



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 37 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

MARTIN KIIO NGEL.....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 26th Day of August, at Masawa Village, Thinu Sub-Location, Ngeleni Location, Machakos District within Machakos County murdered **Josephine Mueni** (the deceased).

2. In support of its case the prosecution called 14 witnesses.

3. According to PW1, **HMK**, a 17 year old daughter of the deceased, on 27th August, 2012, a Sunday, in the company of her grandmother, **Rose Mukonyo Kanguta**, PW4, and her sister left for church leaving her mother, the deceased outside the house and her father, the accused sleeping in the house. At the end of the service, PW4 told the two children to return home as she was proceeding to a funeral and the two returned home. Upon their arrival at home at 1.00 pm, they found their cousin, **Mary Ndunda**, PW3, who informed them that their parents had gone to the new house that had been constructed but was yet to be occupied. PW1 then proceeded towards the house in order to inform their parents that they were back from the church but upon nearing the said house she heard screams from her mother, the deceased. Due to fear, they decided to retreat back to the old house from where she heard more screams. On inquiring from PW3, the latter informed them that she had seen the deceased taking the accused tea in a thermos with a cup. They then heard the accused, who was standing outside the new house, calling PW3 and asking her to take to him a jug, water and matchbox. The three (3) of us decided to take the items but on nearing the said house, the accused instructed the two girls to hand over the said items to PW3 and return back to the old house which was about 30 metres away and they obliged. Upon her return from the new house, PW3 informed them that she had not seen the deceased and that the accused was standing at the door. Later the accused called PW1 and asked her to take to him a cell phone which PW1 collected from the bedroom of the old house and took to him and returned back.

4. They were then informed by their cousin, Michael, that he had been sent to call their grandmother, PW4, and the said Martin returned with PW4 who went to find out what had transpired. The accused then came out a blood stained short pair of trousers with a yellow paper and a catapult, entered the house and came out with clothes in a paper bag and took the deceased 'lesso' that was outside and returned to the new house. PW1 then saw PW4 enter the same house and come out carrying clothes in the same paper bag that the accused had and took it to her house. Shortly thereafter, a taxi arrived and the taxi operator informed them that he had been called because there was a sick person at home. PW1 then saw two (2) people who were unknown to her supporting the deceased who was unable to walk on either side. The accused who was ahead of them ordered the two girls to go into the kitchen as he did not want to see them after which the accused changed his clothes and left with the motor vehicle. PW1 then took his pair of trousers and kept it at a safe place and later on handed the same to the police. Two hours later their uncle, Mandela took food to them which they ate and slept. However, at 11.00 p.m. when she heard a motor vehicle come, she got up and went to the sitting room where the accused disclosed that the deceased was ailing and would return the following day. However, PW1 never saw the accused nor the deceased after that and it was only later that she was informed by her maternal relatives that their mother, the deceased had died.

5. According to PW1, Prior to that incident the accused had threatened to cut her, my sister and their mother with a *panga* and turn himself into the police custody and there was a time he threatened to assault the deceased thoroughly.

6. In cross-examination PW1 stated that the previous night the accused and the deceased had spent the night in the same bedroom and that they were staying in the same homestead with PW4. According to her the accused used to smoke cigarettes. According to her the accused changed from the clothes he was wearing earlier which were a black T-shirt with a yellow colour and a pair of grey shorts which were blood

stained and which PW1 kept and handed over to the police. While admitting that she was not in good terms with the accused, she was quick to state that she had no grudge against the accused and agreed that she did not record the earlier threats by the accused in her statement.

7. PW3, **Mary Ndunda Kanini**, a niece to the accused, was on 26th August, 2012 at 7 am at the said home with her grandmother, PW4, her grandfather, **Paul Ngei**, the accused and the deceased with their children, when the deceased informed her that she was going out for a walk and look at the gardens. According to her the accused and the deceased used to stay in Nairobi and had returned home on a visit on 22nd August, 2012. PW3 then went to collect water. After taking tea, her grandmother, PW4 and the deceased's children went to church while PW3 left for a walk and returned home at 2pm by which time those who had gone to church had not yet returned. A person then came with a car asking where the patient was and PW3 informed him that she was not aware of any patient as she was alone. She left him and went to get the goats and bring them to home. She then saw the deceased being carried by the taxi driver and the accused from the new home they had built further down and being taken to the car. She however did not know why the deceased was being carried and she was then taken to hospital. She later heard that the deceased passed away. In her evidence, she did not know if the accused and the deceased were at the home. And she did not notice anything amiss at home that day.

