



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 34 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MUSEMBI NGULA MUTHUSI.....ACCUSED

JUDGEMENT

The accused Musembi Ngula Muthusi is facing a charge of a murder contrary to section 203 of the Penal Code, punishable under section 204 of the same Code (Cap 63 of the Laws of Kenya). The particulars of the charge as per the Director of Public Prosecutions allege that on or about 23rd December, 2013 at Bondeni area, near slaughter house in Loitokitok District, within Kajiado County the accused murdered Augustine Ndinda Muema.

The charge was read and explained to the accused who pleaded not guilty. The accused was represented at the trial by Ms. Moinket advocate whilst the prosecution was conducted by Mr. Alex Akula, the senior prosecution counsel. The prosecution under section 107 (1) of the Evidence Act Cap 80 of the Laws of Kenya set to prove the guilt of the accused person by calling 23 (twenty three) witnesses. The prosecution also along the witnesses produced documentary and other exhibits in the trial associated with the commission of the offence.

The evidence placed before this court to prove the charge of murder contrary to section 203 of the Penal Code can be summarized as follows:

The proceedings laid the foundation of the case by calling PW1 Martin Karani. In his testimony PW1 who testified as the employer to the deceased narrated on how the deceased who was working at Josmart Guest House attended to work normally on 22/12/2013. The following day PW1 explained to the court that he received a telephone message regarding the killing of Augustine herein referred as the deceased. The first step PW1 took was to report the matter to Loitokitok police station and at the same time the family members appeared to have been informed who called PW1 to find out the circumstances of the deceased death.

PW2 Julius Kavulunze evidence captured the accused and his family paying PW2 a visit on 24/12/2013 where they celebrated Christmas together at Kiboko. While PW2 was at his shop on the 25/12/2013 he saw his son Mutua holding a black mobile phone alleging that accused had given it to him to sell at Ksh.600. According to the testimony the mobile phone which was present before court and marked as MFI-1 was the one his son had in his possession with the sole purpose to sell it on behalf of the accused.

The said **John Mutua** who testified as PW3 told this court that prior to the 24/12/2013 he lived at Illasit in the same plot with the accused. It was the evidence of PW3 that the accused had gone to their home to join them to celebrate Christmas. In the course of the celebrations PW3 confirmed that accused gave out a

mobile phone whose physical features he was able to identify in court as an item for sale. In PW3 further evidence he did not have the cash to pay the accused but managed to sell it to PW4 – Titus Mwasya. In his testimony before court PW4 admitted purchasing the mobile phone before court from PW3 at Ksh.700. according to PW4 he took possession of the mobile phone which he confirmed using it until he exchanged with another model identified as ‘Bird’ from one Musyoka. As PW4 was settling down to use the mobile phone ‘Bird’ which he obtained from Musyoka. Police came into contact with him and he was under interrogation on how he acquired the phone. The interrogation of PW4 by the police led to the recovery of the other mobile phone he had exchanged with one Musyoka.

PW5 Peter Sentek told this court that within the month of December, 2013 his motorcycle had been hired by PW3 to be dropped at Loitokitok. PW5 further told this court that when PW3 arrived at the appointed destination he did not pay the prerequisite fare. That led to PW3 leaving his identity card as security for the money to be brought at a later day. However PW5 stated that PW3 never went for the identity card. This forced PW5 to involve the locational chief who referred him to criminal investigating agency. According to the evidence of PW6 Robert Roimen in the month of December 2013 PW5 went there with a young man who offered to deposit his identity card as security for cash 300. The money was to be paid to PW5 and the young man now identified as PW3 was to go back to PW6 to refund the money in order to redeem his identity card. That was never to be as explained by PW6 who expected PW3 to visit the shop as promised to redeem the identity card.

PW7 James Lenayan testified that on 23/12/2013 as he walked on the road he stumbled upon the dead body of a woman. PW7 on being shown the photographs taken at the scene positively identified the body as the one he saw in the early house of the 23/12/2013. PW7 further stated that he decided to go back home and reported the incident to his mother PW8 Salome Naiyama. It was the testimony of PW8 that when she visited the scene and confirmed what she had been told by PW7 she raised an alarm and also telephoned the area chief. That information led to the police being invited to the scene. This was also confirmed by PW9 Leah Wainaina, a neighbour to where the alleged offence had occurred.

PW10 Jane Wachira also testified on how she responded to the alarm and distress call involving the death of the deceased. PW11 Ntooni Moisiati who testified as the former landlord to the accused confirmed he had rented out No. 7 to the accused between February 2013 – September 2014.

