



**Republic v Wahito & 2 others (Criminal Case 7 of 2017)  
[2025] KEHC 13735 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13735 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL CASE 7 OF 2017  
AK NDUNG’U, J  
OCTOBER 2, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DAVID NGATIA WAHITO ..... 1<sup>ST</sup> ACCUSED**

**SAMUEL WANJOHI KIHARA ..... 2<sup>ND</sup> ACCUSED**

**SAMUEL GITONGA NGAARI ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The Accused herein, David Ngatia Wahito, Samuel Wanjohi Kihara And Samuel Gitonga Ngarari were charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged in the information dated 17/08/2017 that on 29<sup>th</sup>/30<sup>th</sup> day of July 2017 at Marina area of Laikipia Central Sub County within Laikipia County murdered Esther Ngorodi Ekale.
2. The Accused persons pleaded not guilty to the charge and in a trial where a total of seven (7) witnesses testified for the prosecution, all the accused were placed on their defence and each proceeded to give a sworn defence..

**Prosecution’s case**

3. PW1, John Maina testified that on 29/07/2017, he went to Frika bar about 7 Pm. Next to his table, were three men and a girl (the deceased) who were also drinking. He knew the 1<sup>st</sup> and 2<sup>nd</sup> accused but did not know the name of the 3<sup>rd</sup> accused but he used to see him. He also knew the girl ‘Ejogo’. The 3<sup>rd</sup> accused said that his money had been stolen and he was directing the words to the deceased which she denied. The 3<sup>rd</sup> accused held the deceased by her clothes and demanded that she give him his money. He testified that he intervened and said the deceased should not be beaten. He was however assaulted by the 1<sup>st</sup> accused. That when he left for home, he left the three accused persons and the deceased in



- the bar. He testified that he left his beer and sweater on the seat as he did not want anyone to know that he had left as he was fearful that someone might follow and assault him more.
4. On cross examination by counsel for 1<sup>st</sup> accused, he testified that he left the three accused and the deceased still sitting together.
  5. On cross examination by 3<sup>rd</sup> accused's counsel, he testified that he left the bar at about 9pm and when he left, the three accused and the deceased appeared to no longer have issues.
  6. PW2, Lokorodi Lobenyo was the deceased's husband. He testified that about a week before her demise, she went to visit her grandmother at Marina but never returned. He was informed that his wife had been killed and he identified her body at the mortuary.
  7. On cross examination by 3<sup>rd</sup> accused's counsel he testified that she had been gone about one month before her demise.
  8. PW3, Marion Wambui testified that in July 2017, she was working at Frika Bar at Marina centre. On 29/07/2017 while at her residence, the deceased visited her and she ordered one glass of alcohol. She then left. She opened the bar at around 5 pm and at around 7:30 Pm, the deceased joined the three accused persons and the 3<sup>rd</sup> accused ordered alcohol for her which he paid for. At about 9:30Pm, she heard the 3<sup>rd</sup> accused accusing the deceased of stealing his Kshs.1000/- and the 2<sup>nd</sup> accused told the deceased that if she had taken the money, she should give it back. The deceased denied taking the money and PW1, a customer entered the bar and he told the deceased to return the money if she had taken it but she denied taking the money. PW1 started quarrelling with the 1<sup>st</sup> accused. At 10:45pm, the deceased left the bar and went outside and after about 5 minutes, the accused persons and PW1 also left and she closed the bar.
  9. She testified that at 12:30am while at her residence, she heard 1<sup>st</sup> accused calling her and he requested her to go and sell them more alcohol. He saw them through the window and he was with the 2<sup>nd</sup> and 3<sup>rd</sup> accused. She declined and she went back to sleep and they went away. The following day, she was informed by a customer that the deceased had been killed and was lying in the bush. She proceeded to the scene which was about a kilometre away and she saw the deceased's body lying on its back. She had no inner clothes, she had cut wounds around the mouth and injuries on the chest. She testified that the 2<sup>nd</sup> accused had a small rungu while in the bar.
  10. On cross examination by counsel for 1<sup>st</sup> and 3<sup>rd</sup> accused, she testified that she had known the deceased for about 5 months but did not know where she lived. That PW1 almost fought with the 1<sup>st</sup> accused who asked PW1 why he was concerned with a matter he found going on. That she did not know where the deceased went after she left. That she saw the accused persons through the glass window as there was electric light and moonlight. The deceased's body was far from any residences.
  11. On cross examination by the 2<sup>nd</sup> accused's counsel, she testified that she did not know where the deceased and the accused persons went after they left. That it was usual for men to carry walking sticks and runqus. The 2<sup>nd</sup> accused had a small rungu in the bar and she did not see anyone else armed. There was a hotel near the bar and she did not know whether the accused persons went to the hotel next to the bar after they left.
  12. On re-examination, she testified that 3<sup>rd</sup> accused left the bar five minutes after the deceased. They were the last customers to leave the bar. They left after she told them she wanted to close since time was up. The closing time was 11p.m but she would start ushering the customers out about 15 minutes before.
  13. PW4 Simon Lonoky, the deceased's brother testified that he identified her body to the pathologist for post mortem purposes.