8. According to PW4, **Rose Mukonyo Ngei**, the accused's mother, on 23rd August, 2012 at about 6.30 – 7.00 pm she was in a funeral at her ancestral birth home when she got a telephone from the accused that the accused's wife had fallen ill at home and she was required at home. She got home at 7 pm. and went to see the deceased whom she found seated in a chair in her house. The deceased however informed her that she would brief her later. PW4 then left to go and look for the accused who returned and informed her that he had gone to look for a vehicle since his wife had taken medicine. She however never learnt from the deceased what she wanted to tell her later because the deceased passed away as she was being taken to the Hospital. Upon realising that the deceased had passed away they proceeded to Machakos Police Station where the accused recorded his statement after which they took the body to the mortuary. In her evidence, she never saw any medicine that the accused told her that the deceased had taken.

9. It was her evidence that for the over 16 years the accused and the deceased were married, she had never witnessed any problem between the accused and the deceased as they were both working in Nairobi and had only returned home two days before the death of the deceased to make arrangement for their home.

10. PW5, **Jackline Kalondu**, the accused's younger sister testified that after coming from her church on Sunday 26th August, 2012, at 6.00pm with her children, she heard the accused calling her several times. According to her, her home, where she had purchased a plot was 1 km away from her place of birth. On hearing the accused calling her she proceeded to her maternal home where she found the accused seated outside his house. The accused then informed her that his wife had taken medicine. She however could not understand why this was so because the two were staying well together. Upon inquiring from the deceased what was wrong, the deceased whom she found seated on a stool in her house, told her that she would inform her and asked for water to drink but PW5 informed her there was no water nearby. I went to the wife and I asked her what was wrong, I found her sitting on a stool in the house. The wife told me she would tell me. She told me to give her water to drink and I told her there was no water that was near. A taxi driver then arrived to take the deceased to the hospital and PW4 was called and the deceased put in the car together with PW4 and PW5 to take her to hospital. The deceased however passed away on the way to the Hospital and the accused proceeded to the Police Station to make the report after which the body was taken to the mortuary. According to PW5, she never saw the accused and the deceased quarrelling though they used to stay in Nairobi and she did not know when they returned home.

11. PW6, **David Mutisya Kangut**, the accused's uncle was on 26th August, 2012 from a funeral walking on the road when he saw was a white car in the compound with many people. The accused then called him and informed him that his wife had drunk medicine. By that time the deceased was in the car seated middle with PW4 and PW5 on her sides. Since it was night PW6 did not look at the deceased but sat in front of the car and they started the journey to the Hospital. However, when they reached Mutituni the people seated at the back told him that the deceased had passed away. He then advised the accused that since the matter was now a police case they should report to the police station had died. After making the report, they took the body to the mortuary.

12. According to PW6, though the couple loved each other, he could not state how they were living in Nairobi. He however denied that he stated in his statement that he saw a black liquid in the deceased mouth and that it was not poison. From the police station they all returned home.

13. PW7, **Regina Mumbi Elijah**, the mother of the deceased testified that on 26th August, 2012 at 6.45pm she called the accused to talk to her grandchildren but got disconnected. The accused then called her back and upon inquiring how they were doing the accused told her that he had left the deceased in the house on her own and had gone for a funeral but when he returned he found the deceased lying on the floor where he had been informed by the children that she was. According to the information given to her by the accused, the deceased had vomited and was foaming from the mouth after having taken medicine. Although PW7 asked the accused to put the phone near the deceased so that she could speak to the deceased, the accused did not do so. Upon asking why they had not taken the deceased for treatment, the accused informed her that they were still searching for the medicine. The accused also informed her that the deceased was also bleeding but when asked whether he was the one who had hit the deceased, the accused switched off the phone. PW7 then contacted her family members who told her to follow up as they had received information that the deceased had been taken to the Hospital. On getting in touch with the accused, the accused disclosed to her that the deceased had passed away at the gate of the hospital. In the company of other relatives, PW7 went to Machakos General Hospital but being unable to trace the deceased there proceeded to the police station where they were informed that the driver, husband of the deceased, mother and sister and uncle of the deceased had left with the body less than an hour before for Migwani funeral home after having left the bottle that had the medicine the deceased had taken. We did not ask for the bottle. They told us to follow up the body and return.

