathologist who examined the body of the deceased.

In brief the evidence by the prosecution witnesses show that the accused and the deceased were husband and wife. They lived in Parklands at the address given in the charge sheet as Boss and Joy Apartments along Suswa Road Nairobi. They had two sons namely 14 years and aged 6 years as at the time the hearing of this case commenced on 30th July 2018. Both bear names S. At the time the deceased died the accused and the deceased had been married for 17 years. The bigger boy was staying with his grandfather AMAK, PW1, and his family. The family of PW1 lived near the home where the accused and the deceased lived. The deceased and the accused had marital problems according to PW1. The deceased used to go to stay with her family when these problems occurred. Court was told that she used to spend the day with her family and go home later in the evening. One of her sons, the bigger boy, lived with her family. She lived with the smaller boy.

The deceased had visited her family on 6th February 2015 during the day and returned home that evening. She was expected to visit the family again on 7th February 2015 but she did not. On the morning of 7th February 2015 at 7.30am, the security guard at PW1's home informed PW1 that the accused was outside the home of PW1 and was calling S, the older son of the deceased and the accused. PW1 told the boy to go to see his father. The boy did not return. Later that morning at about 9.30am the deceased had not gone to visit her family as expected and this set in motion efforts to find out why she had not visited. PW1 sent their housegirl to go to deceased's home and find out why. The housegirl delayed in returning prompting PW1 and his daughter F to go to deceased's home to find out what was happening. They tried calling the deceased but there was no response from her phone. PW1 called TKB (PW8) mother of the accused to find out whether she knew the whereabouts of the deceased. PW8 informed him that the accused had taken the two boys to her home that morning.

Evidence further shows that PW1 and his daughter arrived at the home of the deceased and accused and knocked at the door for long without getting any response. They called the manager to open the house for them. The area chief was also informed. The manager referred to is Moses Wanyoike (PW9). He had a spare key to the deceased's house. He opened house number 18 which was the house belonging to the accused and the deceased. They entered the house and found the body of the deceased in the bedroom on a mattress on the floor. Police were informed and arrived at the scene. The body was removed from the scene and taken for post mortem at MP Shah Hospital. The body was examined by Dr. Oduor Johansen on 7th February 2015. The doctor observed that the body was in blood stained clothes and was pale an indication of loss of blood. He found the following injuries:

- (i) Stab wound on the right cheek measuring 4cm long and 1cm deep.**
- (ii) Stab wound on the right cheek ½ cm long and superficial.**
- (iii) Stab wound on the right upper arm 4cm by 4cm.**
- (iv) Stab wound on the right back 5cm by 6cm with intestines protruding through it.**
- (v) Stab wound on the intestines.**
- (vi) Stab wound on the lower back near the pelvis 4cm by 4cm.**
- (vii) Stab wound on the left arm at the elbow 1cm by 2cm.**
- (viii) Stab wound on the left chest at the 6th rib 2cm by 6cm.**
- (ix) Stab wound on the left chest at the 5th rib 2cm by 6cm.**
- (x) Stab wound on the left chest at the 2nd rib 2cm by 5cm.**
- (xi) Stab wound on the upper right thigh area 2cm by 4cm.**

The doctor did not open the body to examine internally due to religious reasons. After the examination the doctor formed the opinion that the deceased died due to excessive bleeding due to penetrating trauma. The post mortem report containing all the information of the examination was produced as Ex. 13. The doctor told the court on cross-examination that he found enough evidence to make a conclusion as to the cause of death and that had he not found sufficient evidence he would have opened the body, religious grounds notwithstanding. He also said that injuries on the arms are indicative of defence injuries.

Evidence on the circumstances leading to the arrest of the accused show that PW3, HHK who identified himself as the biological father of the deceased, is the one who led PW14 PC Rider Abduba Jattani to arrest the accused. According to PW3 he received information that the accused had been spotted at Gymkhana Club. On 1st March 2015 in company of PW14, they went to Nairobi Gymkhana Club near Forest Road Road (now Professor Wangari Mathai Road). According to PW14 the accused was found inside a plastic paper house near the fence of the Club. He was arrested and taken to Parklands Police Station where he was booked in for the murder of the deceased. After the investigations, the accused was charged with this offence and arraigned in court.