14. PW5, Gunia Inyang' testified that the deceased was a neighbour and she heard that she had been killed and she was taken by the police to the scene where she identified her body.
15. PW6, the investigating officer testified that a report of murder was made and they proceeded to the scene at Marina town centre. They found the deceased's body lying 50 meters from Nyahururu-Nyeri highway and 200 metres from the township. The body had no physical injuries but he could see struggle marks. That it was established that the deceased left home on 29/07/2017 and was lastly seen at Frika within the township in company of the accused persons taking drinks. That there was a suspicion that she had stolen money from the 3<sup>rd</sup> accused and a dispute arose. PW1 tried to intervene but he was assaulted by the 1<sup>st</sup> accused. The deceased left out of fear at 10:00pm and about 15 minutes later, the accused persons followed her. This was according to information by PW3. Around midnight, PW3 was requested to open the bar by the 3<sup>rd</sup> accused but she declined. That they arrested the three accused persons as suspects and they were advised to charge them based on circumstantial evidence, interviews and evidence collected. He produced the sketch plan of the scene as Pexhibit1.
16. On cross examination by counsel for 1<sup>st</sup> and 3<sup>rd</sup> accused, he testified that no one told them that they saw the deceased being murdered. That the deceased left out of fear after the dispute over money and the accused left 5 minutes after the deceased had left. The accused persons left since the bar was being closed. That the deceased's body was about 150 meters near PW3's home. That he did not establish that the deceased had left her matrimonial home. That from investigations, he could not state whether other persons killed her and that he never established whether she met other persons as she left the bar.
17. On cross examination by 2<sup>nd</sup> accused's counsel, he testified that he did not take DNA sample. The deceased was killed overnight but the exact time was not ascertained. That no one saw the accused persons follow the deceased. That he did not explore other theories or motives that could have led to her death.
18. On re-examination, he maintained that the deceased was seen in company of the three accused persons in the bar and the three accused left 5 minutes after she left. They came back around midnight.
19. PW7 was the pathologist who conducted a post mortem on deceased's body. He testified that after examination, he formed the opinion that the cause of death was strangulation. He produced the post mortem report as Pexhibit2.
20. On cross examination by counsel for 1<sup>st</sup> and 3<sup>rd</sup> accused, he testified that there were external injuries, bruises which were in multiple parts of the body. That it was important to indicate that they were at the neck but he did not indicate.
21. On cross examination by counsel for 2<sup>nd</sup> accused person, he testified that there was no mention of pressure marks at the neck that were synonymous with strangulation. That he did not mention if there were defensive marks. That it was difficult to tell time of death as she died 13 days before post mortem. That he could not confirm how many people were involved in the strangulation.
22. On re-examination, he testified that the bruises could have been caused by a struggle or could have been inflicted while transporting the body. That compression of the wind pipe caused the death. The injuries were at the respiratory system and not at the cardiovascular. Whether or not there were pressure marks did not change the cause of death.

### **Defence's case**

23. DW1, David Ngatia testified that on 29/07/2017, they had sold posts and 2<sup>nd</sup> accused left for Karatina. He was at Marina and accompanied by the 3<sup>rd</sup> accused, they went to Furika bar as they waited for the 2<sup>nd</sup>



accused who was to bring money after the sale of posts. They sat at different tables. At around 8.00 to 9.00pm, the deceased also entered the bar and she sat close to the 3<sup>rd</sup> accused. He then heard 3<sup>rd</sup> accused asking where his money had gone but he remembered he had paid the bill and the issue was resolved. The deceased said she had not taken the money. She then left. At the table where he was, he quarrelled with Irungu but they resolved the issue. That the deceased left the bar at around 10.00pm and by the time she left, there were around 15 people in the bar. At 11.00pm, they were asked to leave as the bar attendant wanted to close. Accompanied by his co-accused, they went to a hotel adjacent to the bar where the 2<sup>nd</sup> accused bought them mandazi. He proceeded home alone and the 2<sup>nd</sup> and 3<sup>rd</sup> accused left together. This was around 11.30pm. They never returned to the bar that night. He testified that on the following day while at home with his wife, his wife was informed that there was a lady who was killed. He testified that he did not go to Marina and he did not know the lady who was killed. He did not kill her.