14. At Migwani funeral home, PW7 found the body of the deceased on her back with her head facing the door. According to her observation, her left side of the face, eye and head was very swollen, she had black mark on her hands and her knees abdomen had bruises like she had been stepped on, her nose and mouth had black substance like oil, there were marks where she had been tied on the hands, knees and legs and her private parts were very swollen. The following day on 27th August, 2012 when they went to the accused's home, with uncle **Patrick Kyalo** and a pastor called **Mutunga**, they found **Paul** the accused father, wife, brother called **Kinyanjui** and sister of the accused and they

agreed to go make preparations for the preservation of the body. On arrival at the mortuary, PW7 uncovered the body of the deceased for all of them to view it and confirm if the marks thereon were as a result of taking medicine.

15. It was her evidence that the post-mortem was undertaken by two doctors on 28th August, 2012, in the presence of the accused's father called Paul, his uncle David and his brother called **Bendera, Patrick Kyalo** and the deceased sister called Prisca Katuku and PW7's uncles. Also present was the accused lawyer though the accused was not present. According to the information from the doctor, the body of the deceased had many injuries and she had so many injuries on the head that she could not survive. Further that what was being said to be medicine was given to her after she died and did not pass her throat. She was also pregnant. In her evidence, PW7 insisted that it was not the accused who called her first. To the contrary it was her who called the to talk to her grandchildren. She however did not know whether the accused was in Nairobi or at home at that time.

16. PW2, **Benson Mwita Kioko**, a taxi operator was on 26th August, 2012, at work when at about 6.00 p.m. the accused, who was known to him, called him and informed him that his wife was unwell and requested him to go and pick her by PW2's car. On arrival at the accused's home, he found the deceased lying on the floor breathing heavily at the new building. The accused informed him that the deceased had taken poison and there was a bottle of medicine on the floor near the wife. According to him the accused's parents were also present and the accused's children were also a distance. On the way to the hospital, using his employer's vehicle No. KAH 429X, the deceased, who was accompanied by the accused's parents passed away after traveling for 5 kms from the homestead. At the suggestion of the accused's parents they passed by Machakos Police Station after which the deceased was taken to the mortuary in Machakos. It was his evidence that the poison bottle was however left at home.

17. This witness was however stood down during cross-examination and was never recalled.

18. PW8, **PC Patrick Mwakideu**, was performing his duties at the report office on 26th August, 2012 at Machakos police station when at 19.45 hrs the accused went alone to report that his wife had committed suicide. Upon going out, PW8 accompanied by his colleagues found a body was in a white taxi saloon car. There was a driver and someone holding the deceased. Upon removing the lesso covering the deceased he saw that the deceased was covered with bruises on her stomach and between the thigh and knees. There was also a black liquid on the side of the mouth of the deceased. PW8 recorded the report and told them to take the deceased to the mortuary. According to him, the accused reported that the deceased drank medicine for the dip and he had a small bottle with some liquid. After that the accused left and said he was taking the deceased to the mortuary. In PW8's view, the injuries were the kind of a person who was struggling. He however did not take possession of the bottle leaving the matter to the investigating officer to investigate. In cross examination, PW8 stated that he doubted the report because of the bruises on the deceased body. In further cross examination he stated that the accused left the bottle in the office and he took it to an officer called **Ashiundu** in the crime office.

19. PW9, **Prisca Katuku Elijah**, a younger sister of the deceased testified that on 28th August, 2012 at 11.00 am. she witnessed the post-mortem being conducted on the deceased. Present were her mother, PW7 and PW10. When she arrived at the mortuary, she viewed the body and saw bloodstains on the deceased's underpants. Her head at the front left side had bruises and her wrists and her ankles also had bruises like she had been tied and struggled to release herself. On her upper stomach she had a wound like she had been hit by a sharp object. After the two doctors conducted the post mortem, they stated that the deceased had many injuries, she had been inflicted with a sharp object in her private parts and was 18 weeks pregnant.

