REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 49 OF 2011

LESIIT, J.

REPUBLIC……PROSECUTOR

VERSUS

NICHOLAS NGUGI BANGWA..…….....ACCUSED

JUDGMENT

1. **The accused person NICHOLAS NGUGI BANGWA is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are;**

"That on the night of the 31st day of May, 2011 and the morning of the 1st June 2011 at Ndambaki village Mwiki Estate, in Kayole District within Nairobi County murdered RUTH WANGUI WANJIRU."

2. The prosecution called 10 witnesses. The facts of the prosecution case are that the deceased had rented a single residential room from PW1's parents at Dabaki Area of Mwiki. The room was in a plot with eight other rooms, one of them a double room. Among the tenants was PW7 who lived in the double room which was next to the gate. On the far end of the plot right opposite the room of PW7 was the deceased room. The tenants' shared communal bathrooms and toilets located near the gate. There was no watch man employed to guard that plot. The sketch plans of the houses at the scene are P. Exhibit 2 and 3.
3. The prosecution case was that the deceased was a friend to the accused and that the accused frequented her house in Dabaki area of Mwiki. Among those who knew about their friendship and the constant visits of the accused to the deceased house were PW7 and 8. PW8 testified that he knew the accused and the deceased were friends and that he had seen them together on several occasions over a period of two months.
4. The prosecution case is that on the night of 31st May 2011 the accused was seen by PW7 enter the plot where deceased, PW7 and seven other tenants lived. PW7 was walking to her house from the bathrooms which were across her house when she saw the accused. Few minutes later PW7 heard the voice of the accused arguing with the deceased. She dismissed it as their usual quarrels and an hour later she went to bed and slept until morning. At 5 a.m. one of her neighbours, Mama Karanja, woke her up. On going to the gate of their plot she saw the deceased seated with outstretched legs with her neck tied with a rope which hang on the latchet of the gate.
5. Police officers were called and the body was eventually taken away by OCS of Mwiki, PW4, together with other police officers including PW2 Crime Aid, and PW5 who later took over the investigations. Before removing the body, the scene was photographed by PW9, a Scene of Crime Officer. The photographs were P.Exh.5.

6. The body was subjected to post mortem examination by Dr. Njeru on 3rd June, 2011. Dr. Njeru concluded that the cause of death was asphyxia due to ligature strangulation. The Report was P.Exh.6. The doctor testified that having seen photograph No.5 of the photos of the scene showing how the body of the deceased was found, she testified that the ligature i.e. the rope around the neck of the deceased which caused death was tied to her neck by a third party. The doctor ruled out suicide as the cause of death.
7. There was other evidence by the prosecution. PW3 was a resident of Ruai and his home was the immediate plot neighbouring that of the mother of the accused. PW3 testified that he saw the accused arrive in a motor bike and enter his mother's house between 10 and 11 a.m. on 1st June 2011. PW3 stated that the accused was very drunk, a fact he could tell from his sluggish speech. PW3 testified that the accused shortly later went to his home and requested him to escort him, the accused to Kasarani Police Station to report the death of his wife. PW3 testified that the accused first told him he had killed somebody. He then changed and told him that he had quarrelled with his wife because of his many women friends after which she hanged herself in his presence. PW3 testified that he called a friend and both took the accused to Ruai Police station which was nearby.
8. PW4 stated that he caused the accused to be collected from Ruai Police station 3 or 4 days later immediately police from that station informed him of accused detention there.
9. The accused gave an unsworn statement. In his defence the accused put forward an alibi as his defence. He stated that on 1st June 2011 he received a call while in his mother's place that the deceased, his girl friend was dead. He did not believe and when he tried calling her number, she did not pick up the phone.
10. The accused stated that he went to Ruai Police station to find out the truth. That after waiting to be informed whether the report was correct or not, he was placed in custody. He said that he was eventually taken to Mwiki Police station where he was eventually charged with murder.
11. I have carefully considered the evidence adduced by the prosecution and the defence. I have also considered the submissions by Mrs. Nyamongo, counsel for the accused and Ms. Onunga learned prosecution counsel for the State.
12. 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."**

