



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 31 OF 2014

LESIT, J.

REPUBLICPROSECUTION

VERSUS

SHEILA WANJIKU KIBINGE.....ACCUSED

JUDGMENT

1. The accused person faces one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that:

“On the night of 14th/15th April, 2014 at Gitaru Village in Kikuyu Sub-county within Kiambu, the accused murdered one Leonard Kibinge Kiruri.”

2. The prosecution called fifteen (15) witnesses. The accused gave a sworn defence and called no witness. This case was started by Ombija, J. as he then was who heard a total of ten witnesses. I took over the case on 14th November, 2016 under **sections 201(1)** and **200** of the **Criminal Procedure Code** and continued with the case to the end.

3. The following is a summary of the prosecution case: PW1 and PW9 were tenants at residential houses near the scene of crime. They stated that on the night of 15th April 2014, they heard a loud bang which was followed by two gunshots. PW9 called the police and informed them of the incident. PW9 stated that he saw a vehicle hit the gate of a nearby homestead. PW1 and PW9 stated that when the police came, they drew near the vehicle and saw a man inside the said vehicle bleeding from the head.

4. PW2 a taxi operator in Kikuyu town stated that, he was driving to Kikuyu town from Gitaru area at around 3.00 am on the 15th day of April 2014, when he saw a brown lady dressed in a trouser and a top walking alone towards Kikuyu town. PW2 testified that he found this quite unusual as the said road was not safe at that time. PW2 stopped his vehicle and asked the lady why she was walking alone at wee hour of the morning but the lady gave no reason. PW2 stated that he offered the said lady a lift to Kikuyu town and she obliged. PW2 said that he dropped her at Kobil/Makutano Junction, in Kikuyu.

5. Later that day at around midday, PW2 was informed by PW3 that he was required at Kikuyu Police Station in relation to the lady he had offered a lift to on that morning of 15th April, 2014.

6. PW3 also a taxi operator in Kikuyu town stated that he was also approached by a lady on 15th April,

2014 at around 3 a.m. clad in a bui-bui who told him that she wanted to be ferried to Nairobi town. He charged her Ksh. 1300/= out of which she paid an advance of Ksh.500/= which he used to refuel his car. PW3 testified that the lady sat at the co-driver's seat and appeared very disturbed prompting him to enquire whether she was sick. He said that the lady replied that she was sick but that she had her medication with her. PW3 said that the lady instructed him to rush her to Nairobi because she wanted to link up with someone.

7. PW3 testified that upon reaching Kinoo area, he heard some clicking sound in his car next to the lady he was ferrying and at first thought that she was carrying a ticking bomb. PW3 got afraid and asked the lady what the clicking sound was. The lady replied that it was his balance she was preparing. PW3 stated that the lady asked him to drop her at the nearest Police Station which he did at Central Police Station.

8. PW3 said that the lady paid his balance of Ksh.800/= after which he proceeded directly to Kikuyu Police Station where he made a report with regard to the suspicious clicking sounds he had heard. PW3 said that he was summoned to Kikuyu Police Station to identify the lady he had dropped off at Central Police Station, but he informed the police that he could not identify the lady as she was dressed in a bui-bui at the time.

9. PW11 was the Duty Officer at the Crime Recording Office at Central Police Station on 15th April 2014. He testified that the accused approached him in his office at about 3am on the material date and reported that she and her husband had been carjacked as they headed home. He recorded the report in O.B. No. 4 of 15th April, 2014 at 3:33am and referred her back to Kikuyu Police Station for further police action.

10. PW11 produced the O.B. and an extract of the OB as P. Exhibit 23 and P. Exhibit 23A respectively. PW11 explained that he could recognise the accused as the lady who made the report because she was wearing a long checked dress; that she looked very terrified and that considering the nature of what she was reporting, he had to remember her. PW11 said that the accused had no visible injuries when she reported the incident to him.

11. PW8 was the Duty Officer at Kikuyu Police Station on the material night. She stated that together with PW7, they proceeded to the scene at Gitaru area near Jacks Apartment where they found the motor vehicle registration number KAQ 881N, a Toyota Rav4 maroon in colour, having veered off the road and crushed against a gate. PW8 noticed that the left rear door was widely open and inside the said motor vehicle she saw the deceased body seated on the driver's seat, strapped with the seatbelt and bleeding from the head.