20. PW10, **Patrick Kyalo Munyao**, an uncle to the deceased testified that on 16th August, 2012 I remember that at 7.45 pm he was called by PW7 who informed her that she had been called by the accused that the deceased had taken poison. He then drove with his wife to Mutituni hospital where he picked PW7 and her son and daughter and drove to Machakos General Hospital. Upon failing to get the deceased there, they proceeded to Machakos police station where they found that the accused had reported that his wife had died and had taken her to Machakos Funeral Home. They proceeded to Machakos Funeral Home where they found the deceased's body which had bruises on the neck and both hands and her legs and the left side of the head.

21. PW11, **Dr John Mutunga**, was called to produce the post-mortem report conducted by **Dr Fredrick Okinyi** and **Dr Kimuyu Njugi** signed by **Dr Okinyi**. According to him **Dr Okinyi**, whose handwriting he was well conversant with was in the United States where he had gone for further studies. According to him the post-mortem was done on 28th August, 2012 at Machakos Funeral Home. In the report, the deceased body had a black sweater, a checked skirt and a bloodstained panty. Upon examination, it was found that there were multiple bruises on the head measuring 2 x 2 cm, chest injuries on the back measuring 2 x 6 cm, large lacerations on both bilateral thighs, large haematoma and contused muscles of the thighs. There was a black oily material on the trachea and the lungs while the heart and the great vessels were normal. The oesophagus was clean while the stomach had food substance. However, the black substance was not found in the oesophagus, the stomach or the intestines. There was brain oedema and multiple lacerations on the skull. There were cuts and discontinuity of the skin and lacerations on the anus. There was blood mixed with stool and the deceased was six months pregnant. As a result, **Dr Okinyi** formed the opinion that the cause of death was multiple injuries to the head and body caused by a blunt trauma. The samples were removed for toxicological analysis. According to the witness the initial report did not tally with the results of the test.

22. According to the witness when one drinks poison it goes to the oesophagus, the stomach and after its absorption it causes death. However, the alleged black substance could not cause the head, chest and back injuries and it was found in the windpipe and the lungs which was not the normal flow since these were breathing systems where it can be coughed out. According to the witness the substance must have been forced after the death had occurred.

23. PW12, **PC Stephen Wachira**, who was at the time attached to Machakos Police Station was at the report office on 26th August, 2012 when the accused arrived in a saloon car, parked it and went to the report office and reported that his wife had taken poison and died. The accused produce a bottle alleging that it was the poison which the deceased had taken. At the request of **PC Serem**, he viewed the body and observed a red patch below the right ribs Being suspicious he returned to the office, dipped his finger in the alleged poison bottle and smelled the substance in it. According to him the same had the smell of used oil. He then returned to the vehicle, opened the mouth of the deceased and saw that the substance was dripping and was just in the mouth. He then reported to his colleague, PW8, what he had observed. He then proceeded to the DCIO and informed him about his observations. Together with PW8 they proceeded to the vehicle and PW8 remarked in

the OB that the report made was subject to investigations. After that the accused returned to the car and they took the body to the mortuary. The said bottle was retained at the police station.

24. In cross-examination, he said it was the accused who was driving the vehicle and there were two other people in it. He suspected that the red patch was as a result of a kick.

25. PW13, **PC Maxwell Ogutu Ombuor**, was on duty on 28th August, 2012 at 8.00 am when he was requested by the OCS to prepare a post mortem to be conducted on the body of the deceased. He then identified the people who were to identify the body who were close relatives, the mother and the sister to the deceased. At the Mortuary, he found **Dr Okinyi** and a lady doctor who represented the accused as well as the accused's lawyer and the post mortem was conducted in his presence. After that both doctors concluded that the deceased died of head and body injuries caused by blunt trauma. According to his observations, the body had physical cut injuries on the stomach, hand and the back and samples were taken from the body and the blood which were to be transmitted to the Government Chemist. It was his evidence that the post mortem report was contrary to the report that was filed by the accused. It was his evidence that when in the company of other officers, they visited the accused's home, he peeped in through the window of the sitting room and saw black substance like the one he had seen in the deceased's mouth on the floor since the house had white tiles. He also saw some reddish substance on the floor. The following day, 29th August, 2012, he returned to the place with crime scene personnel but found when the red substance had been cleared and they were unable to collect the samples. He testified that since the samples taken from the body of the deceased were not properly preserved, they were eventually not taken to the Government Chemist for analysis. He testified that the accused disappeared. According to him the taxi was being driven by taxi driver friend of the accused who was called by the accused. Although photographs of the scene were taken, he was unaware whether they were processed.