13. The prosecution case is that the deceased was strangled to death by use of a ligature or rope. The rope was recovered by Dr. Njeru, PW10, at the time of post mortem and produced in court as P. Exhibit 1.
14. The burden of proof lies on the prosecution to adduce evidence to prove that the accused strangled the deceased. The prosecution must not only prove that it is the accused who strangled the deceased. The prosecution must adduce evidence to prove that at the time the accused fastened the rope on the neck of the deceased he had formed the necessary intention to either cause death or grievous harm to the deceased.
15. The intention to cause death or grievous harm is malice aforethought and 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;**
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> **(*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. The prosecution case is that the accused was seen going to the house of the deceased at 10 p.m. on 31st May 2011. This was by PW7 whose house was opposite that of the deceased. PW7 was coming out of the ablution rooms and was walking to her house when she saw the accused headed to the deceased house. In addition PW7 also heard the accused arguing with the deceased, and by 10.30 p.m. when PW7 retired to bed for the night the two were still arguing.
17. The following morning, the deceased was found seated with outstretched legs on the inside of the gate to the plot where she lived. There was a rope around her neck which was fastened to the latchet of the gate. She was dead.
18. The prosecution case is further that the accused went to PW3, his mother's immediate neighbour and first told him that he had killed someone. According to PW3 the accused changed the story and said that his wife had hanged herself in his presence after a quarrel over his relationships with many women.
19. Mrs. Nyamongo for the accused urged the court to find that the evidence of PW1 and 2 was hearsay. Regarding the evidence of PW7, counsel urged that her evidence was not sufficient because it was at night and PW7 did not describe the clothing of the person she saw passing to go to deceased house. As for PW8 who said he saw the accused passing to go to plot where the deceased lived that night, counsel urged that since PW8 was busy closing up his business at the time he claims he saw the accused, he could not have paid enough attention. Mrs. Nyamongo urged that the employee PW8 was with at the time should also have been called to testify.
20. Mrs. Nyamongo submitted that the rest of the witnesses gave a circumstantial evidence of the fact that the deceased was a girl friend of the accused, a fact he does not deny. Counsel urged that the circumstantial evidence was insufficient to prove the case against the accused.
21. Mrs. Onunga learned prosecution counsel submitted that the prosecution case was based on circumstantial evidence. Counsel urged that prosecution has established through PW1, 7 and 8 that the deceased was a girlfriend of the accused. Counsel urged that in addition to the evidence of PW7, they established that the accused was the last person in the company of the deceased before she was found seated with a rope around her neck.
22. Ms. Onunga, the learned prosecution counsel submitted that the prosecution had established that the deceased could not have hanged herself in the sitting position in which she was found dead as the rope around her neck had not suspended her body. Learned prosecution counsel urged that the doctor's finding that death was due to strangulation was consistent with the evidence of PW1, 2 and 7.
23. Regarding accused defence it was Ms. Onunga's submission that the same did not displace the prosecution evidence against him.
24. The Defence Counsel challenged the evidence of PW1 and PW2 and urged that the same was hearsay evidence. PW1 was the caretaker of the plot where the deceased lived. His evidence was that he received a call from one of the tenants informing him that the deceased had hanged herself at the gate. He went to the scene where he found a large crowd of people. Police Officers had also arrived at the scene. PW2 was the Crime Aid who was informed of the deceased's dead body that was discovered at Mwiki by the OCS. He made a record of his findings at the scene of crime. These two witnesses were not the key witnesses in the case and their relevance was to confirm that they received the information regarding the deceased death.
25. The prosecution is relying on circumstantial evidence. The first piece of circumstantial evidence is the evidence that the accused was the last person seen walking to the deceased house, and the last person heard talking, albeit arguing with her. The other piece of circumstantial evidence is the confession the accused made to PW3 as a result of which PW3 escorted the accused to Ruai Police Station where he was held for this offence.
26. Regarding circumstantial evidence the leading case is **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."

27. In order to test whether the circumstantial evidence adduced by the prosecution meets the legal threshold it must meet the principles set out in the case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** where the learned Judges of 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."**

28. The prosecution relies on the eye witness evidence of PW7 that the accused visited the deceased from 10 pm on the night of 31st May,2011 and was heard arguing with her that night before her body was found the next morning; that the next morning the accused confessed the murder to PW3 who promptly took him to the police.
29. I agree with Mrs Nyamongo for the accused that the time PW7 claims to have seen the accused pass to go to the deceased house it was night. There is no evidence of the lighting condition at the plot in issue on the day in question. The evidence of visual identification of accused by PW7 is therefore unreliable and I place no reliance on it.
30. The prosecution was not just relying on the evidence of visual identification by PW7. It relied on PW7's evidence of voice identification. In regard to voice identification the court of appeal has made certain pronouncements concerning the manner in which such evidence should be received and tested and the weight that should be assigned to it. In the case of **Simeon Mbelle v. Republic [1982] KLR 578 the court held as follows:**