Defence case

The accused is the only witness for the defence. He gave a sworn defence. He puts the date of the incident giving rise to this case as 7th February 2015. He admits to having married the deceased and termed their marriage as a love marriage. He admitted that he lived with the deceased and their younger son aged 3 years at the time. He told the court that their marriage was a normal one with its ups and downs but they managed to resolve whatever issues arose between them. He testified that he woke up at 6.30am that morning and prepared to go to work. He said he instructed the deceased to run some errands for him- to pay some bills and for the apartment they intended to move to and left the house at 7.30am. He said that the deceased asked him to take their son to his mother's home in South C because she was not able to run the errands with the child. He said that he took his younger son with him and went to his father in law's home to pick the bigger boy. He said he took both children to South C and that he dropped the younger so and went with the older boy to buy breakfast. He said that after buying breakfast he dropped his older son with the breakfast and left to pick his foreman at Kibera Slums after which he drove to Gymkhana to wait for his client, a Mr. Shah. He said he was in the business of doing contractual work of finishing apartments. He said that his client arrived at 9.15am and they discussed about his property after which they drove to the property on 1st Avenue Parklands to evaluate the cost. He said he received a call from his mother informing him that the deceased was not picking calls. He said he was not worried about this and that he told his mother that he would get in touch with the deceased and call the mother back. He said that he received another call from his mother shortly thereafter informing him that his wife had died and the police and his in-laws were looking for him. He said that he drove to

his home where he found many people. He said he was arrested by the 3 police officers in civilian clothes on the same day at about 10.30am and taken to Parklands Police Station. He said he was threatened about killing his wife but he explained to the police that he did not kill his wife. He said he was taken to a cell and kept there for many days and that he was injected with some medicine he did not know. He said that he found himself in Mathare Mental Hospital where he regained his consciousness in 1 ½ to 2 years. He said that he was helped by a nurse at Mathare to get in touch with his family; that his parents went to see him and told him that his children were living with his parents in law. He denied killing his wife. He denied writing any note or giving handwriting samples to the police. He said he recalled that police took blood samples from him to compare with the bloodstains found on a vest in his house. He denied that he was not arrested several days after the death of his wife.

On cross examination he denied that he escaped after killing his wife maintaining that he was arrested on the same day. He said he wanted to move from the apartment and that he had informed the caretaker about it. He denied having gone into hiding or switching off his phone. He said that anyone could have placed one of his many white vests in deceased's blood. He denied knowledge of the knife as the murder weapon. He denied that he wrote a note and left it.

Submissions

In his submissions, Mr. Ochako learned counsel for the accused told the court that there is no evidence linking the accused with the death of the deceased; that all the witnesses found the deceased dead and none of them testified to witnessing the act; that the police did not produce records of the Occurrence Book (OB) to show when the accused was arrested and that the document examiner did not link the handwritten letter to the accused as the author and that no handwriting samples were taken from the accused. He submitted that the case was not properly investigated because the handwritten note and the knife were not dusted for fingerprints; that the prosecution have failed to call as a witness the son of the deceased as a witness and that the police took the opinion of the parents of the deceased that it is the accused who had killed her. It was submitted that the processing of the blood sample was done by a police officer below the rank of inspector contrary to section 122A (1) and section 122B of the Penal Code. He cited Abiud Muchiri Alex & another v. Republic Cr. Appeal No. 2 of 2014. He submitted that the evidence of the prosecution does not establish the motive for the murder. He submitted that the police relied on suspicion and cited Sawe v. Republic Criminal Appeal No 2 of 2002. Mr. Ochako further submitted that the prosecution has not proved the ingredients of murder and urged the court to acquit the accused.

On the other hand the prosecution submitted that it has proved beyond reasonable doubt all the ingredients of murder; that the accused lived with the deceased and on the morning of the murder they were the only people in their house save their young child. It was submitted that the accused was placed at the scene of the crime; that death of the deceased was not a natural death and that the injuries sustained by the accused point to the intention and planning to cause that death. It was submitted that the accused could not explain the whereabouts of the deceased and that his vest was stained with deceased's blood. It was submitted that the defence of alibi by the accused was not raised at the earliest opportunity and therefore it was raised as an afterthought. The prosecution urged that this court finds the case proved beyond reasonable doubt and convict the accused.