PW12 Cpl Ernest Malinga a gazetted scenes of crime officer testified that on 10/1/2014 he received a flash disk from Sgt Munga of Loitokitok police station. On receipt of the flash disk containing photographic prints PW12 told this court that he processed and developed the prints into various photographs. The photographs as explained by PW2 covered the scene and the body of the deceased. PW12 produced the bundle of photographs exhibit 3A and the accompanying certificates exhibit 3B.

PW13 Alex Mutunga is the brother to PW3. The evidence by PW13 was to connect the chain on the sale of the phone which accused first offered to him but since he did not have the money he invited PW3 to buy it instead. PW13 on being shown the subject mobile phone which is at the center of this case duly identified the physical features of the mobile referred as J and marked as MFI-3.

PW14 Margaret Mwikali who testified as a co-worker with the deceased told this court that on 22/12/2013 the deceased spent some time on and off within Josmart Club. PW4 further in her evidence testified that she checked out of the day shift from Josmart Club but left the deceased in the premises drinking with other customers. She only learnt of the death of the deceased the following day of 23/12/2013.

PW15 Jackson Musyoki in his testimony told this court that he had exchanged his mobile phone make ‘Bird’ referred as MFI-15A with a black/silver phone in possession of PW4. During the same period PW15 testified that accused approached him to exchange the phone he received from PW4 with a techno phone he had in his custody. After giving due consideration PW15 exchanged the phone he had received from PW4 with the accused. In the transactions PW15 received a techno phone which he positively identified before court. When the police came knocking inquiring about the phone PW15 pointed at the accused as the one currently in possession. The police recovered the phone from the accused. PW16

Jacinta Wajila, the co-worker to the deceased testified on how she learnt about the death of the deceased whom they worked together for about a month.

PW17 Gladys Nyokabi Mugo who also worked with the deceased attested to the fact that on 22/12/2013 they spent time together at Josmart Club. According to PW17 the deceased on or about 10.30 pm received several calls from a caller whom she could recollect on the language of communication being Kikamba. PW17 further told this court that when the time for them to close the club, reached the deceased called for a motorcycle. That is how she parted ways at Josmart gate. In the evidence of PW17 the motorcycle which picked her at the gate was expected to come for the deceased at the same point. PW17 further testified at the time of closing the daily sales which amounted to Ksh.40,000 was handed over to the deceased. She was also able to identify the deceased mobile phone colour silver/black model AJO as one in her possession when she was receiving calls and communicating with motorcyclist. According to PW17 when she left the deceased at the Josmart gate she was wearing the brown leather jacket and also carried the handbag. Both items which had been recovered at the scene by the police were identified by PW17 as the items which the deceased had during her last moments.

PW18 Isaac Waithera testified as the motorcyclist who was telephoned by PW17 to go and drop her at home. PW18 who confirmed operating motorcycle reg. No. KCMC 578B told this court that he complied and went to pick PW17 from Josmart Club. PW18 however explained that though he was expected to go back in order to pick and drop the deceased that did not happen because he encountered many police officers on patrol. He therefore decided to abandon the idea and went to sleep. PW18 did not know how the deceased left for home.

PW19 Cpl Feisal Jama testified as Safaricom Call Data and Mpesa analyst. In his testimony PW19 explained that a request was made by CID Loitokitok to provide call data for mobile No. 0703-882-766 with effect from 20/12/2013 – 1/1/2014. The evidence by PW19 was to the effect that the analysis done revealed that the mobile number belonged to Augustine Ndinda – the deceased in this case. PW19 further told this court that the deceased had made several calls with the last call being at 1.43 am on 23/12/2013. The communication according to PW19 was in Loitokitok – Kamukunji area. PW19 also confirmed that the same mobile phone was used by Titus Mwasya PW4 from 10/2/2014 – 3/3/2014. Thereafter PW19 testified that another request from the same CID office was written requesting call data analysis of mobile number 0712[...]. In his testimony PW19 explained that the call data analysis revealed that the mobile number is registered in the name of Ngula Muthusi of ID No. [...].

According to PW19 the call data of the number was from 5/7/2009 – 6/2/2015. It was further the testimony of PW19 that by reading and examining the call data of mobile No. 0712[...] alongside mobile number 0703[...] it revealed the following:

That several calls were made from mobile No. 0712[...] to 0703[...] with the first one on 23/12/2013 at 0.23.46 hrs and the last call at 1.43 hrs on 23/12/2013. He also explained that the call data entry revealed that the caller of 0712[...] called mobile number 0703[...] twenty times on the same day. The call data record extract was produced as exhibit 6(c), 2(c) and (d), certificate of ownership of mobile numbers 0712[...] as exhibit 62(e) and certificate under section 65(5) and section 106(b) of the Evidence Act. Exhibit 6(f) as evidence in support of the prosecution case.