> **"a) That it was the accused person's voice;**
>
> **b) That the witness was familiar with it and they recognized it, and;**
>
> **c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."**

31. In the case of **Karani –vs- Republic – CA No.181 of 1984 at Kisumu**,(U.R.) the Court held:

> **"Identification by voice recognition is admissible however; care must be taken to ensure that the voice is that of the appellant."**

32. In **Choge –vs- Republic [1985] KLR 1** the Court of Appeal held in part that:

> **"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."**

33. I have weighed the evidence of PW7 and tested whether this witness could identify the accused voice. PW7 stated that she had seen the accused visit the deceased every after two or three days over a period of two months. She testified that she had exchanged pleasantries with the accused three or four times when she met him at the gate to the plot as he went to see the deceased. PW7 testified that apart from meeting the accused and being able to identify him, she also knew his voice not only from the few times they exchanged greetings at the gate but also the many times she heard the accused arguing with the deceased in the latter's house.
34. PW7 stated that during the visits to deceased house the accused was first of all very loud; secondly he was always drunk; thirdly he spoke in a sluggish voice, like that of a drunk person and

fourthly he always picked a quarrel with the deceased in each of those visits. PW7 stated that she had come to know his voice and that she had no doubt that it was the voice of the accused she heard in deceased house that night.

35. **I also tested the ability of PW7 hearing the voices coming from the deceased house from her house. PW7 described the distance from her house to that of the deceased as being 16 meters. PW7 testified that what made it easier for her to hear the arguments between the accused and deceased was due to the fact there was no ceiling in any of the houses and secondly for the fact that the houses were all connected by one roof even as the sketch plan attested to.**
36. **Having considered all these factors I am satisfied that PW7 was familiar with and therefore knew the accused voice and could identify it. I am satisfied that it was the accused person's voice that PW7 heard in the deceased house; that PW7 recognized it that night, and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to the fact the accused visited the deceased on the night before she died.**
37. The evidence of PW7 places the accused at the scene of deceased house the same night in which she died. 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."**

38. Having been placed at the scene of deceased house as the last person to be with the deceased before she died, the accused had a duty to give an explanation of how either the deceased died or of how they parted company. The accused in his statement in defence put forward an alibi as his defence. That does not meet the statutory requirement of sections 111(1) and 119 of the Evidence Act. Therefore the rebuttable presumption created by these two sections that having been the last person seen with the deceased before she died the accused knew how she died, and that it is in his interest to give an explanation.
39. Court of Appeal case of **ERNEST ABANGA ALIAS ONYANGO VS REPUBLIC CA NO. 32 OF 1990,** the court of appeal observed:

> "In **RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226**, **the appellant there was convicted of murder and the case against him 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**:
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> 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 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 availably".

40. I am guided by the above case which I have taken the liberty to cite. The *recidendi* of that case is that where an accused person either attempts no explanation of facts which he may reasonably be expected to be able and interested to explain or gives a false, incredible or contradictory explanation, that may augment circumstantial evidence adduced against him. In this case the accused gave an alibi as his defence. That alibi was pure falsehood in light of the prosecution evidence especially that of PW7. His denial augments the circumstantial evidence by PW7 given against the accused.
41. In light of the presumption created under section 111(1) and 119 of the Evidence Act, I have also considered that the normal human conduct of a person who commits an offence is either to escape arrest, or surrender to the authorities and or cover up their tracks. In this case the accused surrendered to the authorities under the escort of PW3 at the accused own request.
42. PW3 testified that the accused confessed to him that he had killed his wife before retracting and claiming the wife hanged herself in his presence. I noted that the accused confessed to having killed his "wife". Later he changed and said that she had killed herself by hanging. What the accused required of PW3 was a lift in PW3's vehicle and his escort to the police so that the accused could report the death. And indeed PW3 lifted him to the police as requested.
43. The accused confession to PW3 was an admission which the accused person later retracted. In his defence the accused said that he went to the police without mentioning that he had requested PW3 to escort or accompany him there. No police officer came from Ruai Police Station to say how accused went to the Station. None the less I consider that PW3 had no grudge against the accused and had no reason to fabricate the evidence against him. In cross examination no question was put to PW3 suggesting he had a grudge or that he was lying against the accused. I find that PW3 was telling the truth and I believed him.
44. A confession made before a judge or a magistrate under section 25A of the Evidence Act, who is not the trial Judge or magistrate is an extra-judicial confession and its admission is subject to all the safeguards prescribed by the law, more precisely sections 26 and 27 of the Act where such confessions is rendered inadmissible if made through inducement, threat or promise are deemed inadmissible.
45. In my view there are other confessions which are also extra judicial confessions if made to any person other than a person in a position of authority and in the ordinary day life. Such a confession will be admissible under section 26 of the Evidence Act if made voluntarily without any inducement or force of any kind. The statement made by the accused to PW3 was one such confession. It was voluntary and was not influenced by force, fear or inducement of any kind. It is admissible in e3vdience.
46. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, in the Indian case of **State of Rajasthan v. Raja Ram [(2003) 8 SCC 180]** The court stated that such statements should:

