IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 30 OF 2012

LESIIT, J.

REPUBLIC.....PROSECUTION

VERSUS

ERIC MUTUA DANIEL…….....ACCUSED

JUDGEMENT

1. The accused person **ERIC MUTUA DANIEL** is charged with **Murder** contrary to **section 203** as read with **section 204** of the **Penal Code.**

> **"The particulars of the offence are that on the 14th day of April 2012 at Ongata Rongai Township within Kajiado County, murdered Daisy Wamunyu Mukiria."**

2. The prosecution called a total of 14 witnesses. The accused person gave an unsworn statement in defence. This case was heard by Ombija J, both the prosecution and the defence case. I took over the case under **sections 200** and **201 (1)** of the **Criminal Procedure Code (CPC),** at the submissions stage.

3. The facts of the prosecution case are that the deceased was found dead at Plains View Bar and lodging, in room number 6, in Ongata Rongai town. This was on the 14th April 2012 at about 6.30 pm. Earlier the same day, the accused person booked room number 6 from the bar attendant, PW1. PW1 issued the accused with a receipt for the payment, P.Exh.1 At 6 pm the same evening the accused went back to PW1 and bought a bottle of beer and returned with it to room 6.

4. PW2 who was a watchman at the Bar and lodging said that at 3.30 pm he was at the side of the kitchen from where he could see the lodging rooms. PW2 said that he saw the accused talking to the bar man, PW1. He then saw a lady on the corridor and asked her whether she needed assistance but she did not respond. He said that the deceased was dressed in a red T-shirt and pencil jeans. Shortly later he saw the accused and the lady, who is the deceased in this case, together. The two entered room no. 6 and before they entered PW2 greeted the accused and sought to know why he had been away for a very long time. PW2 testified that ten minutes later he saw the deceased wrapped in a towel going towards the bathroom. He identified that towel as P.Exh.2.

5. At about 6.30 p.m. PW2 was passing along the same corridor when he saw the door to room no. 6 ajar. PW2 first reported to the bar attendant, PW1. He then returned to the room and upon pushing the door realized that it had been blocked by a chair. That is when he saw the deceased in a kneeling position and sitting on her thighs, with the head touching the floor and with a nylon rope around her neck. The rope was P. exhibit 1.

6. PW3 a sister of the deceased told the court that the deceased left home on the 23rd April in the afternoon hours dressed in a red t-shirt and a black jeans commonly known as pencil jeans. PW5 who was the scene of crime officer who visited the scene to take photographs confirmed that the deceased was dressed in the same clothing when her body was found in room no. 6. He produced them as P. exhibit 3 and his report as P. exhibit 6. Before the deceased left, a person had asked for her at the gate of her home from their house maid (PW10). PW10 was not able to identify the person who had asked for the deceased on the material day in an ID parade conducted.

7. The accused person was arrested on the 17th April, 2012 by PW6 at Mfangano, within Nairobi Central Business after laying an ambush. PW6 carried a quick search on the accused person and he recovered an ATM card bearing the names of the deceased and a blackberry mobile phone, produced as P. Exhibit 4 and 5 respectively. The mother of the deceased, PW4 identified the mobile phone and the ATM as her late daughter's property. She also produced the receipt, charger and the box for the mobile phone to prove ownership.

8. PW6 arrested the accused on 17th April 2012 at 10 am outside Tusky's supermarket at Mfangano Street in Nairobi and recovered the deceased's ATM card number 0610196822980 and black berry phone serial number 38863304552709 from him before they charged him with murder. PW14 the investigating officer corroborated PW6 and said that they recovered the deceased's Equity ATM card no. 0610196822080 P. exh.4, black berry mobile phone serial No. 358033045552709 P. exh. 5 and a Nokia phone serial No. 35867501996467/2. Other exhibits handed to the CID were blue shoes, a blue manila string, P. exh.3, a grayish towel, P. exh. 2 and a receipt book of the lodging called plains view with a duplicate No. 902 in the name of Eric dated 14th April 2012 for room number 6.

9. PW8 a Chief Inspector of Police conducted an identification parade at Ongata Rongai Police station on 17th April, 2012. In that parade PW2 in this case identified the accused person as the man who had booked room no.6 at Plains View Bar on the 14th of April. As stated earlier, PW10 who was also called to identify the accused person was not able to identify him.