PW20 John Nyangaresi a chief inspector of police testified as having visited the scene of murder on 23/12/2013. At the scene where he found the deceased body he observed and saw a deep cut on the right jaw. PW20 made arrangements to have the body taken to the mortuary and the personal items like ATM, ID card, handbag taken in custody as evidence.

PW21 Dr. Kennedy Opiyo testified by going through the contents of the postmortem report which he conducted on 24/12/2013. Dr. Opiyo testified that the deceased sustained deep cut wound 9cm long anterior neck exposing the trachea, deep cut wound right jaw 14 cm with fracture right mandible, lost teeth, swollen tongue, deep penetrating wound left infra a vinculum region, severed left carotid, internal and external jugular veins, deep cut wound, shoulder extending from left to right exposing inner structures, right infra scapula deep penetrating wound 4cm, the upper limbs, dislocation over bilateral

wrists suggesting of being tied right haemothorax cut wound upper right lung. He also expressed his opinion that the cause of death was cardio pulmonary collapse following hypovolemic shock due to cut wounds.

PW22 Mohammed Tusinguyo testified as the owner of motor vehicle reg. KBM 743E. The witness recounted the details of how the accused hired his motor vehicle to transport himself and the family to Emali for Christmas celebration. According to PW22 he negotiated the fare with the accused and on reaching an agreement he dropped them at Kiboko. In his evidence having accomplished the mission he made a return journey back to Loitokitok.

PW23 Detective IP Geoffrey Kibet Samburumo testified as the investigating officer. According to PW23 he alluded to the role he played in recording witness statements. PW23 also testified as having attended to the incident in seeing to it that a postmortem was conducted, the recovery of the mobile phone and relevant call data extraction from Safaricom, tracing the last moments of the deceased, verification of the ownership of mobile numbers in communication with the deceased or about the day of the incident. PW23 also told the court that the retrieved brown leather jacket, bird mobile phones AJO mobile phone, techno mobile phone inventory, bundle of documents of the accused which were relevant to the prosecution case were in his custody. The exhibits were produced by PW23 and admitted in evidence as exhibit 1 (a) (b), 5 (a) (b), 8 (a) (b), 9, 10 and 11 in support of the case put together by the prosecution.

At the close of the prosecution case the accused was placed on his defence under section 306 (2) of the Criminal Procedure Code. The accused gave a sworn statement of defence. The accused version is that he knew the deceased through his herbal medicine practice at Loitokitok. According to the accused the deceased came to know of his herbal medical practice by his sign post pointing the location of his clinic. He was also introduced to the deceased as a patient by one Munyao Muli. According to the accused he is a licensed herbal practitioner by the Ministry of Culture and Social Services vide licence exhibit 11. The accused told this court that on 22/12/2013 and 23/12/2013 he spoke with the deceased severally and it was all about her illness. The accused further testified that he had prepared various drugs which the deceased was expected to come to the clinic to pick and start taking for her treatment. The accused admitted that his last telephone call was at 1.43 am on 23/12/2013 with the deceased when she informed him that she would not be able to go to the clinic for her medicine. As the Christmas and festival season was around the corner the accused stated that he organized his family and left for Kiboko. That is the place he spent the Christmas holiday with the rest of the family including paying a visit to his in-laws. The accused also denied handing over any mobile phone to PW3 as alleged in the evidence by the prosecution.

In a nutshell the accused denied that he was involved in any way in killing the deceased. He maintained that his relationship with the deceased was that of patient/doctor and nothing more.

Ms. Moinket learned counsel submitted that when she appraised the entire evidence the prosecution has failed to prove its case of murder against the accused. Learned counsel argued that the testimonies of PW1, PW2, PW3, PW5, PW6, PW4 all the way to the investigating officer PW23 consist of inconsistencies and contradictions which was fatal to the prosecution case. Ms. Moinket learned counsel submitted that there was no eye-witness to the murder. Learned counsel contended that the case against the accused was purely circumstantial. In her evaluation the circumstantial evidence relied upon by the prosecution failed to satisfy the criteria in law to link the accused with the crime. Learned counsel relied on the case of *Mwangi & Another v Republic [2004] 2KLR 32*. Ms. Moinket learned counsel on the other hand submitted and discounted the evidence on the doctrine of recent possession put forth by the prosecution. The bone of contention by learned counsel is in respect of the fact that the accused was never found in possession of the deceased phone. In support of this issue learned counsel invited the court to examine the evidence by PW2, PW3, PW4, PW13 and PW23 to make a finding that the doctrine of recent possession does not apply in this case as against the accused. Learned counsel placed reliance on the case of *Isaac Nganga Kahiga alias Peter Nganga Kahiga v Republic Cr. Appeal No. 272 of 2005*. Ms. Moinket learned counsel further submitted that in absence of the evidence on the doctrine of recent possession and also circumstantial evidence not able to consistently prove the facts of the case and place the accused at the scene, there is no case against capable of proving guilt of the accused. She urged this