24. On cross examination by the State counsel, he testified that they went to the bar at 2.00pm. The 3<sup>rd</sup> accused bought the deceased a drink and she left at 10.00pm. He did not know why he was framed. He learnt of the incident on the following day and he did not follow up. The scene was 3 kilometres from his home and it was not near his home. That they were not the last to be seen with the deceased and he only saw her leaving the bar. That Wanjiri sold to them at the hotel and he could be called to confirm.
25. DW2, Samuel Wanjohi testified that on the material day, he had gone to Karatina for business and he returned at around 8.00pm and he went to Furika bar where he found the 1<sup>st</sup> and 3<sup>rd</sup> accused. He gave them their money and they proceeded to have drinks. He testified that the deceased was in the bar when he entered and she was seated with the 3<sup>rd</sup> accused. He heard 3<sup>rd</sup> accused say his money had been stolen but he then remembered he had given to the bar attendant. The deceased left alone at 10.00pm. The bar was closed and they went to Bidii hotel which was adjacent to the bar and he bought mandazis and ate. He left with the 3<sup>rd</sup> accused on the same route and the 1<sup>st</sup> accused went on a different route. He arrived home at around 12.00am. On the following day, he went to the 1<sup>st</sup> accused home and they learnt that the deceased had been killed. He did nothing concerning the killing. That he used to see her in town and that he had no dispute with her.
26. On cross examination, he testified that the deceased left at around 9.00pm. That Wanjiri could confirm that they went to his hotel and bought mandazi. That Carol knew his appearance. That he never returned to the bar and he did not have any weapon that day. He did not know of any reason why anyone would frame him.
27. DW3, Samuel Gitonga testified that they were in business of selling posts and the 2<sup>nd</sup> accused left for Karatina. They were left at Marina with the 1<sup>st</sup> accused and they went to Furika bar at 2.00pm. The 2<sup>nd</sup> accused found them there at 8.00pm. They shared the money. In the bar, they did not sit together. The deceased went to his table and attempted to take his drink and he bought her one glass of Vienna which she took and left. He did not know her. At some point, the bar attendant failed to refund his change and he questioned her. That he left the bar at 11.00pm. The deceased left about an hour before him. She left alone and he had not quarrelled with her. When she left, there were about 10 people in the bar. They left when Carol told them that she wanted to close. That he left with his co-accused to the hotel adjacent to the bar where they ate mandazi. He went home accompanied by the 2<sup>nd</sup> accused and the 1<sup>st</sup> accused took a different route. He arrived at his home at around 1.00am as it was about 10 kilometres. He was contacted by the 2<sup>nd</sup> accused the following day who informed him that the deceased had been killed.
28. On cross examination, he testified that the deceased was not in the bar at 2.00pm but came at around 9.00pm and sat with him. He sat with others he did not know. He bought her a drink. He denied



having a relationship with her and kissing her. She left at 10.00pm. That it was his first time in the bar and he did not know whether the bar attendant knew him. That they never returned to the bar. That the owner of the hotel, Wanyiri sold mandazi to them. From 11.00pm to 1.00am, he was walking home. That he did not have any arrangement with the deceased. That he did not follow up when he was informed of the deceased's death.