Analysis and determination

The offence of murder is committed when any person who of malice aforethought causes death of another person by an unlawful act or omission. The onus is always on the prosecution to prove the offence of murder. The prosecution must prove that death of a person has occurred; that the death was caused by an unlawful means either an act or an omission; the prosecution must prove the identity of the person who caused that death and that the person causing that death had intended to cause the death.

This court has received evidence from the relatives of the deceased who went to the scene. These included PW1 AMA, PW2 RK, PW3 HHK, PW4 MMK, PW5 HAK, PW8 AKC as well as from the caretaker PW6 Stephen Shitandayi and manager of the building PW9 Moses Wanyoike. This court also received evidence from the police officers who visited the scene. All these witnesses testified to seeing the body of the deceased and the state the body was in with stab wounds on most parts. The pathologist PW19 has testified to the numerous stab wounds on the body of the deceased. The cause of death has been ascertained by the pathologist. Further CIP Lipton Mbengi, PW10, took 25 photographs at the scene. The photographs have been produced in evidence. These photographs show the body in different angles. After careful analysis and consideration of all the evidence touching on the death of the deceased including the post mortem report Ex. 13 it is my conclusion that the prosecution has proved beyond reasonable doubt that death of the deceased SAK occurred and that the death was by an unlawful act, excessive bleeding due to penetrating force trauma.

Who killed the deceased? This is the next issue for determination. In answer to this question, the State says it is the accused. The accused on the other hand says it is not him. He says that it could have been anyone since there were many people at the building where they lived as the building was still under construction. He says it could even have been the caretaker Stephen Shitandayi who left the scene and relocated to his rural home after the death of the deceased. The accused said he left his wife alive and only came to learn of her death through his parents.

From the outset, it is clear to me that there is no direct evidence against the accused. There is no evidence from any of the witnesses that they witnessed the murder of the deceased. It is clear to me therefore that the evidence against the accused is based on circumstances surrounding this case. The evidence tabled by the prosecution against the accused is circumstantial. As to what amounts to circumstantial evidence was addressed by the Court of Appeal in Neema Mwandoro Ndurya v. R. [2008] eKLR when that court stated as follows:

‘It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics as was said in R. v. Taylor Weaver & Donovan (1928) 21 Cr. App. R. 20. But circumstantial evidence should be very closely examined before basing a conviction on it.

In Teper v. R. [1952] AC at p. 489 Lord Normand said:

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another..... It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

With the understanding of what circumstantial evidence is and how it should be applied this court now turns to the examination of the evidence in order to address the issue as to who killed the deceased. As I have stated above in this judgement, all the witnesses who arrived at the scene found the deceased already dead and the accused not present at the scene.

The circumstances leading to the death of the deceased are well captured in evidence. Evidence shows that on 1/2/2015 the accused went to the offices of his landlord. He met Ann Muthoni Kimani (PW12). He told Ann that he wanted to vacate his house. Ann Muthoni Kimani worked for Boss & Joy the owners of the building where the accused and the deceased lived. They lived in House No. 18 which was located on the second floor. The family had occupied the house in 2014. The accused has signed a lease to that effect. He was required to give a 30 days written notice but he chose to give a verbal one. When this happened, as Ann testified, the tenant loses his deposit of the house to the landlord. Ann informed the manager Moses Wanyoike, PW9, about the notice by the accused to vacate and the need to inspect the house. Moses in his evidence narrated to the court that on 6th February 2015, (he had confused the date as 7th February 2015 but he corrected himself in cross-examination), the accused went to see him in the office and informed Moses that he wanted to move out of the building. They agreed to have the house inspected the following day, 7th February 2015, a Saturday. On 7th February 2015 at about 7.30am the accused in the company of his younger son went to talk to Moses. He told him that he was leaving but the deceased was in the house sleeping and once she wakes up she would call Moses to inspect the house. The same morning (7th February 2015) Stephen Shitandayi (PW6) the caretaker of the building saw the accused in the company of his son whom he had picked from his in-laws. Evidence will show that this is the bigger boy. The accused told Stephen that a woman who used to wash their (accused and deceased) clothes would come that morning and that Stephen should tell the woman not to wake the deceased who was sleeping up but instead to ring the bell.