court to find that the burden of proof for the offence of murder contrary to section 203 has not been discharged beyond reasonable. That therefore according to learned counsel should be resolved in favour of the accused person and benefit with an acquittal.

As for the state Mr. Akula, the senior prosecution counsel submitted that the twenty three witnesses provide a nexus which points at the accused as the perpetrator of the crime. Learned counsel for the state further submitted that the doctrine of recent possession and the electronic evidence on the call data places the accused person at the scene of the murder of the deceased. The learned counsel further canvassed that the proven facts as required under section 107 (1) of the Evidence Act are that the elements of the offence contrary to section 203 have been proved beyond reasonable doubt. In support of the entire prosecution case and the issues which emerged at the trial learned counsel placed reliance on the following cited authorities; *Isaac Nganga Kahiga alia Peter Nganga Kahiga v Republic Cr. Appeal No. 272 of 2005, Mohamed & 3 Others v Republic 21 KLR, Mwangi & Another v Republic [2004] 2KLR 32, Libambula v Republic [2003] KLR 683, Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990.* The learned counsel for the state argued and urged this court to apply the principles laid down in the cited authorities above and find that the prosecution has put forward a watertight case against the accused to warrant for a verdict of guilty and conviction.

I have considered the evidence at the trial, the rival submissions by both counsels to the issues for determination of this case. The accused in this case has been charged with the offence of murder contrary to section 203 of the Penal Code. The prosecution is therefore required to prove the following elements beyond reasonable doubt namely;

- 1. The death of the deceased Augustine Ndinda Muema.**
- 2. That the death of the deceased was by unlawful act.**
- 3. That in causing death the perpetrator/accused did it with malice aforethought.**
- 4. That it was the accused who committed the offence.**

I will now turn to consider each of the ingredients of the offence and the evidence advanced by the prosecution together with the defence by the accused person.

a. Death of the deceased.

In the offence of murder proof of the death of the victim and positively identifying the deceased is an essential ingredient. As stated by *Tibamanya Mwene Mushanga, in his book Homicide and its Social Cases (Law Africa) publishing (K) Ltd 2011 NBI, 31* that:

“Homicide is the taking of human life by a human being. That evidence to establish the death is therefore crucial. The evidence must point to the person particularized in the charge sheet so as to create a nexus to the deceased and the offender.”

In our jurisdiction the law is well stated that proof of death is usually through medical evidence. The prosecution does this by production of the postmortem report upon examination of the deceased body by a qualified medical doctor or pathologist. This however does not lessen the burden to prove the death of a deceased person by other cogent and credible circumstantial evidence in absence of an autopsy report.

On this element i have considered the evidence of PW7, PW8, PW9, PW13 and PW16 whose testimonies refer to the visit to the scene where the body of the deceased was discovered lying in the bush in the morning of 23/12/2013. The photographs of the scene processed and developed by PW12 documented the scene including the deceased body. PW1 the employer to the deceased prior to her death positively identified that the deceased his employee is dead. It is not in dispute that the deceased on 22/12/2013 was alive and going about her duties at Josmart club upto around 1.00 hrs. PW21 conducted a postmortem on the body of the body of the deceased at Loitokitok Hospital Mortuary. The postmortem report exhibit 7 is

indicative that the body of Augustine Ndinda aged 36 years being female adult is dead. It is further not in dispute that the deceased body as confirmed by PW21 in his autopsy report had sustained multiple injuries with severe ones to the head. The defence has not disputed the death of the deceased.

I am therefore satisfied that the prosecution has proved beyond reasonable doubt that Augustine Ndinda, the deceased is dead.

b. That the deceased death was by unlawful act:

This is what the law defines as the actus reus of the offence. The prosecution is obligated to establish that the death of the identified deceased was caused by unlawful acts or omission which resulted in death. (See *Criminal Law (Law Africa Ltd Reprint 2016) by William Musyoka J at pg 300 2(a)*.)