12. PW8 arranged to have the car towed to Kikuyu Police Station. PW8 later re-visited the crush scene in company of the DCIO, PW14 and scene of Crime Scene Officer PW13. PW8 stated that she saw the following items which she produced in court as exhibits: 3 live bullets P. Exhibit 2 (a), (b) and (c), a used cartridge P. Exhibit 22, and a black headscarf P. Exhibit 3. PW8 said that she later escorted the body of the deceased to PCEA Kikuyu Mortuary.

13. PW12 testified that at around 2.20am he received a call from a police officer from the police control room informing him of an incident at Gitaru Area along the Kikuyu Wangige Road. PW12 testified that he called PW9 who explained to him that he had heard gun shots near his house. PW12 instructed PW7 and 8 to attend to the scene.

14. PW12 testified that later proceeded to the police station where he saw the deceased seated on the driver's seat supported by a seat belt and that the deceased had a bullet hole on the head, and that blood had spilled all over inside the car. PW12 said that he spotted a shiny object in the car and on picking it up, he realised it was a bullet head that was identified as P. Exhibit 21. PW12 stated that he also recovered a black purse P.Exhibit4 in the car. Inside the black purse was a Safaricom wallet P.Exhibit 5 with an ID card bearing the names Esther Nyakio Kairu P.Exhibit7 (a). PW12 stated that an anonymous person called him later at around 11 am and informed him that the suspect had been traced. He requested the caller to bring the suspect to the station. The accused was escorted to the station by one Mr. Kinuthia

who claimed to be a relative of the accused.

15. PW12 stated that the scene of crime was inside the motor vehicle and that was the reason he had it secured. PW12 also admitted that the decision to remove and tow the vehicle from the scene of incident before the scene of crime had conducted their investigations was an error of judgement.

16. PW13 the Crimes Scene Officer stated that he visited two scenes pertaining to this incident; that is the motor vehicle registration number KAQ 887N which was parked at the Kikuyu Police Station Yard and the crush site at Gitaru area. He first took photos of the motor vehicle at Kikuyu police station and later proceeded where the motor vehicle had allegedly crushed. At the 2nd scene PW13 stated that he recovered 3 bullets of 9mm calibre P.Exhibit2 (a), (b) and (c), one used cartridge P.Exhibit22 and one scarf P.Exhibit3. PW13 produced the booklet of photographs as P.Exhibit24, his certificate and report as P.Exhibit25.

17. During cross-examination, PW13 stated that he could not tell if the 1st scene had been disturbed before he photographed it. He further stated that no dusting was done on the motor vehicle as the vehicle had already been towed from its initial crush site and it was drizzling at the time. PW13 stated that he tried dusting the dashboard but the material was not good enough to generate positive results. PW13 did not find any object for DNA testing.

18. PW10 conducted a post mortem on the body of the deceased on 17th April, 2014 at PCEA Hospital Mortuary. PW10 said that the deceased was dressed in a maroon sweater, brown t-shirt and brown trouser which were all stained with blood. PW10 found a stellate entry gunshot wound on occiput with a bullet lodged on the right side of the head; a second bullet entry wound on the back side of the neck in midline which had exited on the front of the neck at the midline; and, a third bullet entry wound on the left side of the chest located between the 1st and 2nd rib just below the armpit whose exit was on the right upper arm on the backside.

19. Internally, PW10 found a bilateral laceration to the lung and the heart with bilateral haematoma. There was a skull fracture with an inner bevelled entry gunshot wound at occiput with radiant friction from the walls, with brain laceration and haemorrhage. PW10 formed the opinion that the cause of death was multiple injuries due to gunshot wounds. PW10 produced the post mortem report as P.Exhibit 20. PW10 retrieved a bullet from the head and produced it in evidence as P. Exh. 21.

20. PW14 the lead investigating officer in this case searched the vehicle on 15th April 2014 and recovered a wallet from the deceased containing 3 ATM cards P.Exhibit28, a Safaricom purse P.Exhibit5, Kshs. 810/= P.Exhibit6, an identity card in the name of Esther Nyakio Kairu P.Exhibit7(a), a torch P.Exhibit26, a car mat P.Exhibit31, a Black purse P.Exhibit4, two (2) spent cartridges P.Exhibit1 and 8, a bunch of keys P.Exhibit27, a pair of spectacles P.Exhibit30, and two (2) Samsung phones P.Exhibit29(a) and (b). PW14 also recovered a scarf P.Exhibit3, 3 live ammunitions P.Exhibit2 (a), (b) and (c) and 1 spent cartridge P.Exhibit22 at the scene of the incident.