In the same morning relatives of the deceased arrived at the house of the deceased. The circumstances leading to their going there were narrated by PW1 AM. He said that the accused had gone to his (PW1) home to pick his older son and gone away with him. He said that when the deceased did go to visit the family at around 9.00am to 9.30am PW1 called her without success. He also called the accused without success. This prompted him to send a housegirl to the deceased’s home to check on her because according to him it was strange that the deceased had not gone to visit and was not picking his calls. When the house girl delayed in returning, PW1 and PW2 went to deceased’s home and discovered she had been murdered. They attempted to knock on deceased’s house without success. They called other relatives and this is the commotion mentioned by Moses in his evidence. They asked for the spare key from Moses to open the door. Moses was reluctant but one of the relatives called the chief who arrived at the scene. In the presence of the chief, Moses opened the door and the body of the deceased was found inside the bedroom.

Further evidence shows that the accused took his younger son to his parents AKC (PW7) and TKC (PW8). They lived in South C. Their evidence is that the accused arrived at their home at 7.30am on 7th February 2015 in company of his younger son. This was unusual to them as the children, especially the younger one, was always accompanied the mother, the deceased. This prompted both parents to ask the accused what had happened. He told them that the deceased would come to join the child later. The child was left playing with PW7 his grandfather. The accused went away. It seems that he went to his in-laws home and picked the bigger boy. He took him to South C too. By the time he arrived he found his father had left to work. Indeed accused’s actions were strange even to his mother. His actions that morning prompted his mother (PW8) to ask him why he was bringing children one by one and where the children’s mother was. PW8 told the court that the accused told her that the deceased would join the children at around 2.00pm.

The accused went at large after this. He was not reachable either by his parents or by his in-laws. He remained at large until 1st March 2015 when PW3 HHK received information from a friend he named as Babu that the accused had been spotted at Gymkhana Club. PW3 informed PC Rider Abduba Jattani (PW14). This officer was based at Industrial Area Police Station and was performing traffic duties. It was not explained why this officer was involved but he seems to know PW3 and both had contacts of each other. That aside, PW3 called PW14 asking for help to arrest the accused. PW14 asked him if he had reported to the regular police and PW3 said he had. They went to Gymkhana Club and with help of security at the Club they were pointed to the direction where the accused was found. He was found in a shelter made of polythene paper bags. He was arrested by PW14 and taken to Parklands Police Station. At the Station PW14 was informed that the police at the Station had been looking for the accused for a long time.

It may be recalled that the accused has denied that he was at large following the death of his wife. He said he was arrested on the same day when he returned to his house after getting information from his parents that the deceased had been killed. The law does not place any burden on the accused to prove his innocence. The burden always remains with the prosecution. The prosecution has tendered evidence of PW1 father of deceased, PW7 father of the accused and PW8 mother of the accused to the effect that the accused was not reachable on the days following the death of the deceased. None of these three relatives knew about his whereabouts. PW8 the mother of the accused told the court that the accused called her 1 ½ weeks after the death of the deceased. The accused told her to take care of his children. The mother asked him where he was but the accused just told her not to worry. It is therefore a lie for the accused to tell the court that his mother called him and informed him that the deceased was not picking up calls. It is also a lie for the accused to tell the court that his mother called him a second time to tell him that his wife was dead. There is also the evidence of PW3 HH and PW14 PC Rider the arresting officer. These two testified that the accused was arrested on 1st March 2015. This is exactly 3 weeks after the death of the deceased. I have no reason to doubt the evidence of all these witnesses that the accused was at large and was not reachable by his family until he was arrested on 1st March 2015. His evidence that he was arrested on the day the deceased was killed is a lie.

Secondly, the accused told the court that he was not present when his wife was killed and that he did not kill her. He seemed to point towards any other person especially the construction workers and specifically targeted Stephen Shitandayi (PW6) the caretaker. In his defence and also in his submissions he seemed to say that the caretaker had access to the spare key and could have opened the house and murdered the deceased. He seemed to say that this is the reason why this witness (PW6) left his employment and went to Kakamega his rural home. PW6 denied he had access to the keys and denied that he had killed the deceased. He said he was not arrested as a suspect but police took his statement. He told the court that he just decided to go home to Kakamega after that death because it traumatized him. Moses the Manager

told the court that he was the one who kept the spare keys of the apartments in his office in a safe and that PW6 did not have access to the keys when Wanyoike was not in the office. He told the court that he is the one who sent PW6 to pick the key from his (PW9) office to open the accused's house. Ann Muthoni Kimani (PW12) told the court that the caretaker (Stephen) did not have access to the keys. I have no reason to disbelieve their evidence. It cannot therefore be true that Stephen or any other person gained access to accused's house and murdered the deceased. There was no evidence of breakage into that house and the relatives could not even gain access until Moses opened the door for them in the presence of the chief.