The elements or acts attributable to the cause of death are defined under section 213 of the Penal Code to include the following circumstances where an accused:

a. He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death.

b. He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precautions as to his mode of living.

c. He by actual or threatened violent causes such person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused.

d. He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death.

e. His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other person.

It is also trite that the offence of murder and other homicides are presumed unlawful unless committed in execution of a court order, reasonable defence of property or self (see generally the law in the case of *Republic v Guzambizi S/O Wesonga [1948] 15 EACA 65*.)

In order to establish acts of omission the prosecution summoned the evidence of PW19 who testifies as gazetted scenes of crime officer. The photos of the deceased body confirm that she was lying dead next to a bush. The deceased had suffered multiple injuries and some of them were oozing blood. PW17 parted ways with the deceased on 22/12/2013 or about 1.00am where she showed no signs of ill health or any physical injuries. The deceased body was discovered in the early hours of the day on 23/12/2013 by PW7, PW8, PW9, PW13 and PW16 in unexpected location along Bondeni area near a slaughter house dead with multiple injuries. These injuries seen by the witnesses who arrived at the scene were confirmed by PW21 when examining and finally documenting the findings in the postmortem report. The injuries as depicted by PW21 in his report demonstrate clearly an assault against the deceased involving both blunt and sharp objects. As opined by PW21 the bodily injuries suffered by the deceased caused his death.

I am satisfied that the prosecution has tendered sufficient evidence to prove that the deceased was attacked and assaulted by a third party. As a consequence she suffered grievous harm which is consistent with her death. These are not the kind of injuries which can be said to be self-inflicting or someone falling on the ground or hitting herself against some objects.

The ingredient of unlawful act has been proved beyond reasonable doubt.

c. The third ingredient is that of malice aforethought:

Malice aforethought as defined under section 206 of the Penal Code is established when any one of the following circumstances are proved beyond reasonable doubt.

- a. An intention to cause the death of another.
- b. An intention to cause grievous harm to another.
- c. Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
- d. An intention to commit a felony; and
- e.”

There are strings of cases which have given rise to the interpretation on malice aforethought. In *Paul Muigai Ndungi v Republic [2011] eKLR* the Court of Appeal held that:

“Malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievous harm to any person.”

In *Bonaya Tutut Ipu & Another v Republic [2015] eKLR* the court stated inter alia that:

“Malice aforethought is the mens rea for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case.”

The phrase ‘*aforethought*’ as used under section 206 of the Penal Code does not imply deliberate acts or lapse of time but it refers that malice on the part of the offender must precede the act of killing the victim. The elements of intention to kill where malice aforethought can be inferred are discussed in *Republic v Tubere S/O Ochen [1945] 12 EACA 63* the Court of Appeal of Eastern Africa stated as follows:

“In determining whether malice aforethought has been established the court has to consider the nature of the weapon used, the manner in which it was used, part of the body injured, the nature and number of injuries inflicted, the conduct of the accused immediately before and after the attack.”

In the case of *Ernest Bwire Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990*, the Court of Appeal held inter alia that:

“Malice aforethought can be inferred from the manner of the killing the victim, if the grievous harm consists of the death of the victim is caused by intentional infliction of extreme, or brutal prolonged acts of assault for one to conclude that the killing was well calculated and planned that alone is sufficient to infer an intention to kill the deceased.”

Malice aforethought is also present if the accused has an intention to cause grievous bodily harm (See *Samwel Mosirigwa Manderu v Republic Cr. Appeal No. 59 of 1995, Musyoka & Others v Republic [2003] 1EA 177, Cunningham v DPP AC 566*).

The meaning of intention to commit an offence or existence of malice aforethought was succinctly stated in the English case of *Hyam v DPP [1974] 2 ALL ER 41* where Lord Diplock stated:

“No distinction is to be drawn in English Law between the state of mind of one who does an act because he desires it to pronounce a particular consequence, and the state of mind of

one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act.”

In *Lemon v DPP [1979] AC 617* Lord Diplock further stated:

“It is by now well settled law that both states of mind constitute ‘intention’ in the sense in which that expression is used in the definition of a crime whether at common law or in a statute. Any doubts on this matter will finally laid to rest by the decision of this House in *Republic v Hyam [1975] AC 55.*”

In addition to the above analysis in the case of *Stevens v Queen [2005] 227 CLR 319 – 346* on what the courts should look for to infer the necessary specific intention. The court states as follows:

“The accused is under no obligation to prove any of these matters. Before you can convict, you must be satisfied by the prosecution on whom the onus lies, beyond reasonable doubt; that the death was not an accident, that is, not an event which occurred as a result of an intended and unforeseen act or acts on the part of the accused; and that it would not have been reasonably foreseen by an ordinary person in his position.”