10. On 25th April 2012, PW11 Chief Inspector Onyango took charge and caution statement from the accused person. The statement was admitted unopposed as P.Exh.10. At the time PW11 recorded the statement from the accused, the accused had invited two witnesses, Daniel Muthama Elijah his father and Justus Mwendwa Mule his cousin. In that statement the accused stated that he went for the deceased at her home. He said that they agreed to meet later at a lodging place and that the deceased gave him her ATM card and pin number in order to withdraw money to pay for the room because he had no money. He said that he went and withdrew the money and proceeded to book a room. The deceased joined him there later. At around 3 pm the accused stated that the deceased took a shower outside the room and then returned to the same room. He said he was fiddling with the deceased phone when the deceased returned to the room. The accused stated that the deceased inserted his sim card in her phone, and that soon thereafter, another girl by name Jackie Nyawira called the accused's number in the deceased's phone. The accused stated that the deceased became aggressive and started hurling insults at him and tried to get her phone back from him. The accused said that in the process he pushed the deceased and because there was water in the floor, she fell down and did not wake up again. He said he got worried and decided to go home. He said that he learnt later that the deceased died.

11. The doctor who performed the postmortem examination on the body of the deceased found a blue nylon code doubling around the neck with a slip knot, multiple ligature impression with inverted Vs' on the left petechial with haemorrhage on sclera and conjunctivae. Internally the doctor found slight subcutaneous contusions frontal scalp which in his evidence the doctor said was not significant. After the examination the doctor formed the opinion that the cause of death was neck compression due to hanging.

12. The accused was placed on his defence and he gave a sworn statement. He stated that he met the deceased who was his girlfriend at Plains View bar on 14th April 2012 and booked a room where they stayed until 4 pm. The accused said that a disagreement and an altercation arose between him and the

deceased when another lady called him. The accused stated that he pushed the deceased to the floor and she fell down after which he left the room and went home. He said that he was arrested three days later and charged with the murder of the deceased. He denied the charge.

13. The accused faces a charge of **murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. Murder is defined under **section 203** as follows:

> **"203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."**

14. The prosecution has the burden of proof in this case and should prove the charge against the accused beyond any reasonable doubt. The prosecution must adduce evidence to show that the accused by some act or omission caused an injury or injuries on the deceased out of which injuries the deceased died. The prosecution must adduce evidence to prove that at the time the accused committed the act or omission he had formed the necessary intention to either cause the death or grievous harm to the deceased.

15. The intention to cause death or grievous harm is malice aforethought. Under **section 206** of the **Penal Code** the circumstances which constitute malice aforethought are set out as follows:

> **"206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—**
>
> **a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
>
> **b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
>
> **c) an intent to commit a felony;**
>
> **d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."**

16. I have carefully considered the evidence adduced by the prosecution and the defence. I have also considered the submissions made by Mr. Were, Counsel for the accused and by Ms. Onunga for the Prosecution.

17. In his submissions, Mr. Were urged that the cause of the deceased death contained in the post mortem report was neck compression due to hanging and the court only had to determine whether the hanging was done by the accused person, someone else or it was suicide. Counsel urged that malice afore thought had not been proved as the confession statement showed that it was the deceased who called the accused and requested that they meet. Counsel urged the court to acquit the accused as he was not connected in any way to the nylon rope that was found on the deceased neck.

18. I also considered the submissions by Ms. Onunga learned Prosecution Counsel for the State. In her submissions, Ms. Onunga urged that the State had proved its case beyond any reasonable doubt. The accused, she said had been identified by PW1 and PW2 who placed him at the scene, and also testified that they knew the accused well since he frequented Plains View Bar & Restaurant where they worked. Counsel urged that the accused was the last person seen with the deceased person before she died. The leaned counsel urged that he admitted being with the deceased at the bar in his statement in defence. Learned Counsel urged that the accused also admitted that he pushed the deceased in the room and that she fell down and hit the floor.

19. Counsel urged that the accused statement under caution was therefore a confession as he admitted the

events of that day. Ms. Onunga urged that the only conclusion that could be made from the circumstances of the case was that the accused strangled the deceased with a rope and feigned that the deceased committed suicide.

