REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 9 OF 2010

REPUBLIC...PROSECUTOR

=VERSUS=

GEOFFREY KILONZO MAKAU..ACCUSED

JUDGEMENT

1. The accused herein is charged with the offence of murder contrary to section 203 as read section 204 of the ***Penal Code***. It is alleged that the accused on the 12th day of January, 2010 at Mwanga Village, Mitaboni Location in Kathiani District within Eastern Province murdered **Winfred Mwende Kiindu** (the deceased).

2. In support of its case the prosecution called 8 witnesses.

3. On 12th January, 2010 at about 8.30 am, PW 1, **Rosalia Nthenya Kiindu,** was at a Christian community meeting near her home when she received a message on her cell phone from her son in law, **Kilonzo Geoffrey**, the accused herein, saying that he wanted the deceased, her daughter, to take to him the small bag in which the deceased had carried in clothes. Upon returning home, PW1 relayed the information to the deceased who had gone home from Nairobi to attend a birthday party of her niece. The deceased took the bag and left at about 9.00 a.m. As PW1 took tea the accused, whose home was not far away, arrived and informed PW1 that he was to take up a job with Atugas – Nairobi hence he would be traveling there on Wednesday but promised PW1 to get in touch with her on arrival at Nairobi. After passing the said information, the accused left. At 5.00 p.m. the accused rang PW1 saying that he had taken drugs and he would die. Upon being asked where the deceased was, the accused responded that he had left her outside and switched off the phone. PW1 then called her daughter, **Mutheu Kiindu**, and told her to go to the accused's mother's place to see if the deceased was there. Upon her return, the said daughter informed PW1, while crying that the deceased was not at home. PW1 then notified family members and went to the AP Camp Kenol to report what had transpired and, accompanied by three (3) Administration Police Officers, she went to the accused's place where they found a crowd. As the door to the house was opened she entered the room and found the deceased in the bedroom. Upon coming out, she noticed the accused on the ground unconscious. The body of the deceased was then collected by police officers from Machakos.

4. In cross-examination PW1 stated that she did not show anyone the message that she received. According to her, when the deceased went home she told PW1 that the accused had threatened her and threw a plate at her but she had not reported to the police. She testified that when her other daughter returned crying, she had not seen both the deceased and the accused.

5. At 5.00 pm on 12th January, 2010, PW 2, **James Muindi Paul**, was at the Komarock road junction Mitaboni – Kenol selling sand when he heard screams emanating from the house of the accused, **Geoffrey Makau**. According to him, he was with the other young men about 200 meters away from the house. Upon proceeding there, they found women who were screaming, including the accused's mother, saying that people had locked themselves inside the house having drugs and they needed assistance. Since both the door and the windows were made of metal the people used rocks to break the windows after which he entered the house through the bedroom window. He found the body of the deceased, who was his niece, on the bed with a cut wound on the neck.

6. There was blood spilt on the mattress and the bedroom wooden door was locked from the sitting room side. Using a rock, he broke the door and found the accused lying on the carpet foaming in the mouth. He then jumped over him and opened the door for members of the public. He testified that there were four (4) bottles, a letter, which was read by members of the public and a cup of porridge. After that he went back to check on his business and when he returned he found the police having arrived and the accused having been removed outside, unconscious. According to him the door to the house could be locked both from outside and inside.

7. PW3, **Erick Makau John,** was similarly at Kenol Market at 5.00pm with a friend, **Kioko**, when he heard people screaming and running. One of them told them some people had taken poison. They proceeded to the accused's father's homestead and found people gathered there. Upon checking through the window he saw the accused lying in the sitting room without a shirt but with tracksuit trousers, foaming in the mouth. According to PW3, he could sniff some pesticide. Through the window pane, he saw a lady lying on the bed. After the people broke

the window, PW2, entered the house through the window and broke open the wooden door. PW3 entered the house and saw bottles of the same substance on a coffee table with a letter and a cup with porridge. The letter was to the effect that the accused had decided to end his life and that of his wife. He also saw aa lady who had a cut wound on the neck. The accused who was unconscious had urinated and defecated on himself. Later the police officers from Machakos arrived and collected the mattress, the letter, bottles, the deceased and the accused.