26. PW14, **Cpl. Wycliffe Ashiundu**, the investigations officer, testified that on 26th August 2012 at 8.00pm he was at Machakos Police Station when the accused went to report that his wife, the deceased, left home for vegetables and after realising that she was taking too long to return he decided to go and check on her when he found the deceased unconscious inside the house they were constructing having taken poison. According to him, the accused reported with a bottle containing black substance written diazonate and handed over the bottle to him. Due to the injuries observed on the body of the deceased investigations were commenced by the recording of statements from the witnesses after the body of the deceased was taken to the mortuary by the accused. On 29th August, 2012, in the company of the families of the accused and the deceased and other police officers they visited the said house together with the photographer. From the house they collected the bloodstained trouser of the accused and later post mortem was done and samples taken for analysis. However due to long period of time and lack of proper preservation the said samples could not assist in the case and were never taken to the Government Chemist. On 15th October, 2012, with the help of a member of the family for the deceased, PW14 arrested the accused and charges were preferred against him. It was his evidence that the delay in effecting the arrest of the accused was due to the fact that he was working in Nairobi. According to the witness, even the black substance that was submitted by the accused was never submitted for analysis since in his view, without the other samples it could not have been of any assistance. He then discarded the said bottle since it was of no use.

27. In cross-examination, he states that though the photographs were taken, he was unaware if they were processed. He however did not take samples of blood stains on the floor of the house since they were dried. He stated that the accused's trouser had black stains which he thought could have been blood but it was never taken for analysis just like the bottle. According to him the accused was suspected due to the injuries sustained by the deceased which showed he could have been beaten.

28. After being placed on his defence, the accused gave sworn evidence in which he stated that on 26th August, 2012 they woke up with the deceaseds at around 11.00 am and took breakfast after which he left to go and look for grass for cattle. While feeding the cattle, his cousin called him home. At home the deceased informed him that she was tired and opted to stay behind. The accused then took his jacket and went to see his cousin from where they proceeded to Mater Hospital to collect the body of another cousin called **Richard Wambua** which they took to Machakos to prepare for his funeral. Upon returning home at about 5.45pm he found no one in the old house or the kitchen and then proceeded to the new house where he found the deceased lying down unresponsive holding a bottle while fluids were oozing from her mouth. It was his evidence that the bottle had black substance. He then arranged for her to get medication. He then called his mother, PW4 and informed her of the same. He also relayed the information to the deceased's mother, PW7. After that he called PW2, the taxi driver and his uncle PW6 as well as his sister and relayed the information to them and asked them to go and assist take the deceased to the Hospital which they did. According to the accused, on that day his children had left with his mother for church at 11.00am. It was his evidence that when he was taking the deceased to the Hospital, she was still alive. However, on the way, his sister informed him that the deceased seemed to have died and it was decided that they pass by the police station where they made a report and they were given a chit to take the deceased to the mortuary. He was with the said substance which he found the deceased holding. It was the accused's testimony that he did not know what caused the accused's injuries whether she could have fallen on the construction materials which were at the place where the deceased was lying. He testified that when the police went home, he was present by they just looked around without taking any photographs.

29. He stated that they had a cordial relationship with the deceased and they never quarrelled and during their 16 years marriage they had rare minor disagreements which did not warrant a beating. The deceased was however temperamental but never informed him that she had any problems. The deceased however informed him that her mother quarrelled her why she was obstructing her from talking to the accused.