20. Ms. Onunga submitted that when the body of the deceased was discovered, the position in which it was found did not support the suicide theory as she was found kneeling with her head touching the floor. Further, counsel urged that the nylon rope used to strangle the deceased could not support the deceased's body.

21. Having considered the facts of the case for both sides and the submissions by both counsels, I found that there are some facts which are not in dispute. There is no dispute that the accused hired room number 6, at Plain View Bar on the afternoon of the fateful day. There is no dispute that the accused and the deceased entered the room and remained there from 3:30 pm when PW2 saw them together. There is no dispute that the accused went away from the room leaving behind the deceased. It is also not in dispute that the accused was found in possession of an ATM card bearing the deceased names, and a Black berry phone which the accused admits belongs to the deceased.

22. The issues which arise in the case are:

a) Whether the prosecution case had inconsistencies and if so whether they were material to the prosecution case;

b) Whether the prosecution has proved motive;

c) Whether there was foul play in the death of the deceased;

d) Whether the prosecution has established malice aforethought against the accused;

e) Whether the defence by the accused is reasonable and plausible.

23. I considered whether there was inconsistency in the evidence adduced by the prosecution. PW3 the deceased's sister said she last saw her leave their home on the 23rd April 2012 never to be seen again. All the other witnesses, PW2, 4, 10 all stated that the deceased was last seen alive on the 14th April, 2012. It was also the same day she died. I looked at the original hand written record and confirmed that the date the court recorded from PW3's testimony was indeed 23rd April. I then counter checked with the record of the witness bundle which contains the typed statements of witnesses. The one in the name of PW3 shows clearly that the date this witness gave to the police was 14th April, 2012 as the date the deceased left home. I find that even if PW3 gave 23rd as the day the deceased left home it was human error. It appears the court did not grasp the date properly. This too is human error. I find the error is not material as it does not go to the core of the prosecution case.

24. I considered the issue of motive. From the record, there was no direct evidence of motive, ill will or grudge between the accused and the deceased that could have driven the accused to commit the offence. There was however some evidence from the mother of the deceased, PW4 to the effect that some women had gone to complain to her about the deceased in 2005. The complaint was that the deceased was moving with a tout called Eric. PW4 testified that the deceased denied moving with the tout and said that he only reserved a seat for her. PW4 testified that she did not however see Eric and did not know the accused.

25. The accused on his part claimed that the deceased was his girlfriend for four years prior to her death. That places the time of the friendship as between 2008 and 2012. The deceased had a child who was three years and eight months at the time she died. PW4 could not however tell who the father of the child was. She however stated that she did not think the accused was the father of the child and could not say whether he was jealous of her daughter.

26. There is no apparent motive for this offence. The court in the case of **Libambula v Republic [2003] KLR 683** reasoned that point thus:

> **"Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap. 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime."** (Emphasis added)

27. The lack to prove motive is not fatal to the prosecution case. I am guided by the court of appeal 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 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.**"

28. There was no eye witness to the incident. The prosecution is relying on circumstantial evidence. Regarding circumstantial evidence the principle which apples can be found in the oldest case on the point, **REP V. KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135**, where the Court held:

> **"In order to justify the inference of guilt, the inculputory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."**

29. In order to test whether the circumstantial evidence adduced by the prosecution meets the legal threshold the court in the case of **ABANGA alias ONYANGO V. REP C. A. NO.32 of 1990(UR)** the Court of Appeal stated thus:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."**

30. The prosecution relies on the evidence of PW1 and PW2, who testified that the accused booked a room at Plains View Pub where PW2 saw him with the deceased person before her body was found murdered, few hours later.

31. PW1 was the Bar Attendant at Plains View bar in Ongata Rongai who said that he had known the accused for a period of 3 years before the incident. He said that he booked the accused in room 6 at the lodging on 14th April 2012 at 3 pm and gave him a receipt having paid. PW2 saw the deceased, then the accused and the deceased together at around 3:30 pm. The accused has been placed at the scene, which the accused does not deny.