The mental element in murder cases was also discussed in the case of *Republic v Nedrick [1986] 1 WLR 1025 at 1028*. The court stated as follows:

“Where the charge is murder and in the rare cases where the simple directions is not enough, the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty barring some unforeseen intervention as a result of the defendants actions and that the defendant appreciated that such was the case.”

In light of the above principles the prosecution adduced evidence of PW21 Dr. Opiyo who did the postmortem examination. The injuries as stated by PW21 were multiple, severe and targeted the right jaw, face, shoulders, lungs arteries, fractured right mandible, severed left carotid, deep cut wound 9cm long to the neck. The deep cut wound to the jaw was 14 cm. The back had deep cut wounds one measuring 30cm long from the left to the right side. According to the doctor both hands of the deceased were handcuffed as demonstrated by discolouration. The photographs processed by PW19 and produced as exhibit 3(a) to the injuries as seen externally and corroborated by the autopsy report. The testimony of PW17 clearly shows that prior to 1.00am on 23/12/2013 the deceased enjoyed good health. The bodily injuries found on the deceased must have been inflicted immediately or soon thereafter when they parted ways at Josmart club. The doctor PW21 went on and stated that the cause of death was a result of cardio pulmonary collapse following shock due to multiple deep cut wounds. In the present case there is cogent evidence that the deceased was repeatedly assaulted targeting various vulnerable parts of her body. The deep cut wounds signifies use of a sharp object accompanied with brunt force. There is also a definitive finding that while the deceased was being assaulted both hands were handcuffed. According to PW20 when he visited the scene there was evidence and signs of struggle presumably between the assailant and the deceased. In accumulative analysis of these meters pertaining to the gravity of the injuries and the force applied to inflict each one of those definitive conclusion. I arrive is that of the intention of the attackers to kill the deceased; or cause her grievous harm.

I am satisfied that the person who killed the deceased had all the time to occasion the bodily harm. I believe also from the circumstantial evidence that the assailant was armed with a sharp weapon/object which facilitated infliction of some kind of torture on the deceased. It is also clear that whoever killed the deceased left the scene when he had confirmed that there was nothing left like a life anyone in view of the devastating injuries. By the deceased body being hidden from the public view at some bush an inference to be drawn is that of possibility of decomposition as way of destroying evidence to implicate the perpetrators. The intention therefore to be inferred before, during and after against the perpetrators is that of malice aforethought. I have no doubt in my mind elements under section 206 (a) and (b) of the Penal Code which constitute the intention to cause death or the intention to cause grievous harm have been

reflected in the circumstances of this case beyond reasonable doubt.

Malice aforethought as an ingredient for the offence of murder has been proved by way of circumstantial evidence by the prosecution.

d. I will not turn to consider the ingredient on identification and placing the accused at the scene:

This case against the accused is purely circumstantial evidence. The concept of circumstantial evidence has evolved over time through judicial interpretation in various string of cases. This has played a major role in drawing a distinction between direct or eye-witness evidence to where facts relevant to the issue are inferred from the prevailing circumstances to prove a fact in existence. The Supreme Court of India a country we drafted the provisions of our Evidence Act had this to say in the case of *Sathya Narayan v State [2013] 80 ACC 138 SC*. The court elucidated the five principles the court should look for when applying circumstantial evidence.

- 1. The circumstances from which the conclusion of guilt is to be drawn should be full established. The circumstances must but should and normally be established.**
- 2. The facts so established should be consistence only with the hypothesis of the guilt of the accused, that it to say, they should not be explained on any other hypothesis except that the accused is guilty.**
- 3. The circumstances should be of a conclusive nature and tendency.**
- 4. They should exclude possible hypothesis except the one to be proved.**
- 5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion of the accused and must show that inconsistent with the innocent of the accused and must show that in all human probability the act must have been done by the accused.**

As discussed in the case of *Republic v Taylor, Weaver and Donovan [1928] 21 Cr. Appeal R20*

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of materialics.”

In our own courts judicial precedents on circumstantial evidence with similar principles like *Sathya Narayan Case (Supra)* has been made in a number of cases to mention just but a few; *Chimera Omar Chimera v Republic Cr. Appeal No. 56 of 1998, Simon Musoke v Republic [1958] EA 715, Mwangi v Republic [1983] KLR, Elis Bwire Abanga Onyango v Republic [1990] UR eKLR at pg 32.*

In all these decisions the key principle is that which requires the court to satisfy itself before relying on circumstantial evidence that there are no other co-existing circumstances which would weaken or destroy the inference of guilt.