21. A trial within a trial was conducted concerning two statements under inquiry recorded by PW14 from the accused. The court in its ruling on 21st November, 2014 admitted the statement dated 15th April, 2014 into evidence. PW14 produced the same as P.Exhibit32. That statement was admitted into evidence because it was taken by PW14, the Investigating Officer as a statement under inquiry before PW14 commenced his investigations. The second statement was not admitted for reason PW14 had already carried out some investigations when he took it, and must have been privy to some information at the time. What PW14 should have done is to request a senior officer not involved in the investigations to record the second statement from the accused.

22. PW14 said that on 21st April, 2014 in the course of investigations, he went to Mash Bus Company Offices to confirm what the accused had alleged that she had travelled from Uganda to Kenya using Mash Bus Company, on the 13th day of April, 2014. PW14 stated that he checked the records at the Bus Company where he confirmed that the accused had not been a passenger on any of the buses that plied

that route the entire month of April. He produced a certified copy of Mash Bus Company passenger manifest dated 21st April, 2014 as P.Exhibit34. PW10 testified that he also obtained the accused passport and checked to confirm whether it had any entry stamp from Uganda, and found none.

23. PW14 conducted a search in relation to ownership of motor vehicle KAQ 887N and found that the vehicle belonged to the accused and deceased. He produced the search document as P. Exhibit 35. PW14 prepared an exhibit memo P. Exhibit 38 and forwarded three (3) rounds of ammunition P.Exhibit2(a), (b) and (c), three (3) empty cartridges P.Exhibit1, 8 and 22 and a bullet recovered from the deceased head P.Exhibit21 to the Ballistic expert for purposes of examination of the said exhibits.

24. PW14 stated that he did not recover any murder weapon in relation to the offence. He stated that what led him to charge the accused with murder was the fact that her testimony was not consistent. He testified that the inconsistencies arose from the facts that the accused had indicated that she came to Kenya via Uganda but her entry point was not stamped on her passport; that the accused had bypassed Kikuyu Police Station which was 500 metres from the scene of the incident and other Police Stations which were along the way to Central Police Station which was kilometres away; that the accused had changed her clothes to a bui-bui before going to Central Police Station and finally the fact that PW3's account of the events all pointed to the accused as the culprit.

25. PW14 stated that the motive of the offence would have been a tussle over a land situated in Mtwapa which had been sold by the deceased. He produced a demand letter dated 20th February, 2014 from Housing Finance addressed to the accused and deceased persons as P.Exhibit39 in support of this narrative. PW14 produced a P3 form in respect of the accused by consent of all parties as P.Exhibit40.

26. PW15 stated that he received and examined the following exhibits on the 16th April, 2014: three (3) rounds of ammunition P.Exhibit2 (a), (b) and (c), three (3) spent cartridges P.Exhibit1, 8 and 22 from one P.C Edward Gasio. PW15 examined the exhibits and found that P.Exhibit2 (a), (b) and (c) were live round of ammunitions of 9 by 19mm normally used in pistols and submachine guns. PW15 compared P.Exhibit1, 8 and 22 under a comparison microscope and established that they were ammunitions of 9 by 19mm fired from one gun. PW15 explained that there was sufficient matching on the injector bridge face markings and firing pin markings born by the P.Exhibit1, 8 and 22. PW15 produced his report dated 18th May 2014 as P.Exhibit41.

27. PW15 stated that on the 24th day of April, 2014 he received a fired bullet P.Exhibit21 from one P.C John Ngata. PW15 said that P.Exhibit21 was a 9 by 19mm parabellium which meant before it was fired it was part of a 9 by 19mm calibre. He examined P.Exhibit21 and formed the opinion that the bullet could have been fired by a 9 mm pistol or a machine gun. He stated it was of the same calibre as P.Exhibit2 (a), (b), (c) and (c) and P.Exhibit1, 8 and 22. PW15 produced his report dated 27th June 2014 as P.Exhibit42. PW15 explained that if a gun malfunctions it fails to release a bullet and once the bullet is stuck and one is not experienced in handling the gun, one would cock the gun causing it to release a full bullet. PW15 stated that, that could have been the reason why live bullets may have been found at the scene.

28. The accused was placed on her defence and she gave a sworn statement. She stated that on the 14th of April 2014, she arrived in Kenya at around 9.30pm from Uganda via Mash Bus Service. She produced D.Exhibit1 as proof that she used to travel via different countries to and from Kenya.

29. The accused stated that she asked her daughter via email to inform the deceased that she had arrived in Kenya and was waiting for him at Ambassador Hotel. She stated that after the deceased picked her up, they got into the deceased car and proceeded to Gitaru area within Kikuyu. The accused stated that since she was tired, she fell asleep in the car and woke up at Kinoo area where she realised that they had stopped and her husband was talking to two men. She stated that one of the men got into the back of their car as the other person got into a white car that followed them.