32. The real question is about the cause of the death of the deceased.

33. PW2 a security guard at the bar said he saw the accused alone at the bar on 14th April 2012 at 3.30 pm talking to the bar men. Shortly after, he saw the deceased and accused persons entering room 6 and even

spoke with the accused before they entered room6. PW2 said that after he saw the deceased wrapped in a towel labeled **"P.V Guest House"** going towards the bathroom at 3:30 pm. That evidence is confirmed by the accused who stated that the deceased went for a shower outside room 6. PW2 did not see her again until about 6.30 pm as he passed along the corridor, when he noticed the door to room 6 half open and the lights on. The door he said, was blocked from the inside using a chair. PW2 pushed the door and saw the deceased kneeling down with head on the floor and with a nylon rope tied around her neck and with a knot tied to the ceiling board.

34. The scene of crime officer took photographs of the scene on 15th April 2012 at 1 am. The photos show the deceased in a kneeling position with her bottoms resting on her thighs and with her head touching the floor. There is a nylon string around her neck attached to the ceiling with a knot but hanging loosely.

35. The evidence of PW5 was further corroborated by PW7 who also visited the scene on 15th April 2012. PW7 prepared a sketch plan of the room showing the position of the deceased's body inside room 6, which he produced as an exhibit.

36. The evidence of the pathologist, PW12 was to the effect that the deceased's death was a result of neck compressions due to hanging, which PW12 opined may not necessarily be suicide but could also have been murder. PW12 testified that he was not aware of the circumstances of the case, stating that the circumstances could be useful to determine the cause of death.

37. I dealt with the issue of doctors' opinion and the value of same to the court, in a 2003 case in which I presided namely: **REPUBLIC Vs. KAMLESH MANSUKLAL DAMJI PATTNI alias PAUL PATTNI [2005]eKLR. In the cited case, I quoted from a text, Sarkar's Law on Evidence 15th Edition Vol. 1**, the opening remarks under the title ***Medical opinion and its*** **value** thus:

> **"The opinion of physicians and surgeons may be admitted to show the physical condition of a person, the nature of a disease, whether temporary or permanent the effect of the disease or of physical injuries upon the mind or body as well as in what manner or by what kind of instruments they were made, or at what time wounds or injuries of a given character might have been inflicted, whether they would probably be fatal, or actually did produce death."**

38. In same text, **SARKAR ON LAW OF EVIDENCE** (Supra) I relied on a case quoted from **TANVIBEN PAKAJIKUMAR DIVETIA Vs. STATE OF GUJARATA 1995 SC 2196; 1997 Criminal Law Journal 2535, 2551** where it was suggested:

> **"The doctor who had held the postmortem examination had occasion to see the injuries of the deceased quite closely and in absence of any convincing evidence that he had deliberately given a wrong report his evidence is not liable to be discarded."**

39. In same case, **REPUBLIC VS PATTNI**, (supra), I quoted **REPUBLIC Vs. LANFEAR 1968 1 ALL ER 683** where **DIPLOCK, L. J**. gave the correct English position in regard to doctors evidence thus:

> **"… Our view is that the evidence of a doctor, whether he be a police surgeon or anyone else, should be accepted, unless the doctor himself shows that it ought not to be, as the evidence of a professional man giving independent expert evidence with the sole desire of assisting the court."**

40. And I continued to state as follows:

> **The above case did not elaborate on the statement to show when a doctor's evidence can cease to be treated as that of a professional man giving independent expert evidence. I did come across a more recent British authority which seems to lay down principles to be applied by the court to determine the value to be placed on such evidence. TURNER {1975} QB 834 at**

page 840;

'Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or had omitted to consider relevant facts, the opinion is likely to be valueless.'

It would seem then that the position in England seems to be that the facts upon which doctor's opinion is based must be disclosed and proved in evidence. Failure to prove them in evidence would render such an opinion of minimal or no value. In Kenya the position is quite clear and established, in <u>DHALAY vs. REPUBLIC {1997} KLR 514</u> the Court of Appeal held:

'It is now trite law that while the courts must give proper respect to the opinion of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.'