8. In his cross examination, PW3 stated that his statement was silent on the said letter.

9. PW4**, Joseph Musee Mutunga,** on 12th January, 2010 received information from the members of public that his cousin's daughter called **Mwende** was killed. He then accompanied his said cousin, **Patrick Mutua**, to Machakos Police Station and later to Machakos Mortuary and identified the body of the deceased to the doctor for post-mortem examination was done.

10. **Mary Ndunge,** PW5, the mother of the accused testified that on 12th January, 2010 she found people gathered in her home saying that someone had died and that the accused had killed the deceased. She then saw the accused being removed out of the house by people while unconscious. The police then arrived and carried both the body of the deceased and that of the accused. She also visited the accused in hospital where he was admitted in a critical condition while the deceased was in the mortuary. She was later buried. According to her the accused and the deceased were married but she could not tell if the marriage had problems. However, the deceased separated from the accused for one (1) month. When she left the homestead PW5 was not aware whether or not the accused and the deceased were inside the house but last saw them on 11th January, 2010 the day the deceased returned back from their home.

11. It was her evidence that the couple used to stay in Nairobi and when the deceased went to her home she was not aware.

12. PW6**, Mary Mueni Mutua,** was on 12th January, 2010 at home at 5.00 p.m. when a girl called **Mutheu**, a sister to the deceased, informed her that the accused, PW6's brother in law, had rang their mother saying they had taken drugs. Upon proceeding to the house they found it locked from the outside. She then went to her father-in-law, **Peter Makau**, and relayed the information to him but he said he was unwell. PW6 proceeded to the accused's house on removing a window pane of the window to the bedroom and she saw a body on the bed. When she called out the deceased she got no response. She then went to the door and removed the window pane and saw the accused. She then called a neighbour, **Munguti**, whose wife, **Katoto**, went and saw what happened after which they raised an alarm by screaming. After the people gathered, they damaged the window and PW2 entered the house and she heard him say that the young man had killed the wife. PW2 the opened the door and the deceased and the accused, who was calling out in a faint voice begging for medical assistance, were removed outside. They were taken away by the police and the following day she found him in hospital but he was not talking.

13. **Stephen Matinde Joel**, PW7, an Assistant Government Chemist working with the government chemist Nairobi on the 14th day of May 2010 received from one police officer, **Moses Biwott**, PC No. 38212 from Machakos police station the following items for examination:

1) Item A- Kitchen knife

2) Item B- Whitish/Orange/Greenish skirt

3) Item C- A greenish T-shirt

4) Item D- A blood sample labelled as that of the deceased one **Winfred Mwende Kulo.**

14. The items were accompanied by an exhibit memo and he was to ascertain whether the items were stained with blood and do a comparison on the same. Upon examination of the items it was his finding that item A and item B were heavily stained with human blood of Group B while the t-shirt (item C) was lightly stained with human blood of the same group. The blood stains on item A, B, & C all matched the group B of the blood of the deceased person. Based on these findings he formed an opinion that the blood stain could have come from the deceased as a result of injury. He prepared a report on his findings bearing his signature reference No. A99/10 dated 2-2-2011 which he produced as an exhibit.

15. According to him, around 24% of people have that blood group and it is a probability that the blood stain came from the deceased though it could also have come from another person with the same blood group. According to him, blood group B is a common blood group in any given population and among African 24% would have the said blood groups. There was no other distinctive thing to indicate that the blood belonged to the deceased and no other person.

16. PW8, **Dr. John Mutunga,** produced a post-mortem report that was filled by **Dr. Obuta,** the medical superintendent of Machakos Level 5 Hospital. According to the report, the body of the deceased, **Winfred Mwende,** was identified by **Joseph Mzee** and **Patrick Mutua** who were police officers. The clothes of the deceased had dried blood at the neck, the body was well preserved, the face had dried blood, the right side of the neck had two puncture wounds and the right shoulder had one fracture wound 8 cm by 6 cm. Upon internal examination it was found the trachea was slit completely, the lungs were engorged with blood the internal and external artillery arteries were cut, the esophagus was also slit anteriorly. **Dr. Obita** found that the deceased had died from brain ischemia- lack of blood to the brain due to the lack of supply resulting from the cut blood vessel. The witness however stated that he had not worked with **Mr. Obuta** and did not know his handwriting and that his evidence emanated from the hospital.