The evidence by the accused is that he took the children to his parents upon request by the deceased to allow her time and space to run some errands for the accused. The accused told the court that he had sent his wife to pay some bills and pay for the apartment they were to move to. He said he took his two sons to his parents and left the younger boy with his parents and took the bigger boy to buy breakfast. This cannot be true. His parents, PW7 and PW8, have told the court that the accused took the younger boy first and after one hour he brought the older boy. That morning the accused was seen by Moses (PW9) with the younger boy and later the same morning he was seen by Stephen (PW6) with the older boy who, according to PW6, he had picked from his in-laws. It is because of taking the children to his parents one by one that prompted his mother to ask him where the mother of the children was. It cannot be true that the accused took his children to his parents upon request by his wife to allow her time to run the errands assigned to her by the accused.

Before making my conclusions on the issue of who killed the deceased I need to mention the issue of accused's health after his arrest. It is true that he stayed in Mathari National Teaching and Referral Hospital for a long time. On record are three medical reports on his mental status. The first report is dated 5th March 2015. It is signed by Dr Karanja Kibet. It was produced on her behalf by her colleague Dr Kisivuli (PW16). It was produced as Ex. 10. The second report is dated 12th March 2015 by Dr Kisivuli. It is Ex. 9. Both doctors found the accused suffering from reactive depression and certified him not fit to plead. It was explained by Dr Kisivuli that reactive depression is a depression caused by depressing circumstances. He stated that this condition was secondary to the death of the deceased. To my understanding this means that the reactive depression the accused was suffering from was as a result of the death of the deceased. Dr Kisivuli indicated in his report that the accused had complete amnesia when it came to the circumstances leading to his wife's death. The third report, marked Ex. 12, is by Dr Ngugi Gatere signed on his behalf by Dr Mucheru. It is dated 13th July 2016. This report is based on the examination of the accused after he had undergone treatment. He found the accused fit to plead. I have no evidence that the accused suffered from any mental instability before the death of the deceased nor did the accused raise the defence of insanity. I have understood the doctors to be saying that the death of the deceased caused the accused to suffer from reactive depression for which he was treated and certified fit to stand trial.

I have examined the issues raised in submissions by the defence counsel. He raised the issue that there is no witness who saw the accused kill the deceased. Defence counsel failed to appreciate the available circumstantial evidence on record. Another issue raised by the defence is that the evidence of the prosecution does not prove the case against the accused beyond reasonable doubt because all that the evidence does is raise suspicions which cannot be relied on to convict. He cited the case of *Joan Chebichii Sawe v Republic [2003] eKLR*. This court appreciates the legal principle that suspicion alone no matter how strong cannot be a basis of conviction. However I wish to distinguish the above case with the case under consideration. Given the evidence on record, this case cannot be said to be based on suspicion. Indeed in the *Sawe case* the Court was dealing with circumstantial evidence and it found that the evidence in that case did not irresistibly point to the appellant to the exclusion of all others within the meaning of *Kipkering arap Koske & Another 16 EACA 135*.

Mr. Ochako further raised the issue that this case was poorly investigated. He cited the extraction of the blood sample from the accused and criticized the manner in which a police officer of a lesser rank than that of an Inspector of Police extracted the samples from the accused in contravention of section 122A and 122B of the Penal Code. This is the law and any police officer involved in extracting samples for DNA should comply. However failure to comply to these provisions by the police does not in any way weaken the case for the prosecution.