30. The accused said that an argument ensued between the man who had joined them and the deceased leading to the anonymous man asking for her phone and hand bag which she gave him. She stated that the

man asked for more money which led to more arguments. The accused stated that soon thereafter there was big bang and the car got off the road. The accused stated that she woke up and found her door open. She then unbuckled her seat belt and fell outside the vehicle and started to run to get to safety.

31. The accused stated that as she was walking on the road, she noticed a vehicle following her. The vehicle slowed down as the driver kept on asking her where she was going. She answered that she was headed home because she was coming from work late. The driver offered her a lift to Kikuyu town. The accused said she was dressed in a shawl, a long red and black shirt and black jeans. On arriving at Kikuyu Town, the accused stated that she asked a taxi driver to take her to Westlands Police Station but the driver took her to Central Police Station. The accused stated that she paid the taxi man 800/= as that was the agreed price and not 1300/= as PW3 had indicated.

32. At Central Police Station, the accused narrated her ordeal to the officers who were present. The officers called Kikuyu Police Station to report the same and referred her to Kikuyu Police Station as it was the jurisdiction of the incident. She stated that at around 4.00am her statement was recorded. She stated that the brother took her to Kikuyu Police Station where she was informed of the death of the deceased. The accused said that the months just before the incident took place she had gotten the deceased a green card as they were planning to go live together in the USA. She produced a blank form with the deceased name as D.Exhibit2. She further produced a document from the citizenship immigration services bearing number A.63145524 as D.Exhibit3.

33. During cross examination, the accused stated that she travelled with US travelling documents which were stamped and as such she did not need a visa. She stated that she used a modern new bus by name Mash or something and could not dispute what PW14 had stated concerning her name not being in the Mash travel records for the entire month. She stated her home was 15 minutes away from the scene of crush but she did not go towards that direction as it was dark. She further stated that PW2 terrified her and carried her by force to Kikuyu town. She also stated that what PW3 described as a clicking sound was the sound of her belt buckle that she was unbuckling to enable her get money to pay the driver his balance.

34. The accused was represented by two defence counsels Mr. Mbutia and Mr. Gitahi, who made submissions. The defence urged that there were three issues in dispute in this case. The first one was whether the prosecution had adduced sufficient evidence to prove that the accused pulled the trigger that killed the deceased. Secondly, whether the prosecution had adduced sufficient evidence to establish the three ingredients of circumstantial evidence and thirdly, whether the prosecution had established the ingredients of murder beyond reasonable doubt.

35. The defence urged that the prosecution had failed to prove that the accused shot the deceased. The defence urged that malice aforethought had not been proved. Counsels further urged that none of the witnesses saw the accused or indirectly linked her to the offence. Counsels urged that the investigations in the case were not professionally carried out and were biased against the accused as she was arrested when she had gone to report her ordeal.

36. The defence urged that the prosecution tried to frame the accused by alleging three probable motives for the offence which included an alleged dispute over the actual amount of money realized from the sale of a property which the deceased had sold and a love affair involving another woman in the deceased life. Counsel urged that these theories were well disputed by the accused in her defence and only amounted to innuendos and mere suspicions.

37. The defence cited several authorities in support of their arguments that the prosecution had failed to prove the three issues raised by the defence. They cited **REPUBLIC V FREDLICK WAKALA Case No. 51 of 2011** for the proposition that since there was no eye witness to establish that the accused committed the offence of murder, the case had not been proved. The defence also relied on **SAWE V REPUBLIC C.A No 2 of 2002** for the proposition that suspicion however strong is not sufficient to found a conviction and that the prosecution must prove the charge against the accused beyond any reasonable doubt. I agree with this decision and I have relied on it in this judgement.

38. The defence cited **PETER MOATE OBERO & ANOTHER V REPUBLIC C.A No. 177 of 2008** for the proposition that circumstantial evidence relied upon by the prosecution should be strong enough as to be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of the accused guilt.

39. The defence also cited **R V HARRISON KAMURI WAHOME C.A No. 111 of 2005** which spells out the duty of the court to examine each and every circumstance relied upon by the prosecution to determine their strength. I agree with this holding relied on by the defence. It is in tandem with **CHARLES MATHENGE MWANGI & ANOTHER V REPUBLIC C.A No. 72 of 1997** which I have quoted herein.