i. **It should be made voluntarily and should be truthful.**
ii. **It should inspire confidence.**
iii. **An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.**
iv. **For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.**
v. **Such statement essentially has to be proved like any other fact and in accordance with law.**

47. Regarding accused retracted confession I find that the same falls under confessions and is

admissible under section 26 of the Evidence Act, the same being extra-judicial confession. That section provides as follows:

> **"A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him".**

48. The accused confessed to PW3 who was alone at the time. PW3 was not a person in a position of authority as he was the accused neighbour who tended to his cows. He was a man of 64 years who had retired from civil service. I am satisfied that the statement admitting the offence albeit retracted was made voluntarily having regard to all the circumstances of the case surrounding the making of the confession.

49. Before considering the weight to placed on the confession of the accused I will consider the accused defence. The accused gave an alibi that he was not at the scene of the crime. The Court of Appeal in **UGANDA V. SEBYALA & OTHERS [1969] EA 204** adopted a decision made in the same year by Georges, CJ in **TANZANIA CRIMINAL APPEAL 12 D68** thus:

> **"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is then an alibi which is not particularly strong it may very well raise doubts."**

50. The Court of Appeal in the case of **LEONARD ASENATH VS REP (1957) EA 206** adopted with approval an English decision, **REP VS JOHNSON 46 CR. APP. R. 55[1961] 3ALL E.R. 96 9** which held as follows:

> **"Though an alibi is commonly called a defence, it is to be distinguished from a statutory defence such as insanity or diminished responsibility and is analogous to a defence such as self-defence or provocation. A prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer, and it is a misdirection to refer to any burden as resting on the prisoner in such a case."**

51. The accused has no burden to prove his innocence or adduce any evidence to prove his alibi is true. I am entitled at this stage to consider the entire evidence before court including testing the circumstantial evidence adduced and the accused alibi defence to draw my conclusions. I am satisfied that the prosecution has cogently and firmly established the circumstances from which an inference of guilt is sought to be drawn. I am satisfied that those circumstances unerringly pointing towards guilt of the accused. I am also satisfied that the circumstances taken cumulatively forms a chain so complete that there is no escape from the conclusion that within all human probability it is the accused and no one else who committed this offence. The accused gave obvious falsehood that he never went to the accused home that night. He also denied telling PW3 that he had killed his wife or ever going to ask PW3 to escort him to the police to report the death.
52. There was also an attempt to cover up the murder by planting the deceased body at the main gate with a rope around the neck as if deceased had committed suicide. The suicide theory was rejected by the doctor who performed post mortem. I agree with the doctor's opinion that the deceased did not commit suicide as she was in a sitting position with legs fully outstretched and the rope around her neck bearing no weight at all which would be the only way blood flow to the body would have been interrupted in order to cause death.
53. Taking all the facts and circumstances of this case cumulatively, I find that they 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.

54. In regard to whether there were any co-existing circumstances that could destroy the inference of guilt, I have taken the liberty to quote from the same case, **VENANZIO NZIVO –V- REP**, a test laid by the court. TUNOI, O'KUBASU and WAKI JJA set out the correct test for circumstantial evidence as follows:

> **"For our part, we think the appellant is on firmer ground here. As the entire case is dependent on circumstantial evidence the tests laid by this Court on many occasions readily come to mind:**
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> **"In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (Sarkar on Evidence – 10th Edition P.31). It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference – Teper v. The Queen [1952] AC 480, at page 489." – See James Mwangi v. R [1983] KLR 327 at pg.331."**

55. I have considered all the circumstances of this case and I am satisfied that there are no co-existing circumstances that could negate or destroy the inference of guilt.