The acid test set out in this case is that an expert's opinion can only be rejected if there is proper and cogent basis for rejecting it. The principle was fortified in an earlier case <u>NDOLO vs. NDOLO {1995} KLR 390</u>. The Court of Appeal held;

'The evidence of PW1 and the report of MUNGA were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held, the evidence of experts must be considered along with all other available evidence and it is the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision… of course where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected."**'**

41. In this case the evidence of the pathologist was inconclusive and the doctor stated clearly that the cause of death of the deceased **"was not necessarily suicide and could have been murder."** It is therefore not the case of rejecting or accepting the doctor's evidence but the fact the evidence was not conclusive either way, and thus what a court ought to do in such circumstances.

42. As I stated earlier, the case was heard by another judge. Apparently, the circumstances of the case and the photographs showing how the body of the deceased was found were not shared with the pathologist, neither were facts of the case put to him in order to give him a chance to state his opinion. That being the case, it is the burden of this court to analyze the facts of the case, evaluate the evidence adduced in order to draw its own conclusions.

43. The facts are clear that the deceased and accused entered room 6 at 3:30 pm on the 14th April 2012. The next time the deceased was seen was at 6:30 pm when dead. The position in which the body was found is illustrative. The deceased body was resting on her legs in a sitting position with legs bent at the knee level and with the head touching the floor. The rope was attached to the ceiling on one end and tied to the neck on the other end. The body was not hanging, or dangling or any part of its weight carried by the string around her neck.

44. The doctor's finding at post mortem was that the deceased had multiple ligature impression with inverted Vs' on the left. The fact the ligature impression on the neck were multiple is suggestive of the fact the compression on the neck was not caused by a single bond of the string around the neck. It is suggestive of the fact the bond around the neck was repeated, moved or shifted in order to cause compression multiple times. This fact, revealed by the post mortem examination clearly shows there was another hand behind the tying of the string around the neck. It was not the work of the deceased.

45. The fact the deceased was found with her buttocks resting on her thighs in a sitting cum kneeling position and her upper torso leaning forward with the fore-head touching the floor, tells of the fact the

string never carried the weight of the deceased body; and further that the compression on the neck by the string was not as a result of hanging.

46. Given the circumstances in which the deceased body was found, it cannot be concluded that this was a suicide case. The suicide theory can only make sense if it is shown that the string around her neck carried the body, suspending it above the ground in order to create the compression on the neck that the doctor noted. It is the suspension of the body that could have caused a compression on the neck causing death.

47. In the absence of such suspension, the only conclusion one can make is that the deceased could not have committed suicide, but that her death was the act of another person, and therefore foul play was involved.

48. There was other evidence adduced by the prosecution in this case. PW13 the Government chemist examined items recovered from the scene to determine the presence and source of the blood stains. They included a grayish towel, a blue string and a grayish pair of shoes belonging to the deceased. PW13 also received mouth swabs of the accused and of the deceased's mother and father. PW13 after he carried out his examination concluded that the DNA profile generated from the blood stains on the towel and the string was that of the biological daughter of the donors namely the father and mother of the deceased. He presented the report as P. exh. 12.

49. The evidence from PW2 is that the towel, with words **'P.V. GUEST HOUSE'** which was P. exh. 2 was the one he saw with the deceased as she went to take a shower, slightly after 3:30 pm on the material day. PW2 testified that the deceased had used it to wrap her body with it. When PW2 saw the deceased again she was fully dressed. There was a manila rope around her neck, P. exh. 3.

50. PW7 who was among the first police officers to enter the room where the deceased body was found testified that he saw the towel, P. exh. 2 on a table on the far front as one enters the room (SIC). It was blood stained and thus he took it for purposes of DNA analyses.

51. The towel was on a table near the door and had the deceased blood on it. The deceased was dead at the middle of the room. From the doctor's evidence, the deceased body had no external injuries except the compression on her neck. The doctor saw bleeding on her body, on the sclera and conjunctivae. The area of the body known as sclera according to the **Encarta Dictionary** is **'tough outer coating of the eyeball'**. From the same dictionary, conjunctivae is '**a delicate mucous membrane that covers the internal part of the eyelid and is attached to the cornea'.**

52. Looking at the photographs taken at the scene, there was blood only on the floor near where the deceased body was found, precisely next to where her head was found resting. It is understandable how the deceased blood could be found on the rope or string found around her neck, P. exh. 3. The question is how did the deceased blood find itself onto the towel, far from where the deceased body was? The deceased must have bled from her eyes as a result of the compression on her neck. This is informed by the fact the blood stains were confined to the place where the deceased head was. It is evident that the only way the blood could have found itself to the towel could only have been by the act of a third party.