30. In cross-examination he stated that he has never quarrelled with his daughter, PW1. According to him, the only injury he observed was a head injury. Though he is the one who informed the police that the deceased died from poisoning, he insisted that he did not concoct the story. His said information was based on what he had found. He was however unaware if the substance was given after death.

31. In the submissions filed by **Miss Mogoi**, learned prosecution counsel, it was contended that though the evidence adduced in this case is circumstantial in nature since there was no eye witness to the incident, it is confirmed by the evidence of PW1. It was submitted that from the evidence, it is clear that it is the accused person who knows what exactly happened to the deceased. He was the one who told everyone that the deceased had taken poison and died yet the post mortem report contradicted that. The post mortem revealed that the deceased died as a result of multiple injuries to the head and that she also had suffered other injuries on her body which could only have been occasioned by a blunt object.

32. On behalf of the accused it was submitted by **Mr Kimeu** that it was not proved that it was the accused person who committed the offence. According to learned counsel, PW1's evidence was hearsay and referred to a different date of the offence as 27th August, 2012 and not 26th August, 2012. It was also pointed out that PW1 was not in good terms with the accused and her evidence was uncorroborated by any other witness.

33. It was noted that no one else stated that the accused and the deceased were in bad terms. It was submitted that PW11 who produced the post mortem report was not the maker and that the samples which were taken from the deceased's body for toxicology analysis were not produced. Further, it was admitted in cross-examination that the post mortem report was not conclusive. Apart from these there were contradictions in the prosecution's case, no samples were collected from the scene, the alleged poison bottle and its contents were never produced as exhibits and there was no report from the government chemist. Similarly, the trouser allegedly belonging to the accused was never produced as exhibit and no analysis was conducted in respect of the alleged bloodstains on the said trouser.

34. It was submitted that the investigations if any in this case were shoddy and the manner in which exhibits were handled wanting. It was further submitted that *mens rea* has not been established against the accused. **Determination**

35. The prosecution's case in summary is that on 26th August, 2012, PW1 had accompanied PW4 to church leaving the deceased and the accused at home. On returning home, she heard screams coming from their house which was under construction but due to fear she did not go there. Instead she decided to inquire from PW3 what called PW3 for some items but prevented PW1 from going nearer. When she asked PW3 what she had seen, PW3 informed her she never saw the deceased. She was however able to retrieve the accused blood stained trouser from the house which she handed over to the police. This trouser was however not produced in evidence and it was not confirmed what substance it had as it was never taken for analysis. PW1 however admitted that she was not in good terms with the accused since the accused had threatened to kill her and the deceased. Her evidence was however not confirmed by PW3 and her sister whom she was with never testified.

36. PW2 was the taxi driver which was called to help in transporting the deceased to the hospital. PW3's evidence in the relevant part was simply that she saw the deceased being carried to the hospital. PW4, the accused's mother only received information from the accused that the deceased had taken poison and when she tried to get the information from the deceased, the deceased informed her that she would talk to her later. This however was not to be as the deceased passed away before doing so. It was however her evidence that when she found the deceased, she was sitting in a chair. Her evidence was similar to that of PW5. PW6 was called and went after the deceased had been placed in the vehicle and therefore did not witness anything. PW7, the deceased's mother received information from the accused about the deceased and was not present when the incident took place. Her only evidence was that she saw that the deceased had injuries which in her view could not have been caused by poison. She further saw black substance in the deceased's mouth which in her view smelled like oil. She also was present during the post mortem.

37. PW8 saw the deceased in a vehicle at the police station and saw that the body had bruises and saw black substance in her mouth. PW9 and PW10 identified the body of the deceased at the mortuary and according to them, they saw that the body had injuries. According to PW9 the deceased was 18 months pregnant though she never disclosed the source of this information. PW12 similarly viewed the body of the deceased in the vehicle. According to him the deceased's body had a red patch below the ribs. Being suspicious, he smelled the black substance and according to him, it resembled used oil. PW13 was present during the post mortem examination and also visited the scene. He observed the injuries on the deceased and at the scene peeped in the house and saw black like substance similar to the ones in the mouth of the deceased. He also saw reddish substance on the floor. However, these were never collected and by the time he returned the red substance had been cleaned.