17. When placed on his defence, the accused testified that the deceased was wife. On 12th January, 2010 he woke up in the morning and got a call from his friend, **George Otieno**, his workmate in Nairobi who told him about funeral of his mother in Gem Yala and requested him to go and stand in for him in his work on 14th October, 2010. He went to see his mother-in-law, PW1, on 12th January, 2010 and told her he could go to Nairobi anytime. Upon his return to his house he informed the deceased of the same and that he would return either Wednesday or Thursday since they had plans of starting business at Mitaboni centre. He went to check the premises on 15th January, 2010 for selling clothes and proceeded to the centre the same day at 2.00 pm with the deceased. He got a house which he was unhappy with so he told the

owner to do some renovations. They agreed on monthly rent of Kshs. 100,000/= and he deposited Kshs. 50,000/= but was to await renovation. At about 4.45 pm, he returned home and while taking porridge three people entered the house, camouflaged. They ordered him to lie down and demanded the money he had. He tried to resist but after he was struck with metal bar I gave them Kshs. 30,000/=. They then struck the deceased and demanded money from her and he told her to hand over the Kshs. 20,000/= she had. She then went with them to the bedroom while they continued to demand money from him. One of them suggested they finish me. They put a bottle in his mouth containing poison and he fell down. The house has two bedrooms and a sitting room. When down he pressed two buttons on his phone and luckily it went to his mother-in-law whom she told that they were under attack and he had been poisoned. After pressing the button twice and passing the information he was stepped on and the phone taken. He regained consciousness at Machakos General Hospital. According to him there was no letter mentioned by PW3. It was his testimony that he was unconscious when they allegedly broke the door. He however denied that he was the one who killed the deceased and he did not know how the deceased passed away.

18. In his evidence, he told the police to look for the phone and he gave them the document with several numbers. He stated that he had two documents showing the several numbers and had the receipt which he was forced to chew and throw in the dustbin.

19. In cross-examination, he stated that the deceased was his wife and that they got married in 2006 and were married for three years without separation. According to him, she only went to attend her youngest sister's birthday. They were staying in Nairobi but on 12th January, 2010 she was at their home while he was in Nairobi. He was with her that day 12th when the deceased returned from her home but they did not disagree. He admitted that PW5, **Mary Mueni Mutua**, was his mother and that they had never disagreed.

20. According to the accused, on 12th he was with the deceased in same compound. While PW5 could not lie, it was his evidence that due to advanced age, PW5 would sometimes get confused. He denied that he called PW1 and informed her he had taken poison. In his evidence the door had both padlocks and locks and that day it had padlocks. He opened the door with the deceased and after being hit with iron bar on his back he became unconscious. It was his evidence that the attackers were armed with iron bars and that the deceased was hit where they were and he was threatened that if he screamed he would be killed. Though he admitted that that was the first time he was mentioning the attackers, he denied that it was a made up story and denied that he was angry with the deceased for deserting him.

Determination

21. The prosecution's case in summary is that on 12th January, 2010 at about 8.30 am, the accused called PW1, his wife's mother and informed her to tell the deceased to take to him a particular bag. When the information was transmitted to the deceased she obliged and the accused took the bag and went away. Shortly, the accused returned and informed PW1 of his impending trip to Nairobi and left again. However, at about 5pm she received a call from the accused who informed her that he had decided to take his own life and switch of the phone on being asked where the deceased was. PW1 then sent her daughter to go and check on the deceased. Apparently, the said daughter, **Mutheu**, relayed the information to PW6**, Mary Mueni Mutua,** who proceeded to the accused's house and saw both the deceased and the accused lying in the house and alerted the neighbours by screaming. In the meantime, the said **Mutheu** returned home crying but informed PW1 that she had not seen the deceased. PW2 and PW3 were some of the people who were alerted by the screams and proceeded to the scene. At the scene, window was broken and PW2 entered the house where he discovered the body of the deceased lying in the bedroom with a cut injury on the neck. After breaking the connecting door, he found the accused lying unconscious foaming in the mouth while there were bottles, a letter and porridge on the table. He seems not to have read the letter. After giving access to the members of the public, he returned back to his workplace. PW3, on the other hand, entered the house when it was opened by PW2 and saw the same items. He however managed to read the letter in which according to him, it was stated that the accused had decided to end both his wife and that of the deceased.

