



**Republic v Kiplagat (Criminal Case 7 of 2016)  
[2025] KEHC 15502 (KLR) (31 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15502 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL CASE 7 OF 2016  
AK NDUNG’U, J  
OCTOBER 31, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ANTHONY KIPLAGAT ..... ACCUSED**

**JUDGMENT**

1. The accused (Anthony Kiplagat) is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 28<sup>th</sup> day of February, 2016 at Muthaiga Estate, in Nanyuki Town, Laikipia County with the Republic of Kenya murdered Priscilla Waithera Ngugi.
2. The Accused pleaded not guilty to the charge and the matter proceeded for hearing wherein a total of 10 witnesses were called by the prosecution in support their case. When placed on his defence, the accused gave sworn testimony and chose not to call any witness.
3. At the close of the evidence, learned counsel on record for the state and for the Accused filed written submissions dated 7<sup>th</sup> day of October, 2022 and 16<sup>th</sup> day of September, 2022 respectfully.
4. PW1 Juma Guyo Jaldesa recalled that on 27/02/2017 at about 5pm both the Accused and the Deceased drove off the homestead and that about 11:30pm he heard a knock on the gate and he was hesitant in opening the gate. He said that he went behind the flowers which were in the compound and noted hazard lights of the Deceased’s motor vehicle, Reg. no. KBW 619P. He testified that he then went to the gate which was closed and noticed the car which was already inside the compound but not in the parking area. He testified that he also saw the Accused who seemed to be crying quietly and when he inquired, the Accused answered that something bad had happened and the Accused led him to the boot of the Deceased’s car where he saw the Deceased’s body lying in the boot. He stated further that



- he removed the cloth which was covering her body and face and he noted an injury on the head and that the injury appeared to be blunt with some blood.
5. It was his evidence that the Accused threatened him with a knife telling him not to scream. He ordered him around as they removed the body even telling him that he would be his boss henceforth.
  6. PW1 testified that the Accused told him that “the thing I have done; I don’t think you will forgive me!”. The Accused then asked him to get into the car and they proceeded to parking area after which he assisted the Accused in removing the Deceased’s body from the boot and placed it near the door to his house near some flowers and the Accused then covered the body with sheet of cloth- a masaa Shuka, which he identified as Prosecution Exhibit 1 and that they entered the main house where the Accused placed his phone and wrist watch on the table. The Accused then went to the kitchen to wash his hands.
  7. PW1 added that the Accused then went to the bedroom where he changed his trouser. PW1 said that initially, the Accused had blue jeans which he identified before Court as Prosecution Exhibit 3 and changed to grey jeans which he identified before Court as Prosecution Exhibit 4. The blue jeans had heavy blood stains on the front. He stated that the Accused then took the blue jeans and proceeded to the kitchen where he tried to light it using a matchbox but it did not catch fire.
  8. The Accused rummaged through documents in the house stating that he was looking for some files.
  9. The Accused then directed Pw1 that they go to town and when the Accused drove to the gate, PW1 escaped to a neighbour, one Paul Wanjohi by jumping over a perimeter wall. He said that he informed the said Wanjohi about the incident and the police were called to the scene. When they went back to the Deceased’s compound in the company of the police, they did not find the Accused and neither the Deceased’s car.
  10. He testified that they broke into the house and found two mobile phones which he identified before Court as Prosecution Exhibit 5 (for the Accused) and another phone with broken screen as Prosecution Exhibit 6. He said that he had never seen Accused and the Deceased quarrelling.
  11. In cross-examination, PW1 stated that on 27/2/2016 when both the Accused and the Deceased drove off from the compound, they seemed okay and that he did not know how the gate was opened to allow the Accused drive in on 27/02/2016 and that on 28/02/2016 he noticed blood stains in the grass near the gate on the inside.
  12. PW2 Lenny Wandera (the son to the Deceased) recalled that on 28/2/2016 he was called to go to the Deceased’s compound where she found her dead and her car was missing. Inside the house, he was shown Prosecution Exhibits 2, 3, 4 and 5. On 3/3/2016. He witnessed the post mortem of the Deceased and later the Deceased’s car was spotted at Karatina where it was recovered together with bundles of key identified as Prosecution Exhibit 7, ID for the Deceased as Prosecution Exhibit 8, two ATMs Cards for the Deceased, Prosecution Exhibits 9 (a) and (b), ATM Card for Family Bank, Prosecution Exhibit 10, ATM Card for Co-operative Bank, Prosecution Exhibit 11, NHIF Card, Prosecution Exhibit 12, ATM Card for Taifa Sacco, Prosecution Exhibit 13, ATM Card for KWFT, Prosecution Exhibit 14, KRA Pin Card, Prosecution Exhibit 15, Driving License, Prosecution Exhibit 16, Deceased’s phone, Prosecution Exhibit 6. He stated that all the items were allegedly recovered from the Accused.
  13. PW3 Peter Ndegwa Gatibi testified that on 27/2/2016 the Accused called him using the Deceased’s phone number 0715501922 and requested him to go outside but he continued to sleep. He testified that he later tried to call the Accused’s line which was 070006810 but the same was not answered. He was later informed that the Accused was alleged to have killed the Deceased and he went to the scene and found the Deceased’s body lying on the ground.