38. PW11 was called to testify on behalf of **Dr. Okinyi** carried out the post mortem, examination and wrote the report. According to him the post-mortem was done on 28th August, 2012 at Machakos Funeral Home. In the report, the deceased body had a black sweater, a checked skirt and a bloodstained panty. Upon examination, it was found that there were multiple bruises on the head measuring 2 x 2 cm, chest injuries on the back measuring 2 x 6 cm, large lacerations on both bilateral thighs, large haematoma and contused muscles of the thighs. There was a black oily material on the trachea and the lungs while the heart and the great vessels were normal. The oesophagus was clean while the stomach had food substance. However, the black substance was not found in the oesophagus, the stomach or the intestines. There was brain oedema and multiple lacerations on the skull. There were cuts and discontinuity of the skin and lacerations on the anus. There was blood mixed with stool and the deceased was six months pregnant. As a result, **Dr Okinyi** formed the opinion that the cause of death was multiple injuries to the head and body caused by a blunt trauma. The samples were removed for toxicological analysis. However, the results of these toxicological analysis were never produced since the samples were never taken for examination due to poor preservation which rendered them useless. He however testified that in the absence of the toxicological results, he could not see what the black substance was.

39. PW14 was the investigations officer. He recorded some of the witnesses' statements. He was given the bottle containing the substance which was presented by the accused but the same was discarded by him without its contents being analysed. Similarly, the photos taken to the scene were never processed and the long trouser which was given to him allegedly belonging to the accused and which was suspected to have had blood stains was never taken for analysis.

40. The accused evidence was that he left the deceased at home when he went to attend a funeral arrangement of his cousin. On his return he found the deceased lying on the floor where the building material were with a bottle containing substance which he thought was poison in her hand. In his evidence the deceased had problems with her mother, PW7.

41. 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.

42. 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.”

43. 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.**

44. In this case, there was no doubt as to the fact of death of the deceased. The evidence of PW9 and PW10 who identified the body as well as that of PW11 who produced the post mortem report clearly proved beyond reasonable doubt that the deceased passed away.

45. As regards the cause of death, the post mortem report showed that the deceased met her death as a result of multiple injuries to the head and body caused by blunt trauma. It is therefore clear that contrary to the accused's thinking that the deceased passed away as a result of taking poison, it was in fact the injuries she sustained that led to her death. However, from the evidence adduced, it is not possible to make a determination as to whether the substance which was found in her mouth and in the bottle in question was poison or not. Had that substance been tested and analysed, it would have conclusively proved whether or not it was poison. That piece of evidence would have ruled out the possibility that the deceased was attempting suicide and therefore that her death was as a result of the actions of a third party. While some prosecution witnesses were of the view that the substance resembled oil, there was no evidence to that effect. Instead of subjecting the same to analysis, for some unexplained reasons the investigating officer thought it fit to discard the bottle with its contents. The testing of the said substance would have assisted in ruling out the possibility that the deceased's death could have resulted from some emotional trauma arising from possible disagreement between her and her mother as suggested by the accused. It is unfortunate that the investigative agencies had in their power the evidence, presented to them by the accused himself with which they could have discredited the accused's testimony yet they decided to destroy the same without subjecting it to proper analysis. One may well be justified in making an inference that maybe the investigating agencies were unsure whether the results of the tests could in actual fact prove the accused right that the deceased attempted to commit suicide.

46. 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 that case, as appreciated by **Ms Mogoï**, learned prosecution counsel, the case against the accused has been proved to the required standards? 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.”

47. 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.”

48. 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.”

49. 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.”

50. 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.”

51. 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.”

52. 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.”

53. 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.”

54. 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.”

55. 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.”

56. 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.”

57. 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.”

58. 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.”

59. In this case the evidence of PW1 seems not to have been supported by any of the witnesses. She said she was with her sister when they heard screams from the house that was being constructed. Nobody knows who was screaming because that house was some 30 metres away from the old house. That the accused prevented her from entering the new house cannot be explained only on the basis of the guilt of the accused. It may well be that the accused was protecting her from witnessing what might well have been a traumatising scene. The evidence that the accused had threatened her, her sister and her mother, was not corroborated by any of the witnesses including her sister who was a party to the threats. In the absence of the corroboration, one cannot conclusively take such evidence as proving the motive of the offence.