40. The defence relied on **ABANGA alias ONYANGO & ANOTHER V REPUBLIC C.A No.32 of 1990** for the proposition that there are tests which must be met in order to firmly establish circumstantial evidence. I have no quarrel with that proposition. I have quoted this same case in this Judgment.

41. Learned prosecution counsel Ms. Onunga urged that the prosecution had proved its case beyond reasonable doubt. Counsel urged that the demeanor of the accused before and after the murder was inconsistent with her innocence. Counsel urged that the accused had sneaked into the country and it was not clear how the accused met the deceased at Ambassador Hotel. Counsel urged that the accused was placed at the scene as she had admitted to having left Ambassador Hotel with the deceased on the date in question.

42. Counsel further urged that, the fact that the accused opted to report the incident that had happened in Kikuyu, a place and environment that she claimed to be very familiar with, but opted to travel all the way to Nairobi 20 km from Kikuyu was consistent with the fact that she was covering a crime which was the murder of the deceased. Learned Prosecution Counsel urged that malice had been established from the nature of the injuries inflicted on the deceased and that the motive for the murder was apparent from the fact that the accused was a bitter woman who intended to revenge with the death of the deceased who had sold her piece of land in Mombasa but had lied to her on the amount of moneys received.

43. Having carefully considered all the evidence adduced before court and the submissions by all counsels I find that the issues for determination in this case are:

I. Whether the circumstantial evidence adduced by the prosecution was sufficient to prove the charge against the accused.

II. Whether the prosecution had proved malice aforethought.

III. Whether the prosecution had proved the motive for this offence.

IV. Whether the failure by the prosecution to recover and therefore produce the murder weapon was fatal to the prosecution case.

V. Whether the accused defence was reasonable and plausible.

44. The accused faces a charge of murder contrary to **section 203** as read with **section 204** of the **Penal Code** which stipulates as follows:

“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.”

45. **Section 206** of the **Penal Code** sets out the circumstances which constitute malice aforethought in the following terms.

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

1. 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,

2. 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;

3. An intent to commit a felony;

4. 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.”

46. The onus and evidential burden lies with the prosecution to prove its case against the accused person beyond any reasonable doubt. The prosecution must prove that it was the accused who by an unlawful act or omission caused the death of the deceased. The prosecution must also equally prove that at the time the accused committed the unlawful act or omission that led to the deceased death, she had formed an intention to either cause death or grievous harm to the deceased.

47. In regard to the issue **whether the circumstantial evidence adduced by the prosecution was sufficient to prove the charge against the accused.** There was no direct evidence in this case. The prosecution is therefore relying on circumstantial evidence to prove the charge against the accused. The law on circumstantial evidence is now well settled. In the Court of Appeal case of **CHARLES MATHENGE MWANGI & ANOTHER –V- REP CA NO. 72 OF 1997** (unreported), OMOLO, TUNOI JJA and RINGERA Ag. JA held:

“The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example REX vs. KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135.

With profound respect to the learned Judge, it was his duty to himself and to the assessors to specify which circumstances he was relying on and what inference(s) he was drawing from those circumstances. We have ourselves set out what we think were the circumstances the prosecution was relying on and we have come to the conclusion that those circumstances are not necessarily incompatible with the innocence of the appellant. We do not know if the Judge would have come to the same conclusions had he set out each individual circumstance, and analyzed it as we have done. Nor was it fair to the assessors to be given directions on the general principles applicable to circumstantial evidence without explaining to them the individual circumstance and asking them what inference they thought could be drawn from the circumstance.”

48. In **SAWE –V- REP[2003] KLR 354** , the Court of Appeal set out the principles applicable when considering circumstantial evidence and held as follows:

“1. 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.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. 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.

4. ...

5. ...

6. ...

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

49. PW14 was the lead Investigating Officer to this case. He set out the circumstances the prosecution was relying on in his evidence. I will re-state them hereunder once again. PW14 stated that he did not recover any murder weapon or any gun that he could relate to the offence and that what led him to charge the accused with murder was the fact that her story was not consistent. He testified that the inconsistencies arose from the facts that the accused had indicated that she came to Kenya via Uganda but her entry point was not stamped on her passport; that the accused had bypassed Kikuyu Police Station which was 500 metres from the scene of the incident and other Police Stations along the way to Central Police Station which was several kilometres away, where she reported the matter; that the accused had changed her clothes to a bui-bui before going to Central Police Station; and finally the fact that PW3's account of the events all pointed to the accused as the culprit.