53. The other evidence was the fact the accused was found three days later having in his possession three items connecting him to the deceased and to room 6. First was the receipt for the payment of room 6 at Plains View Pub. Second and third were the deceased Black berry mobile phone P. exh. 5 and the deceased ATM Card P. exh. 4.

54. I will get to accused explanation about this later.

55. The question is whether the accused had an opportunity to commit the murder. The prosecution witnesses stated that there were no other customers in any of the rooms at the Bar that evening. The other rooms had padlocks on the outside. Only room 6, which the accused paid for was occupied, by the accused and the deceased. PW2 was the watchman on duty and he did not see anyone else in that area. The prosecution has established that the accused and the deceased entered the room number 6, in the full

glare of PW2. This is after PW1 allocated the room to the accused. The prosecution has established that the accused had an opportunity to commit this offence.

56. The accused has a statutory burden to negate a rebuttable presumption that he knows what caused the deceased death as the deceased was last seen alive in his company. That presumption has been created under **sections 111 (1)** and **119** of the **Evidence Act** which provides 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 prosecution, 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."**

57. There are two statements by the accused. The first one is the statement taken by PW11 a Chief Inspector of Police who recorded a statement under inquiry from the accused on 25th April, 2012 and produced it as P. exh. 10. In the statement, the accused said that the deceased is the one who called him and asked that they meet. The accused stated that he went to the home of the deceased and found her there at around 1:30 pm, on the 14th April 2012. He stated that they agreed to meet at the Plains View Lodging that day. He stated the deceased gave him the ATM Card to withdraw money for the room. He stated that they met and in the process he took her phone to look at. That the deceased put his sim card in the phone to show him how to operate it when a call came through. He stated that they had a disagreement over the phone call leading to a scuffle between them where he pushed her. That since the ground was watery the deceased fell and fainted. He then left her there out of fear as she was not responding after she fell.

58. The other statement is the accused sworn defence. The statement is similar to his statement under caution which he gave to the Police. He explains how things between him and the deceased changed after a lady called him on the mobile phone. He stated that the deceased became hysterical resulting in a disagreement which degenerated to a confrontation. The accused said that he then pushed the deceased and that since the floor was slippery, she fell down and that he left the room and did not return.

59. The accused defence does not explain several facts and issues in this case. There was an injury found on the deceased forehead which the doctor said was not significant and also could not have caused death. Even if the court was to accept accused explanation that he pushed the deceased and that she fell down, that does not explain the rest of the facts. That injury could not have caused death.

60. The defence does not explain why the deceased was on her thighs, knees, bent forward with the forehead touching the floor and a string around her neck in such a position. The other facts not explained is why then did the accused walk away with the deceased phone and ATM card. It does not explain why he also walked away without reporting to a soul about the incident. If indeed they were friends why would he walk away from a friend who has fainted and who therefore needed his help?

61. I find that the accused explanation is illogical, unreasonable, unrealistic and not plausible. It does not answer the questions which arise in this case about the towel on the table, the deceased blood on the towel, the multiple inverted Vs compressions on the deceased neck, death on a seated, bent forward and

kneeling position. Not to mention the recovery of the deceased expensive phone and ATM Card with the accused. I find that all these facts

62. Having considered the entire evidence adduced in this case, I am satisfied that the prosecution has cogently and firmly established the circumstances from which it relies as the basis upon which an inference of guilt is sought to be drawn and that the circumstances are of a definite tendency unerringly pointing towards guilt of the accused. I am satisfied that the circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

63. Having carefully considered the entire evidence adduced in this case I have come to the conclusion that the prosecution has proved the charge of **murder** contrary to **section 203** of the **Penal Code** against the accused beyond any reasonable doubt. Under **section 322** of the **Criminal Procedure Code** I reject the accused defence and find the accused guilty of murder contrary to **section 203** of the **Penal Code** and convict him accordingly.

DATED AT NAIROBI THIS 15TH DAY OF SEPTEMBER, 2016.

LESIIT, J.

JUDGE