60. The only other evidence that would have linked the accused to the death of the deceased was that of the doctor, PW11. However, this evidence only rules out the possibility that the deceased died from taking poison and placed the cause of death as multiple injuries on the head and body caused by blunt oedema. There was no evidence that these injuries were in fact inflicted by the accused. While according to PW1, the accused had the opportunity to commit the offence, the deceased was found in a house which was under construction and according to the accused, where she was lying were building materials. It was not shown that the nature of injuries that the deceased sustained could not have been sustained by someone falling on some construction tools and materials. While there was evidence that the accused’s blood stained trouser was recovered from the said house, this trouser was neither tested nor produced as exhibit. Accordingly, this court cannot tell or determine whose trouser it was and what the substance was considering that it was recovered in a house under construction.

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

62. 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 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 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.

63. 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 in the absence of evidence that the accused committed the act that led to the death of the deceased, one cannot say that the prosecution proved malice aforethought.

64. In this case it may well be that there was a strong suspicion that it was the accused who caused the death of the deceased. This can be attributed to the conduct of the accused maintaining consistently that the deceased took poison when that was not the cause of death. It may also be said that the fact that the substance was found where it ordinarily is not supposed to be if it had been ingested by the deceased was evidence that the accused was attempting to divert the attention of the investigative agencies from the real cause of death. However as stated above, no one knows what the substance was and those who could have conclusively proved that it was not what the accused thought and made it appear to be did not bother to do so. However, as was stated by the Court of Appeal in the case of Joan Chebichii Sawe vs. Republic [2003] eKLR:

“We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled

rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge's view that the prosecution had proved its case against the appellant beyond any reasonable doubt."

65. In *R vs. Ally* (Criminal Appeal No. 73 of 2002) [2006] TZCA 71 it was held by the Tanzania Court of Appeal that:

"Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted."

66. It may well be that the accused's defence may not be very convincing but as was held in *Boniface Okeyo vs. Republic* [2001] eKLR:

"Before we conclude this judgment however, there are two other matters which, though not raised by the appellant's counsel, have caused us considerable concern in this appeal. These arise from the judgment of the High Court on first appeal where it said as follows:

"the appellant himself narrated how he was arrested. He did not raise any serious defence to the charge except to state that he was not guilty."

In another part of the judgment the High Court further said as follows:

"the appellant had full opportunity and did cross-examine the witnesses but no crucial evidence arose out of his cross-examination"

We are satisfied that in the two passages, the High Court on first appeal seriously fell into error by appearing to shift the burden of proof to the appellant. It is trite law that in criminal cases the burden of proof rests throughout on the prosecution to establish the guilt of an accused person beyond reasonable doubt save in few exceptions of which this was not one. The appellant had no duty in law to raise a serious defence, nor did he have a duty to elicit crucial evidence by cross-examination of prosecution witnesses. We are satisfied that the burden of proof was, clearly, placed on the appellant and this is another reason to fortify the conclusion we have reached that the conviction was unsafe and cannot stand."

67. As already stated hereinabove, the investigative bodies committed acts of omission and commission which had they been taken would have either inculpated the accused or exculpated him. The court would have then determined whether or not the accused is guilty of the offence. Instead the investigative agencies treated this serious matter in a very casual manner. The investigative agencies did not follow up on crucial leads and failed to tie up the loose ends in the case. It is therefore not possible based on the evidence adduced to know what exactly happened. Only God and the deceased can tell us what took place and they are both beyond the reach of this court. In that case the benefit of doubt must, as the law requires inure to the benefit of the accused. As appreciated by **Mativo, J** in *Elizabeth Waithiegeni Gatimu vs. Republic* [2015] eKLR:

"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."

68. Having considered the totality of the evidence adduced in this case, I find that the prosecution has failed to prove the case against the accused beyond reasonable doubt that the accused murdered the deceased. Accordingly, the benefit of doubt must go to the accused. In the premises, he is acquitted of the charge of murder and is set at liberty forthwith unless otherwise lawfully held.

69. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 9th day of December, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr J M Kimeu for the accused

Ms Mogoi for the State

CA Geoffrey