The question which begs for an answer in the present case is what are the chain of events. That can satisfy the above principles. The pivotal points in the chain in respect of tracing the foot prints of the deceased with effect from the 22/12/2013 – 23/12/2013 when this body was discovered can be sequenced as follows:

From the record PW1 the owner of the bar where the deceased worked confirmed that she was on duty as usual attending to customers upto 1.00 am. This was corroborated by the testimony of PW17 a co-worker at the same bar and who at the close of business did stock taking and handed over Ksh.40,000 to the deceased. It is also not in dispute that PW17 and the deceased left the bar together for their respective

homes on or about 1.00 am on 23/12/2013. According to PW17 when the motorcyclist PW18 came to give them a ride home the deceased opted to remain at the gate. The agreement was for PW17 to be dropped first so that PW18 will come for the deceased in the second trip of the journey. However as fate would have it PW18 never honoured his promise of coming back for the deceased. The next time PW17 was getting in contact with Augustine Ndinda she was dead. The same night PW17 alluded to the fact that throughout the evening and part of the night the deceased was in possession of her mobile phone. In reference to the said mobile phone in silver/black colour made AJO PW17 duly identified it positively as belonging to the deceased. PW17 further confirmed to this court that it is the same phone which the deceased was heard communicating it in Kamba language as from 10.30 pm. That communication was later to continue on and off including calling for motorcycle to take her to the house after work. As they parted ways at the gate of Josmart club, PW17 stated that the deceased was in possession of her mobile phone.

The investigating officer PW23 who conducted the investigations interviewed PW3 who confirmed the 25th day of Christmas his brother PW13 had been given a mobile phone by accused to sell on his behalf. It emerged according to PW3 that his brother did not have sufficient money to pay for the phone. That therefore forced accused person to give PW3 the same phone to sell to a third party which he did at Ksh.700 (seven hundred only). According to PW3 he sold the phone to PW4 earning a commission of 100 (one hundred shillings). It was the same mobile phone PW4 was arrested with by the police during the ongoing investigations on the murder of the deceased. In the testimony of PW4 he used the mobile phone for a while but later exchanged with another one on request by PW15.

During the trial PW3, PW4 and PW15 all identified the subject mobile phone to the original beneficiary the deceased in this case. When PW23 progressed with the investigations he caused a verification of the ownership be undertaken by Safaricom Company to establish the true owner. According to PW23 the mobile phone identified as AJO black with a twin SIM card provision was registered in the name of the deceased Augustine Ndinda. The deceased mobile phone was singularly identified by IME number 354393051442130. It was produced and admitted in evidence as exhibit 1 (a).

The accused in his defence denied selling or carrying out any commercial transactions involving mobile phone exhibit 1(a) with any of the witnesses PW3, PW4, PW13 and PW15. Considering the evidence of PW3, PW4, PW13 and PW15 i find each of them forming a chain of events on the subject mobile phone exhibit 1(a) which points at the accused as the source and generator of the phone offering it for sale. The accused in his defence did not impeach nor weaken any piece of the chain of evidence as placed before court by PW3, PW4, PW13 and PW15. The absence of James Musembi Yulu did not weaken the case by the prosecution in any way as regards the movement of the mobile phone between the 24/12/2013 and 25/12/2013.

I believe the testimony offered by PW3, PW4, PW13 and PW15 which was not shaken even with the vigorous cross-examination by Ms. Moinket for the accused. I find no reason to doubt their credibility nor a basis of falsify the information on the sale against the accused. It is also interesting to note some of these witnesses do not live in Loitokitok where eventually the police traced the mobile phone to be that of the deceased. In the definition of possession in section 4 of the Penal Code the accused was in possession of the mobile phone with the knowledge that he came to possess it after the death of the deceased.

The inference i draw from the prosecution case is that PW4 was an innocent purchaser who later exchanged the same phone in good faith with PW15. I cannot equate him as accomplice to the crime under review on the charge facing the accused.

The doctrine of recent possession and its application has been discussed by the Court of Appeal in the case of *Isaac Nganga Kahiga alias Peter Nganga Kahiga v Republic Cr. Appeal No. 272 of 2005* where the court held:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words there must be positive proof.

First: that the property was found with the suspect, secondly, that the property is positively the property of the complainant. Thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to one, as has been stated over and over again, will depend on the easiness with which the stolen property can be from one person to the other.”