14. PW4 Beth Wanjiru testified that the Accused passed by her place on 28/2/2016 and left a brief case in the bathroom which he came and collected later in the company of the police. She said that she did not open the brief case in order to know what was the content.
15. PW5 Beatrice Waithera testified that she hosted the Accused at her place on 28/2/2016 and that he had gone in with a big car. She said that on the morning of 29<sup>th</sup> day of February, 2016, she noted that the Accused had tension and on inquiry, the Accused told her that he had a lover and that the previous day, they had gone to drink and that when they went back home, the Deceased who was on the passenger's seat, went to the driver's seat when he had gone to open the gate. The accused told her further that since the Deceased was drunk, she could not drive and so he joined her on the driver's seat in order to drive but the Deceased fell down and hit the gate and that when he went to pick her up, he noticed that she was unconscious and that he called the Caretaker for assistance and that he took the Deceased to the hospital. The Accused told her that he thereafter drove to Kirinyaga. The Accused further told her that the Deceased was very sick at the time that he took her to the hospital and that he noted in the news that she had died.
16. PW5 stated that she advised the Accused to report the matter to the police but he did not since he seemed very much stressed and that she had stay with him in the house throughout the day until the time when he was arrested on the same day.
17. PW6 Dr. Ayub Gitaka Macharia testified that he examined the body of the Deceased on 3/03/2016 and that on examination, he noted that the Deceased suffered fractures second rib right side anteriorly with associated heamothorax meaning accumulation of blood within chest cavity of 200 millimeter, the digestive system was normal, there were injuries on the vaginal wall, fracture of the right facial bone, heamatoa of right jaw-accumulation of blood, fracture of entire corroneasure-associated subaranoïd-one of the layers of the brain, heamatoma and raised graneal pressure-swelling of the brain and they formed the opinion that the cause of death was blunt force trauma to the head with resultant skull fracture subarachnoid haemorrhage and raised intercranal pressuring and he produced the post mortem report as Prosecution Exhibit 18.
18. PW7 Inspector Samuel Nduati recovered the Deceased's car at Mururureini Shopping Centre. He noted that motor vehicle had its front reg. no. plucked and placed inside on the dashboard and that the rear number plate was altered by black insulating tape to read KBW 079P instead of KBW 679P and that from inside, he recovered the Driving License with the Deceased's details. He stated that they towed the motor vehicle to Baricho police station.
19. In cross-examination, PW7 stated that he found the motor vehicle while abandoned.
20. PW8, Corporal Joseph Ndivo recalled that on 29/02/2016 at 9:00am they effected arrest of the Accused at Kibirigwi after which he led them to Gogoini in Kiine Location where they recovered a brown suit case (Prosecution Exhibit 17) from PW4's house. He stated that inside the suit case, they recovered original copy of the Deceased's logbook (Prosecution Exhibit 21), brown hand bag (Prosecution Exhibit 20), Prosecution Exhibit 8, Prosecution Exhibits 9 (a) and (b), Prosecution Exhibit 11, Prosecution Exhibit 10, Prosecution Exhibit 13, Prosecution Exhibit 14, Prosecution Exhibit 12 and they prepared inventory (Prosecution Exhibit 22). They then arrested the Accused and PW4. He identified the Accused before Court.
21. In cross-examination, he stated that the suit case was recovered from PW4's house.
22. PW9 CI John Mugo- Scene of Crime Officer testified that he took photographs of the scene and he produced Prosecution Exhibit 19 (1) (a)-(v) and Certificate as Prosecution Exhibit 19 (2).