29. That was totality of evidence before this court. Counsel on record filed closing submissions.
30. The prosecution's counsel submitted that death of the deceased was proved by PW7 who conducted a post mortem. As to whether the accused persons caused the death of the deceased, he submitted that PW1 and PW3 testified that the deceased was in company of the accused persons at the bar and they left together. They were the last people to be seen in her company when they were taking alcohol and when they left the bar together. PW3 further testified that the accused persons went back at 12.20am and requested her to open the bar which she declined. That she was able to identify them through the moon light and light from security light. They were not stranger to her. That the accused's version that they left for home at 11.30 pm was not supported by any witness.
31. As to whether there was malice aforethought, he submitted that the post mortem revealed that the deceased had generalised bruises, blood clots from mouth, nostrils and ears which shows that the perpetrators had the clear state of mind to murder her by strangling her. He submitted that the ingredients of murder were proved and the testimony adduced in court was credible and reliable.
32. The counsel for the 1<sup>st</sup> and 3<sup>rd</sup> accused persons on the other hand submitted that the accounts by all witnesses did not disclose that the accused persons maliciously or at all killed the deceased. Even though there was a dead body after a drinking spree, the person who caused the death is unknown. That malice aforethought was not proved as the witnesses did not provide cause to show that the accused persons planned or any way had motive to kill the deceased. That the prosecution tried to provide the confrontation between the 3<sup>rd</sup> accused and the deceased over a thousand shillings. That the deceased was taking Vienna which is quite expensive and more than 1000 which was not worth a struggle or taking a life. That if the said argument was a big issue, the four would not have continued drinking till 10.45pm when they left. That at no time after the discord did the witness say that there was any animosity or cause of concern shown to lead the court to believe that there was an intention to kill the deceased. Hence, mens rea was left as a mere speculation.
33. He further submitted that there was no evidence that the accused persons killed the deceased as there were no eye witnesses. That it was unclear whether the accused persons were the last to be seen with the deceased as PW3 could not tell if there were other people outside the bar and whether the deceased and the accused persons went separate ways. PW3 could not be seen as a good witness to provide the last sighting of the parties. That it was unclear what she was doing at the time of her death and it was not indicated whether they were hand marks on her neck to show that she was strangled. It was not indicated whether she had marks on her body to show that death was caused by any of the accused and time of her death was not indicated. That it was unclear whether the deceased met the accused persons after coming out of the bar, it was unclear as to who killed her as no one saw the murder, it was unclear whether the accused persons were last seen with her as PW3 evidence did not tell of the happening outside the bar and it was unclear as to who strangled her and how many people were involved. That it cannot be concluded that the accused persons committed the offence based on suspicion as suspicion alone cannot found a conviction.
34. Counsel for the 2<sup>nd</sup> accused person submitted that the prosecution failed to prove that the 2<sup>nd</sup> accused contributed to the cause of death of the deceased as there was no evidence that placed the 2<sup>nd</sup> accused at the scene of crime at the time of the murder. None of the prosecution's witnesses saw him strangling



the deceased and the investigating officer did not refer to any investigation he conducted that led him to believe that the 2<sup>nd</sup> accused was involved or had any reason to kill the deceased. That none of the witnesses testified seeing the 2<sup>nd</sup> accused involved in a fight at the bar. He was not involved in the fight and did not have bad blood with the deceased and therefore, he had no reason to harm her. That PW1 testified that when he was leaving the bar, the accused persons and the deceased appeared to have no issues. Hence, the prosecution failed to prove malice aforethought on part of the 2<sup>nd</sup> accused person.

35. He submitted that the investigating officer testified that he got the report at around 2.00pm. The deceased left the bar at 10.45pm and the accused persons according to PW3 left at 11.00pm hence, the time gap between when the accused persons were last seen together with the deceased and when her body was discovered was too big and it was possible that other person other than the accused persons could have committed the offense. Reliance was placed on the case of Anjam Kumar Sharma v/s State of Assam (2017) (6) SCALE 556 relied on in the case of Republic vs Katana & another (criminal case 08 of 2017) [2023] KEHC that the last seen comes into play when the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. That the prosecution has failed to prove the case to the satisfactory standard as the prosecution failed to prove malice aforethought on the part of the 2<sup>nd</sup> accused person and none of the witnesses directly linked the 2<sup>nd</sup> accused to the scene of crime.
36. I have had the occasion to consider the charge, the evidence in support thereof, the defence evidence, learned submissions on record and the relevant constitutional and statutory provisions. Of determination is whether the prosecution has proved the charge against each of the accused persons to the required degree which degree ought to be beyond reasonable doubt. The general question would be whether all the ingredients of murder have been proved.
37. Section 203 of the Penal Code defines murder in the following terms:
- “ Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”
38. The ingredients of murder were explained in the case of Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR as follows:-
- “ 1) The fact of the death of the deceased.
  - 2) The cause of such death.
  - 3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly
  - 4) Proof that said unlawful act or omission was committed with malice aforethought.”
39. Thus, the central ingredients of the offence of murder are malice aforethought and an unlawful act or omission on the part of the accused.
40. Section 206 defines 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



- 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.”