22. After PW1 had received the information from her daughter, **Mutheu**, she proceeded to the scene when she found the deceased body. She also saw the accused lying outside unconscious.

23. PW5, the accused's mother saw the accused being removed from the house while the body of the deceased was removed from the house. According to her the decease had separated from the accused and only returned the day of the incident. The body of the deceased was identified by PW4.

24. PW7, who analysed the samples taken to the Government Chemist, found that the bloodstains on the knife, the blouse and the skirt belonged to the deceased's blood group. PW8 who produced the post mortem report of **Dr. Obuta**, stated that the cause of death was brain ischemia- lack of blood to the brain due to the lack of supply resulting from the cut blood vessel.

25. On his part the accused testified that himself and the deceased were attacked by some unknown persons who robbed them and forced him to drink poison. The said persons then went with the deceased to another room while demanding money. In the meantime, the accused lost consciousness.

Determination

26. I have considered the evidence on record. Section 203 of the ***Penal Code*** under which the accused is charged provides that:-

> ***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

27. Arising from the foregoing the ingredients of murder were explained in the case of **Roba Galma Wario vs. Republic [2015] eKLR** where the court held that:

> **"For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."**

28. In **Republic vs. Mohammed Dadi Kokane & & 7 Others [2014] eKLR** the elements of the offence of murder were listed by **M. Odero, J** as follows:-

1) The fact of the death of the deceased.

2) The cause of such death.

3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly

4) Proof that said unlawful act or omission was committed with malice aforethought.

29. In this case, there was no doubt as to the fact of death of the deceased. There was ample evidence from those who rushed to the scene that they found the deceased dead. The fact of death was proved by PW8 who produce a post mortem examination report.

30. As regards the cause of death, the post mortem report showed that the deceased met her death as a result of brain ischemia- lack of blood to the brain due to the lack of supply resulting from the cut blood vessel. It is therefore clear that the deceased's death was as a result of massive bleeding which cut of the supply of blood from the brain. A knife which was recovered in the house had the deceased's blood stains. Therefore, there can be no doubt that the deceased's death resulted from the wound in the neck. The probable murder weapon was the said knife.

31. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person, it is clear that there was no direct evidence that the accused caused the death of the deceased. In criminal cases, it is old hat that the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''**

32. According to ***Halsbury's Laws of England***, 4th Edition, Volume 17, paras 13 and 14:

> ***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."***

33. What then is the standard of proof required in such cases? **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64** stated that:-

> **"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction… Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."**

34. In 1997, the Supreme Court of Canada in **R vs. Lifchus {1997}3 SCR 320** suggested the following explanation:-

> **"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."**

35. In **JOO vs. Republic [2015] eKLR,** **Mrima, J** held that:

> **"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."**

36. **Mativo, J** in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

> **"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."**

37. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372** where he stated:-

> **"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

38. Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness' testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence. Therefore, where circumstantial evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged. In fact, in **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

> **"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. It is no derogation of evidence to say that it is circumstantial."**

39. In this case, as stated above, this court must rely on the circumstantial evidence if the case against the accused is to be proved. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In **Sawe –vs- Rep [2003] KLR 364** the Court of Appeal held.