23. PW10 Henry Kiptoo Sang examined a pair of blue trouser jeans in a khaki envelope marked as “A1”, a wrist watch in a khaki envelope marked as “A2”, khaki pair of shorts in a khaki envelope marked as “A3”, a green blouse in a khaki envelope marked as “B1”, a grey jacket in a khaki envelope marked as “B2”, a piece of blanket in a khaki envelope marked as “C1 Deceased”, a blood sample in a bottle marked as “C2-Priscilla Ngugi; Deceased”, a blood sample in a bottle marked as “C3-Anothy Kiplagat; Accused”. He then prepared, signed and adduced a report dated 23/5/2017 which he adduced as Prosecution Exhibit 25. He referred to a green blouse as Prosecution Exhibit 23 and jacket as Prosecution Exhibit 24.
24. PW11 Daniel Hamisi, Liaison Officer from Safaricom testified that on 27/02/2016 at 17:04hrs the Deceased’s phone number 0729747014 was in use around the Cottage Hospital area in Nanyuki town and that on 28/02/2016 at 08:42:14 hrs, the number was active within Kibirigwi area in Kirinyaga County and that on 28/02/2016 at 09:10:01hrs the phone was active in Thigerechi area within Kirinyaga County.
25. He further stated that on 27/02/2016 at 18:26:55hrs the Accused’s number 0700006810 was active around Nanyuki Cottage Hospital area and it remained within Nanyuki area until on 28/02/2016 at 09:49:50 hrs and he produced the call data as Prosecution Exhibits 27 (a), (b), (c) & (d).
26. PW12, Sgt. Reuben Kiptoo investigated the case and produced various Prosecution Exhibits. He was one of the officers who responded to the murder incident reported at the Deceased’s home and they found the Deceased’s body which was covered with a lesa and he observed an injury on the top left side of the head and that they discovered that the Deceased owned a car Reg. No. KBW 679P Suzuki Escudo black in colour and the same was missing. They also recovered blue pair of shoes as Prosecution Exhibit 30 from the homestead of the Deceased. He stated that they accessed the house where they discovered blood stained blue jeans trouser and at the dining table, they recovered a wrist watch make EMPERIO and one Samsung mobile phone which belonged to the Accused. He said that they took the body to the mortuary and continued with investigations.
27. He stated further that he wrote a letter dated 29/02/2016 to PW11 requesting for necessary information in connection with the Accused’s phone number, the Deceased’s phone number and PW3’s phone number. Later, he learnt that the Accused had been arrested and was being detained at Baricho police station. On 01/03/2016 they proceeded to Baricho police station where they found the Accused and another suspect, PW4 whom they brought to Nanyuki police station. He said that they took blood samples of the Accused and the Deceased and forwarded them to PW10 for examination vide Exhibit memo (Prosecution Exhibit 25). They also recovered a brown suit case with the Deceased’s items produced as Prosecution Exhibits.
28. In his defence, the Accused, gave sworn testimony and chose not to call witness. He stated that the Deceased was his lover and that on 27/02/2018 they went to Nanyuki town where the Deceased was to meet some business people and that after they visited some clubs and drunk alcoholic drinks, they decided to go back home and he was the one driving. At the gate, the Deceased alighted to go and open the gate. He said that she opened the small gate but was unable to open the main gate and so, he got out of the car in order to assist her in opening the gate which a double gate. He then went back to the car and as he drove through the gate, the Deceased was holding the gate while squatting and urinating. He stated that as he drove through the gate, the car got stuck on a heap of soil that has covered a sewage “mtaro” that a neighbour had dug to connect his sewer line. He said that he then stepped on the accelerator to force the car through and in the process the Deceased was hit on the head by the right side of the bumper of the car. He added that she was hit on the left side of the forehead and he stopped the vehicle while inside the gate and got out of the car, closed the gate and started giving her first aid as she was bleeding.