41. In criminal cases, it is trite law that the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. Viscount Sankey L.C in *Woolmington vs. DPP* [1935] A.C 462 pp 481 stated the law on legal burden of proof in criminal matters, thus;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

42. In *JOO vs. Republic* [2015] eKLR, the court held that:

“It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.”

43. The question that arises in the instant case is whether there is any evidence on record tending to prove the above ingredients of the offence of murder against the accused person. The prosecution case against the Accused is purely circumstantial. No known person witnessed the murder of the deceased, and no witness saw the accused persons committing the murder.

44. There was no doubt as to the fact of death of the deceased. There was ample evidence from PW2, PW3, PW4 PW5, PW6 and PW7 who saw the deceased’s body. The body of the deceased was further identified by PW4, for post mortem purposes. The fact of death was further proved by the post mortem examination report, Pexhibit2 produced by PW7, a pathologist. As regards to the cause of death, the post mortem report showed that the cause of the deceased’s death was strangulation. This shows that, the deceased did not die a natural death but she was murdered.



45. As to whether the deceased met her death as a result of an unlawful act or omission on the part of the accused persons, it is clear that there was no direct evidence linking them to the death of the deceased. The prosecution case is purely based on circumstantial evidence. It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests as was enunciated in *Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR)* as follows;

- “(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 the 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; and
- (iv) In *Sawe v Republic (2003) eKLR* and *GMI v R Cr. App. No. 38 of 2011*)- in addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.”

46. Therefore, taken cumulatively, the circumstances the prosecution must establish should form a chain so complete that there will be no escape from the conclusion that within all human probability, the crime was committed by the accused persons and no one else.

47. Further, for this court to find the accused guilty, the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of *Simon Musoke vs. Republic [1958] EA 715* as follows:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

48. In *Teper v. R [1952] AC* at p. 489 the Court had this to say:

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

49. In this case, the prosecution’s case is hinged on the scuffle between the 3<sup>rd</sup> accused person and the deceased when the 3<sup>rd</sup> accused claimed that the deceased had taken his money. The prosecution has also relied on the fact that the accused persons were last seen with the deceased at Frika bar before the deceased was found dead the following day.

50. Regarding the doctrine of “last seen with deceased” the Nigerian court in the case of *Moses Jua vs. The State (2007) LPELR-CA/IL/42/2006* while considering the ‘last seen alive with’ doctrine held that:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of



any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

51. It was however held in the case of Ramreddy Rajeshkhanna Reddy & Anr vs. State of Andhra Pradesh, JT 2006 (4) SC 16 that;

“that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

52. In the Indian case of Anjan Kumar Sarma vs. State of Assam, Criminal Appeal No. 560 of 2014 a case that was considered by the court in the case of Republic vs. Elizabeth Anyango Ojwang [2018] eKLR, the court stated as follows:

“The circumstances of last seen cannot by itself form the basis of holding the accused guilty of the offence...There must be something more establishing connectivity between the accused and the crime...It is clear from the above that in a case where the other links have been satisfactorily made out and circumstances point to the guilt of the accused, the circumstances of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstances of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.”

53. It therefore follows that even when the doctrine applies, it is advisable to seek some corroborative evidence instead of solely relying on the doctrine.

54. As seen earlier, the prosecution’s case is hinged on a scuffle between the deceased and the 3<sup>rd</sup> accused who claimed that the deceased had taken his money. This was as per PW1, PW3 and PW6 evidence. They all testified that the three accused persons were drinking and they were joined by the deceased. The 3<sup>rd</sup> accused bought her alcohol and in the course of drinking, the 3<sup>rd</sup> accused claimed that the deceased had stolen his money. PW1 testified that the 3<sup>rd</sup> accused held the deceased by her clothes demanding that she gives him his money. The deceased denied taking the money. PW1 intervened to prevent the deceased from being beaten but he was assaulted by the 1<sup>st</sup> accused. This was confirmed by PW3, the bar attendant.

55. The other evidence is that the deceased left five minutes before the accused persons. PW3 testified that the deceased left at 10:45pm and after about five minutes, the three accused persons also left and she closed the bar. The accused persons returned at 12.30am and they requested for her to sell more alcohol to them but she dismissed them. She testified on cross examination that the accused and others left the bar five minutes later. That the accused persons were the last customers to leave. She further testified on cross examination that she did not know where the deceased went after she left and that she did not know where the accused persons went after they left. On re-examination, she testified that 3<sup>rd</sup> accused left the bar five minutes after the deceased. They were the last customers to leave the bar. They left after she told them she wanted to close since time was up. The closing time was 11p.m but would start ushering the customers out about 15 minutes.