Once the prosecution has proved the case against the accused as required under the law on this issue, under the statutory exceptions the accused has to provide an explanation in rebuttal. This was the legal proposition in the case of *Stephen Njenga Mukuria & Another v Republic Cr. Appeal No. 175 of 2003* where the Court of Appeal held:

“The burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved basic facts. Firstly that the item he had in his possession had been stolen a short period prior to the possession, that the lapse of time from the time of the loss, to the time the accused was found with it was, from the nature of the items and the circumstances of the case recent: that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver. See also *Mangi v Republic [1989] KLR 22.*”

In my appraisal of the evidence placed before me by PW23 IP Geoffrey Sambulumo the mobile phone in question was proved to belong to the deceased. The deceased was in possession of the phone in the night of 22/12/2013 and or on or about 1.00 am on 23/12/2013. PW13 Gladys who spent the last moment with the deceased gave direct evidence to this court regarding the mobile phone exhibit 1(a). The person who could have taken away the mobile phone did it between 1.00 am and the time the deceased was killed. In view of the evidence of PW3, PW4, PW13 and PW15 the issues of recent possession has been banked at the door step of the accused. This phone was property of the deceased who was found one day after her death. Though it had changed many hands in a short period there is no evidence to exonerate the accused from being in possession.

The doctrine of recent possession applies in this case which the accused failed to give any explanation as required by law in cases of this nature.

In addition to the foregoing, i now revert to the issue of the alleged voice communication between the deceased and the accused person on 22-23/12/2013. The prosecution on this relied on the testimony of PW19 Cpl Feisal Jama of Safaricom Liason Office on call data records and Mpesa accounts. From the record extracted from Safaricom PW19 confirmed that mobile No. 0703[...] with IME 354393051442130 is registered in the name of the deceased Augustine Ndinda while mobile No. 0712[...] is registered in the name of Musembi Ngula Muthusi. According to PW19 the accused mobile number called the deceased mobile number on 22/12/2013 at 15.48 hrs, 15.57.21 hrs, 21.47.54 hrs. Further in PW19 testimony the accused called the deceased a total of 22 times the last being at 1.43 hrs on 23/12/2013. In support of the analysis PW19 produced in evidence extract data for IME mobile number 0703-882766 and for IME number for mobile number 0712[...] as exhibit 6(c) (d) (e) in compliance with section 106 (B) of the Evidence Act Cap 80 of the Laws of Kenya. PW19 tendered a certificate as a requirement of the law that the electronic evidence meets the threshold of section 65 (8) as read with section 106 (B) of the Evidence Act.

I have also considered the provisions of section 78A of the Evidence Act on admissibility of electronic evidence. I am of the conceded view that the evidence by PW19 satisfies the legal criteria on admission of electronic evidence as outlined under section 78A of the Evidence Act Cap 80 of the Laws of Kenya. The accused on his part admitted calling the deceased severally but stated that the calls were purposed to require the deceased to pass through the clinic to pick her medicines. In my mind i am unable to agree with the version by the accused for the simple reasons, the time, nature and number of calls made. The accused is confirmed from Safaricom data to have called the deceased twenty two (22) times. These calls

continued on 22/12/2013 until 1.43 am on 23/12/2013. The calls were at to time and proximity within the same cluster period. There is evidence to circumstantially corroborate PW19 from PW17 that the deceased was first heard talking to a caller who spoke in Kikamba. It emerged that the accused is Kamba ethnic group. The presumption we draw is that the call between the deceased which PW17 heard the communication was from the accused. I reject the explanation by the accused that his relationship with the deceased was that of doctor/patient. I agree with the prosecution counsel appraisal that the accused through his mobile number 0712[...] communicated with the deceased number 0703[...] consistently from 15.48 hrs on 22/12/2013 to 1.43 hrs totalling to about 30 times.

When i hold the web of the evidence before me in this case i find no co-existing circumstances that weakens the prosecution case or destroy the inference of guilt against the accused. The inconsistencies being referred to by the defence counsel are of such a nature minor which do not go to core nor fatal to the case presented by the prosecution against the accused. The burden of proof of beyond reasonable doubt expected of the prosecution is not that of beyond all iota of doubt. See **Miller v Minister of Pensions [1947] 3 ALL ER 373.**

What is clear from the analysis of the evidence is that all the essential ingredients of the charge of murder contrary to section 203 of the Penal Code have been established by the prosecution. In the result the prosecution having discharged the burden of proof i find the accused guilty of murder contrary to section 203 of the Penal Code and do convict him accordingly.

Dated, delivered and signed in open court at Kajiado on 15th day of May, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Accused - present

Mr. Akula Senior Prosecution Counsel – present

Ms. Moinket for the accused - present

Mr. Leonard Court Assistant - present