56. In regard to the weight to be given to the confession I am guided by the court of appeal in the of **Kanini Muli Vs Republic Criminal Appeal No. 238 Of 2007(2)** the court held:

> **"That certainly is not a correct statement of the law, but we take it that the learned judge had in mind the rule of prudence or practice that a court should be cautious to act on a retracted or repudiated confession unless it is corroborated in material particulars (See TUWAMOI VS UGANDA (1967) EA 84and THIONGO VS REPUBLIC (2004) 2 KLR 38). The correct position is that the court can still act on a retracted or repudiated confession if it came to the conclusion in the light of all the circumstances that the confession could not but be true."**

57. The accused stated to PW3 that he had killed his wife and later said she had committed suicide in his presence. The doctor in her evidence concluded that the deceased had not committed suicide but had been strangled to death. I find that the statement the accused made to PW3 could only be made by a person who was privy to the manner in which the deceased death was caused. By stating that the **"wife hanged herself in my presence"**, the accused knew that the death of the deceased was by strangulation. Furthermore, the deceased was left at the gate to her house with a rope around her neck to simulate death by hanging. I find that the accused was possessed of knowledge of how the deceased met her death and that the reason for that was because he was the one who caused that death. I find the fact the accused must have been privy to the manner in which the deceased died is circumstantial evidence and that the same adds credence to the rest of the evidence adduced by the prosecution against the accused. I find further that the accused confession to PW3 that he killed his wife was the truth.

58. Regarding motive for the offence it is trite law that where the case against the accused depends almost entirely upon circumstantial evidence the element of motive is one which the court will have to consider. Considering the issue in **Libambula v Republic [2003] KLR 683**, the Court of appeal stated as follows:

> **"We may pose, what is the relevance of motive here? 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."**

59. PW7 testified that the accused and the deceased engaged in arguments at every time the accused visited her. PW3 described the accused as being very loud. Among the words PW3 heard the accused telling the deceased included accusing her of being a prostitute. He also quarrelled over food and according to PW3, the accused quarrelled over everything and anything. I find that the relationship between the accused and the deceased was not a happy one. Even though the accused did not live with the deceased he visited her very frequently and even referred to her as wife when the accused visited PW3. The accused apparent dissatisfaction with the deceased, especially in regard to her faithfulness to him was sufficient in my view to form a motive to commit the offence.
60. Finally having considered the description of the accused by PW7 generally and by PW3 one day after the incident, it is very clear to the court that the accused heavily abused alcohol. To PW7 he was always drunk whenever he visited the deceased. Both PW3 and 8 describe him as having a sluggish speech as a result of alcohol abuse. It would be a mistake to ignore that evidence even though the accused himself did not plead intoxication.
61. Section **13** of the Penal Code sets out the circumstances that would constitute the defence of intoxication. It states as follows:

> **"13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**
>
> **(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -**
>
> **(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**
>
> **(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.**
>
> **(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.**
>
> **(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.**
>
> **(5) For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs."**

62. I find that given his state few hours after the incident, and given the evidence he heavily abused alcohol, I find that the possibility that the accused action was intoxication at the time he committed this offence cannot be ruled out. As provided under section 13(4) of the Penal Code intoxication should be considered in determining an intention to commit the offence for which the accused is charged. I will state again I am aware that the accused did not raise that as a defence. However there is too much evidence that he was always so drunk that his speech had even changed as a result. It would be an error not to consider that line of evidence.
63. Having considered all the evidence and the circumstances of the case as presented before me I find that there is doubt that the accused was in a state of mind to know what he was doing or that what he was doing was wrong at the time he committed the offence. Consequently I find malice aforethought was not proved. I find that accused caused deceased death and is therefore guilty of manslaughter contrary to section 202 of the Penal Code.

64. **Having come to the conclusion I have of this case I substitute the charge against the accused**

from murder contrary to section 203 of the Penal Code to manslaughter contrary to section 202 of the Penal Code under powers donated to the court under section 179 of the Criminal Procedure Act. I find the accused guilty of the substituted charge of manslaughter c/s 202 of PC and convict him accordingly under section 322 of the CPC.

DATED AT NAIROBI THIS 1ST DAY OF OCTOBER, 2015.

LESIIT, J

JUDGE