56. PW6 testified that according to PW3, the deceased left out of fear at 10:00pm and about 15 minutes later, the accused persons followed her. On cross examination, he maintained that the deceased left out of fear after the dispute over money and the accused left 5 minutes after the deceased had left. The accused persons left since the bar was being closed. He also testified that the deceased’s body



- was recovered 200 meters from the centre. That from investigations, he could not state whether other persons killed her and that he never established whether she met other persons as she left the bar. That no one saw the accused persons follow the deceased. That he did not explore other theories or motives that could have led to her death.
57. The accused persons on the other hand testified that after they left the bar, they went to a hotel which was adjacent to the bar and they bought mandazi which they took. They thereafter left for their homes with the 1<sup>st</sup> accused taking a different route while the 2<sup>nd</sup> and 3<sup>rd</sup> accused went on the same route. They heard about the murder the next day. They denied committing the offence. They also testified the 3<sup>rd</sup> accused had alleged his money was taken but realized that he had given the bar attendant the money to settle the bill so the issue was settled and they continued drinking. They denied returning to the bar at 12:00am.
58. It is to be noted that PW1 testified that by the time he was leaving, he left the three accused and the deceased seated at the same table. He testified on cross examination that by the time he was leaving, the accused persons and the deceased appeared to no longer have any issue. It is further noted from PW3 that the accused persons left the bar after she requested them to leave as she wanted to close. It is not that they followed the deceased after she left the bar. The allegation by PW6 that the deceased left out of fear as they were informed by PW3 was not corroborated by PW3. PW3 also confirmed that there was a hotel outside the bar and after the deceased left, she did not know where she went. She did not know where the accused went after she closed the bar.
59. After the analysis of the evidence, my view is that the possibility of any other perpetrator cannot be ruled out. The prosecution in this case is relying on the circumstantial evidence that, owing to the fact that the 3<sup>rd</sup> accused had prior to the incident had quarreled with the deceased, an inference can be drawn that they were responsible for the murder. However, this inference is weakened by the other circumstances obtaining. There is no evidence that the scuffle degenerated into violence between the 3<sup>rd</sup> accused and the deceased. In fact, PW1 testified that by the time he was leaving, he left the three accused and the deceased seated on the same table and they appeared to have no issue. PW3 also testified that the scuffle only lasted for a few minutes. The deceased left on her own accord and the accused persons left when they were requested by PW3 as she wanted to close the bar. It is not like that they followed the deceased. It cannot therefore be said that the accused persons were the persons who were last seen with the deceased when she was alive as the prosecution did not lead any evidence to show that the deceased did not meet any other persons when she left the bar.
60. A reading of the evidence leads to only one conclusion; that the prosecution's case was based on mere suspicion and suspicion alone cannot be the basis of a conviction. It was held by the Court of Appeal in *Joan Chebichii Sawe vs Republic* [2003] eKLR that:
- “The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt... Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”
61. Further the doctrine of last seen is not applicable in this case within the context of the facts as explained by witnesses since the evidence is that the deceased did not leave the bar in company of the accused persons and from the circumstances of the case, there was discernable opportunity for a 3<sup>rd</sup> party intervention in which case someone else could have killed the deceased.
62. With respect of proof of malice aforethought, the only evidence tending to prove malice aforethought was that there was a quarrel between the 3<sup>rd</sup> accused and the deceased but there was no evidence that



the 3<sup>rd</sup> accused still harboured ill feelings against the deceased as they continued drinking together. In any event, the element of Actus reus was not established which renders the question of motive moot.

63. From the foregoing, and based on the evidence on record, it is quite clear that a heinous crime in which the deceased lost her life was committed on the material night. However, the prosecution despite taking up its public duty with zeal, has failed to prove its case to the threshold set in law. I will echo the words of the court in JOO vs. Republic [2015] eKLR, and hold the same view that it is better to acquit ten guilty persons than to convict one innocent person.
64. With the result that I find each of the Accused not guilty of the charge of the murder of Esther Ngolodi Ekale and acquit each of them accordingly.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 2<sup>ND</sup> DAY OF OCTOBER, 2025.**

**A.K. NDUNGU**

**JUDGE**