50. will examine each circumstance cited by PW14, and compare it with the rest of the evidence and accused defence. As to the inconsistencies from the facts that the accused had indicated that she came to Kenya via Uganda from the USA but her entry point was not stamped on her passport. The passport is deposited in court as part of the condition for release on bond.

51. The accused in her defence conceded that her passport did not have any visa for travel but explained that the reason was the fact she did not need a visa to travel to USA. She did not deny that her passport did not have an entry stamp into Kenya from outside Kenya. Her defence was that she had travelled with USA travel documents which bore the stamps. She said that she left the said documents in the car when she ran after the incident. The accused produced D. Exh 1 which were itinerary forms from Delta Airlines. I have looked at them and find that they relate to periods in April and August 2013. There was none for the period in question.

52. The prosecution evidence shows clearly that the accused had not travelled back into Kenya using her passport. Had she come from USA via Uganda, the passport should have borne witness to same. There is no way any other document other than a passport could have enabled the accused to travel, unless she was being deported, which was not the case here.

53. Also related to this point is the prosecution's P. Exhibit 34, the Passenger Manifest from Mash Bus Company. The Mash Bus Company Manifest was not disputed by the accused. In fact her evidence was that she does not dispute the evidence of PW14 because that is what he found. In re-examination the accused said that she waited from morning to evening for a vacant seat to travel to Kenya from Uganda. That at 6.00pm she was told of a vacant seat and she paid and entered the bus. She said that no receipt was issued for that payment.

54. I find that the story that the accused was travelling back to Kenya via Uganda from USA was not true. The bus company she claims she used did not have her name. The Airline Itinerary she produced related to a period of one year and eight months before the date of the incident. Her story that she paid for a bus seat but got no receipt cannot be true. It was stated in re-examination which clearly shows that it was an afterthought. The only reasonable conclusion to make from these set of circumstantial evidence is that the accused was not returning from Uganda as she claimed. She was within Kenya at the time in question. That means her allegation that the deceased had gone to pick her having come from outside Kenya was not true. The conclusion I draw from this is that the accused had not travelled from USA or Uganda at the material time. Her defence that she used other documents than the passport which she presented to PW14

is a lie.

55. The accused went ahead to produce documents to prove that she was in the process of getting a Visa Card for her husband the deceased in this case so that they could live in the USA where she was based. The documents were D. Exh. 2 and 3. D. Exh 2 was an Immigration Visa Applicants Form. Apart from the deceased name written by hand, the details of information required by the form were not filled and it was therefore blank. That form does not confirm accused claim that she had applied for a Visa Card for the deceased. The second form, D. Exh 3 was a USCIS Immigrant Fee form. This one had information and numbers filled by hand. It does not confirm anything that the accused claims.

56. The other circumstance the prosecution is relying on is the fact the accused had bypassed Kikuyu Police Station which was 500 metres from the scene of the incident and other Police Stations which were along the way and went all the way to Central Police Station which was kilometres away. Along that fact is the nature of the report that the accused made at Central Police Station. PW11 was the Report Office Officer to whom the accused reported the incident. His evidence was that the accused reported a kidnapping incident which occurred against her and her husband. The report was entered in the OB at 3:30am that night.

57. I did consider the evidence of PW2 that he saw the accused walking alone on a very unsafe area in Kikuyu and insisted on giving her a lift to Kikuyu, a place that was much safer. The accused admits that evidence. In her defence she said that PW2 forcefully persuaded her to take his offer for a lift which she obliged. PW2 described the accused as calm and collected at the time.

58. I also considered the evidence of PW3 that the accused hired him to drop her in Nairobi. He said that the accused appeared shaken and disturbed and asked him to rush to Nairobi as she wanted to link up with someone. PW3 said that on their way to Nairobi, just at Kinoo, the accused asked him to drop her at the nearest police station and so he drove her to Central Police Station.

59. The accused defence was that she knew Kikuyu area very well as that is where she was born, and also later married. She however said that she could not think of the nearest Police station from the incident, and that PW3 took her to Central despite asking him to take her to the nearest police station.

60. From PW3's evidence the accused first statement to him was that she was in a rush to link up with someone in Nairobi. It was only much later as they passed Kinoo area that the story changed and she said she wanted him to drop her at the nearest Police station. PW3 did not know accused before. He had no reason to lie against her.

61. I have taken into account the fact that PW2 and 3 said they carried the accused around 3am. I have also considered the fact that her report at Central Police Station was recorded by PW11 at 3:30am upon which PW11 referred her to Kikuyu Police Station. I considered that the accused surfaced at Kikuyu Police Station at 11am, several hours later. That was the evidence of PW8 and 14. It is quite clear from these facts that the accused knew that Kikuyu Police Station was the relevant station to report the matter to. Yet she took long to finally get herself there. The only conclusion is that she was delaying the eventual police action for the deceased death, and went around in the wrong places probably to buy time.