> **"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

40. In **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa had this to say:

> **"In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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."**

41. In **Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken**

cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

42. In **Mwangi vs. Republic [1983] KLR 327** **Madan, Potter JJA** and **Chesoni Ag. J. A**. held:-

> **"In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused."**

43. Therefore, for this court to find the accused guilty the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of **Simon Musoke vs. Republic [1958] EA 715** as follows:

> **"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."**

44. In **Teper v. R [1952] AC at p. 489** the Court had this to say:

> **"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 accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."**

45. In this case the only evidence linking the accused with the deceased's death was that of PW1. According to her, the accused called her and informed her that he had taken poison. The accused however says that that was not the message that he sent. According to him, during the time he was pressed down by the attackers, he pressed two buttons on his phone and informed his mother-in-law, PW1, that they were under attack and he had been poisoned. After pressing the button twice and passing the information he was stepped on and the phone taken and lost consciousness. He regained consciousness at Machakos General Hospital.

46. There is therefore uncontroverted evidence that the accused was found in the same day in the same house in which the deceased's body was. This was at around 5pm. The deceased's arteries had been slit using a knife and she had bled to death. The accused on the other hand was found unconscious. Were the couple attacked by third parties? According to the accused the attackers only had iron bars. However, the death of the deceased was caused by the stab wound that led to massive bleeding cutting of the blood from the brain. There was evidence both from the accused's mother, PW5 and the deceased's mother, PW1 that the marriage between the accused and the deceased was problematic and that the two had separated. In fact, according to PW5 the accused and the deceased had reunited the very day of the incident. To my mind it could not have been by coincident that the very day that the deceased returned to the accused was the very day that both of them would be attacked by unknown persons who not only carried iron bars but also poison.

47. That the accused called PW1 at the time of the incident is admitted by the accused. While the accused disagreed with PW1's version of what the accused relayed to her, what is common is that the accused mentioned the issue of poison. It is however unbelievable that people who are intent at robbing persons of money would go to the extent of securing poison and forcing the person being attacked to take it. The circumstances surrounding the incident are more in consonance with a person trying to commit suicide just as the accused relayed to PW1.

48. That leads me to the last issue: whether it was proved that the said unlawful act was committed with malice aforethought.

49. Section 206 of the ***Penal Code*** on malice aforethought states:-

> ***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 arm 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 of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
>
> ***(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.***

50. The law is however clear that the burden is on the prosecution to prove that unlawful act was committed with malice aforethought. In this case there was evidence that the accused had visited the deceased's home in the morning. That same day, he called the deceased's mother informing her that he was to be away for a few days. Shortly thereafter he called to say that he was taking his life and was soon found lying unconscious foaming in his mouth. The behaviour of the accused portrayed a person who was disturbed on the day of the incident. By his behaviour, it is clear that he did all be could to lure the deceased back into his house. That his house was found locked from the inside and PW2 had to gain ingress through a broken window into the bedroom where the deceased's body was and also apply a similar method to gain entry into the sitting room where the accused was lying clearly rules out the possibility that any third party was linked to the death of the

deceased. He had the opportunity and was the last person to be with the deceased before the deceased was found dead.

51. Regarding the doctrine of "last seen with deceased" I will quote from a Nigerian Court case of **Moses Jua vs. The State (2007) LPELR-CA/IL/42/2006**. That court, while considering the *'last seen alive with'* doctrine held:

> **"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."**

52. In yet another Nigerian case the court considering the same doctrine, in the case of **Stephen Haruna vs. The Attorney-General of the Federation (2010) 1 iLAW/CA/A/86/C/2009** opined thus:

> "**The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."**

53. In this case, the circumstances under which the accused was found in the house in which the body of the deceased was, locked from the inside, coupled with his earlier telephone call to PW1 though circumstantial satisfies me that the the inculpatory facts against the accused are incompatible with his innocence and are incapable of explanation upon any other reasonable hypotheses than that of his guilt; I am unable to find any other existing circumstances which can reasonably be said to have weakened the chain of circumstances relied on by the prosecution. As was held by the Court of Appeal in **Moses Nato Raphael vs. Republic [2015] eKLR**:

> **"What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-**
>
> **'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"**

54. Accordingly, I find that the accused herein on the 12th day of January, 2010 at Mwanga Village, Mitaboni Location in Kathiani District within Machakos County murdered **Winfred Mwende Kiindu** (the deceased). He is therefore convicted of the said offence.

55. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 10th day of December, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ngolya for Mr Muli for the accused

Miss Mogoi for the State

CA Geoffrey