29. He stated further that the Deceased was complaining of pain in her right ribs and he then put her in the car on the back seat in order to take her to the hospital. He said that before he closed the door of the vehicle, she saw the Deceased while convalescing and she then died. He stated that he could not feel any pulse on her and she was unresponsive. He did not see PW1 during that time and he called PW3 and he informed him of the accident and he advised him to leave the place but he remained in the car while crying and about 10 minutes later, he was joined by PW1 and he asked what had happened. He said that he informed him and he drove the car to the parking area.
30. It was his testimony that they removed the body from the vehicle and placed it in a flower bed beside the house. He then went to the main house and took his suit case with clothes, a snake's skin and some Cannabis. He stated that he also changed his clothes since they were bloody and he then proceeded to Kirinyaga at PW4's place in Deceased's car towards 10:00am. He said that he informed PW4 what had happened and they advised him to go to Mombasa. In the evening, they spent at PW5's house. At PW5's house, he removed his brief case and snake skin and Cannabis from the car and took them to the house.
31. He testified that on 29/02/2016 they watched the news about the incident and PW5 instructed that the motor vehicle be removed from her compound and one Wilson offered to do so and he apparently changed the number plates. The Accused stated that he was later arrested.
32. In cross-examination, he stated that when the Deceased was hit by the car, she fell on a stone and she sustained injuries on the ribs. The Deceased was urinating and bent her head down to see why the car was stuck. He was preparing to take the Deceased to the hospital when she died and that it was his decision to escape to Kirinyaga and that he did not report to the police since he did not know the procedure. He said that PW5 advised him to report to the police but he decided to escape to Mombasa since he was afraid. He stated that the purpose of changing the number plate of the car was to disguise the identity of the car and that he tried to reach PW2 but he was unreachable. He stated that he did not deliberately kill the Deceased.
33. I have had occasion to consider the charge herein, the evidence adduced, learned submissions by respective counsel on record as well as case law cited. I have had due regard to the applicable statutory provisions and the principles of law developed over time.
34. The issue for determination is whether the prosecution has proved the ingredients for the offence of murder against the accused to the required legal threshold.
35. 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." Thus, the central ingredients of the offence of murder are
- i. The fact of death.
  - ii. The fact that the deceased's death was caused by an unlawful act or omission.
  - iii. That the accused committed the unlawful act which caused the death of the deceased; and
  - iv. That the accused had malice aforethought.
36. Section 206 defines malice aforethought in the following terms:
- "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.”

37. I will proceed to address the individual ingredients sequentially.

i. The death of the deceased

38. The death of the deceased has been proved by the PW1, PW2, PW3, PW6, PW12 and the Accused who saw deceased’s body with a fracture on the right side of the facial bone and by the post-mortem form PEXH. The evidence of PW6 confirms the death and attributes it to blunt force trauma to the head with resultant skull fracture subarachnoid haemorrhage and raised intercranial pressuring.

ii. The fact that the deceased’s death was caused by an unlawful act or omission.

39. On the evidence, more specifically the medical report produced (the Post Mortem report, it is established that the deceased death was not through natural causes and was not from a fall. The evidence establishes that the death was by an unlawful act.

iii. Proof that accused committed the unlawful act which caused the death of the deceased

40. The prosecution evidence did not offer any direct evidence of eye witness account of the Accused committing the act that caused death. The available evidence is circumstantial and the circumstances of this case trigger the “Last seen doctrine” into play. The first person to get into contact with the Accused and discovering the death of the deceased was PW1, Juma Guyo Jaldesa. He recalled that on 27/02/2017 at about 5pm both the Accused and the Deceased drove off the homestead. They were ok at the time. At about 11:30pm he heard a knock on the gate and he was hesitant to open. He added that he went behind the flowers which were in the compound and noted hazard lights of the Deceased’s motor vehicle Reg. no. KBW 619P. He testified that he then went to the gate which was closed and noticed the car which was already inside the compound but not in the parking area. He testified that he also saw the Accused who seemed to be crying quietly and when he inquired, the Accused answered that something bad had happened and the Accused led him to the boot of the Deceased’s car where he saw the Deceased lying in the boot. He stated further that he removed the cloth which was covering her body and face and he noted an injury on the head and that the injury appeared to be blunt with some blood.

41. The Accused told him that “the thing I have done; I don’t think you will forgive me!”. The Accused then asked him to get into the car and they proceeded to parking area after which he assisted the Accused in removing the Deceased’s body from the boot and placed it near the door to the house near some flowers and the Accused then covered the body with sheet of cloth- a Masaai Shuka. which In court he identified the ‘shuka’. That they entered the main house where the Accused placed his phone and wrist watch on the table and went to the kitchen to wash his hands.