62. As to the fact that the accused changed her clothes to a bui-bui before going to Central Police Station. PW2 said that the accused was dressed in a trouser and top when he dropped her at Kikuyu Town, a fact the accused admitted in her evidence. PW3 said that the accused had a bui-bui when he carried her from Kikuyu Town, whereas PW11 stated that she had a long checked dress when she reported the incident at Central Police Station. This change of clothing is unexplained. The accused does not deny meeting all these people, that is she does not deny being with PW2, 3 and 11. It cannot be said that she was trying to disguise herself. However the only conclusion I can make is that she must have had help to change clothes from a third party as none of these witnesses saw her carrying any bag in which clothes could be carried.

63. The other circumstance relied upon was the fact that PW3's account of events all pointed to the

accused as the culprit. According to PW3, the accused appeared shaken and disturbed, but under the buibui she was wearing he heard a clicking sound which terrified him so much that after dropping the accused at Central Police Station, he proceeded straight to Kikuyu Police Station where he reported carrying a suspicious person who may have had a bomb. The accused explained that the clicking sound PW3 heard was her buckle for her belt as she counted coins to pay him. About the pay, PW3 said that the accused paid 500/= up front as initial deposit and the balance of 800/= after arriving at her destination. The accused said she paid only 800/= and no more. If that is true, then she did not need to make clicking sounds with her buckle as she looked for coins to pay PW3.

64. The other circumstance which presented itself in this case was the fact that the accused has not denied being with the deceased in their motor vehicle when the incident happened. That evidence places upon the accused a statutory burden to discharge a rebuttable presumption as spelt out under **sections 111(1) and 119** of the **Evidence Act**. These sections stipulate as follows:

111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

65. The court of appeal in the case of **Douglas Thiong’o Kibocha V Republic (2009) eKLR** expressed themselves on the applicability of **sections 111 and 119** as follows:

“when parliament enacted section 111(1) above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters especially within his knowledge otherwise the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. Section 111(1) above places an evidential burden on an accused to explain those matters which are especially within his knowledge. It may happen that the explanation may be in nature of an admission or a material fact.”

66. The accused was with the deceased in their motor vehicle on the fateful night. With the deceased having been found dead in the same car, I find that the accused has a statutory burden to explain how they parted ways with the deceased or how he met his death. The accused stated that she heard a single blast which woke her up from her sleep, and realized that the car had veered off the road and crushed. She stated that she saw the deceased head leaning on the steering wheel and that her immediate thought was to walk away which she did. She stated that she walked on foot towards Kikuyu Police station and was later forced by PW2 to board his vehicle.

67. In the court of Appeal case of **ERNEST ABANGA ALIAS ONYANGO VS REPUBLIC CA NO 32 OF 1990**, the court observed:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellants were convicted of murder and the case against them was mainly based on

circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

“The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”

“This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond reasonable doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent availability”

68. I found it difficult to believe that the accused could walk away before finding out whether her husband was okay. The accused admitted that she heard a blast after which the vehicle veered off the road. That is the more reason why she should have checked on the deceased to find out why he crushed into a fence. There is no way she could have missed to see the bullet hole on his head and the other two wounds on the deceased neck and chest area. She could not have missed what according to PW8, Scenes of Crime PW13 and the I.O. PW14 and others described as splashed blood all over the inside of the vehicle. The accused explanation that she was sleepy when the vehicle veered off the road after which she decided to walk away does not explain her indifference to the deceased.

69. I also considered the evidence of PW1 and 9, who lived near the fence the deceased crushed into. Their evidence was that they were woken up from sleep by the sound of a blast and gun shots. There is no way the accused can feign ignorance that three gun shots were fired. And since she does not deny that she was seated right next to her husband at the time, the gunshots were definitely loud enough for her to hear. Also related to this point is the pathologist's PW10 finding that from the nature of injuries the deceased suffered, the shooting was at point blank range. PW10 went further to state that if the victim was driving the car before the injuries were inflicted, then the assailant who shot the deceased must have been in the car.