The examination of the knife Ex. 2, the vest belonging to the accused, Ex. 6, both of which were stained with human blood, revealed that the blood belonged to the deceased. This was testified by PW13 Mr. Lawrence Kinyua Muthuri. DNA samples generated from the stains of blood on the two items compared with DNA samples from the blood sample of the deceased confirmed that the blood found on the knife and the vest was that of the deceased. Evidence shows that the knife was found near the kitchen sink and the vest was found on the floor in the kitchen inside accused's house. The knife was partly washed but some stains of blood still remained. The accused claimed that someone must have taken one of his many vests and dipped it in deceased's blood. I find no basis in this claim.

Finally there is the issue of the note or letter claimed to have been recovered from the house of the accused. I have considered the evidence surrounding the recovery of that note Ex. 8(a) (1) and 8 (a)(2). There is confusion in the manner this exhibit was recovered. IP Mary Nderitu (PW11) told the court that the note was handed to her by PW1. However SGT Frederick Warutere (PW17) told the court that he was present when the note was found on the table in the sitting room and that the notes had not been touched by anyone. He actually told the court in cross-examination that it would be a lie to tell the court that the note was handed over to IP Mary Nderitu. PW1 did not say anything about recovering the note and giving it to IP Mary Nderitu. The prosecution did not address these anomalies. The notes seem to be suicide notes. Despite that lapse on the part of the prosecution it is my finding that the case for the prosecution based on circumstantial evidence remains strong.

To conclude on this issue, it is my finding and I so hold that all the circumstantial evidence points to the accused as the culprit to the exclusion of anyone else. He lived with his wife and the younger son. There is no evidence of any other person who could have gained access into their house and murdered the deceased. The conduct of the accused is telling. He left a trail of his suspicious actions everywhere. He had given notice to vacate his house to Ann Muthoni and to Moses Wanyoike. He had told Moses on the morning of 7th February 2015 that he was leaving and that his wife would call Moses to inspect the house when she woke up. He told Stephen the caretaker to tell the cleaning woman not to wake his wife up because she was sleeping but instead to ring the bell. He took the children to his parents' home in South C, one child after the other and disappeared. He was not reachable either by his parents or by the deceased's family. Evidence including the defence shows that the couple had marital issues. PW1 told the court that every time the couple experienced marital issues, the deceased would leave and go to her family. With the *Kipkering case* (supra) in mind this court finds that the inculpatory facts in this case are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis than that of his guilt.

It is my considered view, and I find sufficient evidence, that the accused murdered his wife. His conduct after the act is indicative of a guilty mind. The murder was brutal given the number of times the deceased was stabbed. It is my considered view that when the accused realized

the magnitude of his actions he decided to take his children to his parents and go into hiding. I am convinced beyond reasonable doubt that the accused murdered the deceased. I find and hold that there is ample evidence to support my findings. The accused's well calculated defence did not raise any doubts in the prosecution case. This ingredient of murder, as to who killed the deceased, has been proved to the required standard that it is the accused.

The final issue for consideration is whether the prosecution has established malice aforethought. Malice aforethought is defined under section 206 of the Penal Code which states as follows:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

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

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

I have enumerated elsewhere in this judgement the injuries suffered by the accused. The deceased's left chest bore the brunt of the injuries. Also her back and abdomen including her intestines. These were fatal wounds. The deceased bled excessively. Some witnesses described the scene as resembling a butchery because of the amount of blood. It is my view that any person who uses a lethal weapon like a knife, stabs the victim in several areas including areas where vital organs are located and all over the body cannot claim to be ignorant of the fact that the stab wounds would probably cause death or grievous harm. I also want to take the view that by telling the management that he was vacating the rented premises the accused must have planned the killing. The deceased had been with her family and as evidence shows if there had been a disagreement between her and the accused that would have made her fear going back to her home, she would have stayed with her family as was the norm. She was not aware of what the accused was planning. I find malice aforethought as defined above, proved beyond reasonable doubt.

Lastly I wish to state that the motive of this murder is not known. I am alive to the fact that motive is not an ingredient of murder but it explains why an accused has acted the way he did. Could it be frustration about financial situations or could be that the accused was consuming some substances that made him act without thinking of the consequences of his actions? There is no evidence to show motive and this court will not speculate.

In conclusion, it is my finding that the prosecution has proved beyond reasonable doubt the offence of murder against the accused ASC . I reject his defence as untrue and enter conviction against him for the offence of murder. Orders shall issue accordingly.

Dated, signed and delivered this 10th day of December 2019.

S. N. Mutuku

Judge