70. I find that the accused decision to walk away from the scene without finding out what had happened to her husband a very unnatural reaction. Further the accused did not bother finding out what had caused the blast that awoke her from her sleep. PW2 who was the first person to interact with the accused described her as calm and collected. All these circumstances compared with the common course of natural events, point to the accused as having had an unnatural reaction which I find is inconsistent with what was expected of her having heard the blasts and seen the vehicle veer off the road. This reaction is inconsistent with innocence. I find that the accused explanation that all she heard was a loud blast and not a gunshot or gunshots a blatant lie. I find her explanation that she decided to walk away without finding out about the deceased also a lie.

71. As to **whether the prosecution had proved malice aforethought**. The weapon used in this incident was a firearm. It follows that anyone who fires at and shoots a person with a gun knows or ought to know that the injury inflicted is likely to cause the death of that person. I also considered that PW2 who was the first to see the accused after she left the vehicle said that she was calm and collected. That calmness immediately after the shooting portrays indifference and is consistent with the conduct of someone who was not affected by what had just happened. Having been in the car when the incident happened clearly shows the accused was involved in the commission of the offence. Having considered these facts, I find that malice aforethought under **section 206 (b) of the Penal Code** was proved.

72. As to **whether the prosecution had proved the motive for this offence**. In regard to motive PW14 stated that the motive of the offence would have been a tussle over a land situated in Mtwapa which had been sold by the deceased. He produced a demand letter dated 20th February, 2014 from Housing Finance addressed to the accused and deceased persons as P.Exhibit39, in support of the reason he believed that the sale of Mtwapa land formed a motive for the murder. The accused maintained that she had no quarrel

with the deceased, and that on the few occasions they had quarrelled they had reconciled.

73. The legal position is that motive need not be proved. This is evident under **section 9(3) of the Penal Code** which stipulates thus:

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

74. That provision was the subject of interpretation in the case of **Choge Vs Republic (1985) KLR1**, where the Court of Appeal held as follows:-

“Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1stappellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.”

75. I find that the evidence adduced to prove motive was controversial. The prosecution apart from alleging that the sale of the land situated in Mtwapa was formed part of the motive for the offence, they failed to link the alleged sale to the demand letter produced as an exhibit in the case. The upshot of this failure is that motive was not established.

76. As for the issue **whether the failure by the prosecution to recover and therefore produce the murder weapon was fatal to the prosecution case.** The murder weapon was not found or recovered.

77. In **EKAI V REPUBLIC (1981) KLR 569** the court held:

“That failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the post mortem report had established beyond reasonable doubt that the injury from which the deceased died had been caused by a sharp bladed weapon.”

78. The Court of Appeal in the case of **KARANI V. REPUBLIC (2010) 1 KLR 73** delivered itself thus:

“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit”.

79. The Court of appeal took a similar approach in **RAMADHAN KOMBE V REPUBLIC, Mombasa C.A. NO. 168 OF 2002** - where it held:

“In the matter before the trial court and before us, the cause of death of the deceased is patently obvious. The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the doctor who prepared the post mortem report was cross-examined. The failure by the prosecution witness to produce the murder weapon was not fatal to the case of the prosecution nor did it prejudice the appellant’s defence. We have no hesitation in rejecting this submission” (emphasis added).

80. I find that the failure to recover the murder weapon was not fatal to the prosecution case. The accused left the scene before the police arrived. Given the testimony before the court, the accused had both the

time and opportunity to dispose of the weapon. Secondly the weapon used to cause death is patently clear, it was a firearm. The pathologist PW10 in his evidence confirmed that the cause of death was multiple injuries due to gun-shots from a low velocity firearm. Indeed PW10 recovered one of the bullets fired lodged inside the deceased head. There is no doubt that it was a firearm used to commit this offence and as such the failure by the prosecution to produce the murder weapon is not fatal to their case.

81. As to **whether the accused defence was reasonable and plausible**. I have already set out the accused defence in this judgment and have analyzed it alongside the entire evidence adduced before this court. I have come to the conclusion that the accused was the principle perpetrator to the deceased murder. Whether she did it alone or with others, we do not have evidence. However, with her frequent change of clothes, it may be possible that she worked in cohorts with others. I find that the circumstantial evidence adduced by the prosecution in this case can only lead to the drawing of one conclusion that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge.

82. I find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. I am satisfied that there are no other existing circumstances weakening the chain of circumstances relied on.

83. In conclusion I find that the prosecution has proved the charge of murder against the accused contrary to section 203 of the Penal Code beyond any reasonable doubt. I reject the accused defence as a sham, unreasonable and implausible. I find the accused guilty as charged and convict her accordingly.

DATED AT NAIROBI THIS 20TH DAY OF JULY, 2017.

LESITT, J

JUDGE