42. He stated that the Accused then went to the bedroom where he changed his trouser. PW1 said that initially, the Accused had blue jeans which he identified before Court as Prosecution Exhibit 3 and changed to grey jeans which he identified before Court as Prosecution Exhibit 4. The blue jeans had heavy blood stains on the front. He stated that the Accused then took the blue jeans and proceeded to the kitchen where he tried to light it using a matchbox but it did not catch fire. PW1 escaped from the scene and informed one Wanjohi. Police were called in and when they arrived, both the Accused and deceased's car were missing.
43. The salient features in this evidence is that the deceased was found in the boot of the subject car. The accused stated "the thing I have done; I don't think you will forgive me!". The accused warned PW1 not to scream. He threatened PW1 with a knife to get his (PW1's) cooperation. The accused escaped from the scene only to be found and arrested in Kirinyaga and the deceased's car found abandoned. Notably, the Accused told PW5 that the deceased had moved to the driver's seat when they arrived at the gate and since she was drunk and could not drive, he joined her at the driver's seat. She fell off and hit the gate and that, when he went to pick her up, he noticed that she was unconscious and that he called the Caretaker for assistance and that he took the Deceased to the hospital. PW5 added that she advised the Accused to report the matter to the police but he did not since he seemed very much stressed and that she had stay with him in the house throughout the day until the time when he was arrested on the same day.
44. Another key piece of evidence is found in the testimony of PW7, Inspector Samuel Nduati. He recovered the Deceased's car at Mururureini Shopping Centre. He noted that motor vehicle had its front reg. no. plucked and placed inside on the dashboard and that the rear number plate was altered by black insulating tape to read KBW 079P instead of KBW 679P and that from inside, he recovered the Driving License with the Deceased's details. He stated that they towed the motor vehicle to Baricho police station.
45. The Accused evidence in defence is that the deceased died in an accident whereby she was hit by the vehicle as she urinated near the gate. That he placed her on the back seat to take her to hospital.
46. I have applied my mind to the conflicting evidence from both divides. In law the Accused had no obligation to prove his innocence.
47. In the quest to find answers as to whether the evidence on record proves beyond doubt that the ingredients of the offence of murder are proved against the Accused to the required degree, the court has to defer to the established legal principle that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt. It is necessary that guilt should not only be the rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty. (See *Ozaki and another v The State, Uganda v Sebyala & Others*, -Case No. 130 of 1988.6{1969} EA 204).
48. This threshold was laid way back by viscount Sankey L.C in *Woolmington v DPP* [1935] A.C 462 pp 481 where he 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.”

49. In *JOO v 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.”

50. The onus on the prosecution to prove the charge against the accused beyond reasonable doubt never shifts and there is no onus on the accused to prove his innocence. The evidence must be considered in its totality. In order to convict the evidence implicating the Accused must be certain and conclusive leaving no room for speculation or assumptions and thus erasing any doubts. Should a scintilla of doubt exist, the benefit as per the law goes to the accused.
51. Having carefully reviewed the evidence herein, it is clear to this court that the Accused was the last person seen with the deceased on 27/2/16 as they left the deceased’s home and he was found with her body later that night by PW1. The pertinent question is “how did the deceased meet her death?” The prosecution has laid down evidence which includes the fact that it is the Accused who was seen with the deceased when she was alive, that she was found dead in the custody of the Accused, that the cause of death was blunt force trauma, that the Accused escaped from the scene with the deceased’s vehicle and that by the time the Deceased’s vehicle was recovered, its Registration Number had been interfered with and disguised. That the Accused threatened PW1 with a knife not to scream and he ordered him around as they removed the body from the car. That PW1 had to seek a moment to escape scaling over a wall to a neighbour’s. All these facts, a mixture of direct and circumstantial evidence taken holistically and coupled with the application of the doctrine of last seen establish a very strong case by the prosecution against the Accused. The conduct of the Accused post the event is totally inconsistent with innocence.
52. While as observed above the Accused has no obligation to prove his innocence, the prosecution having discharged its burden of prove, the Accused has the onus to displace such evidence when accorded the opportunity so to do in his defence.
53. It is the Accused’s evidence that the death of the deceased was from a motor vehicle accident whereby he was driving in to the compound and he hit the Deceased who was squatting and urinating holding the gate.
54. The evidence on record shows that the Accused never mentioned the issue of an accident to PW1, the first person he got into contact with. While the Accused states that he placed the deceased on the back seat to take her to hospital, PW1 confirms the body of the deceased was in the boot of the car.
55. In addition, the evidence of PW5 is to the effect that the Accused told her of an accident involving a fall from the car by the Deceased while in his evidence he narrated an accident involving the car hitting the deceased. It follows that the accused’s explanation of the event is inconsistent. Matters are not helped by his escape from the scene, and, the concealing of the vehicles registration Number speaks volumes and gravitates towards a guilty mind.



56. If at all the incident was by accident caused in the cause of driving, nothing would have been easier than for the Accused to volunteer this information to PW1, PW5 and subsequently to the police during investigation.
57. It is established from the evidence that the accused and the deceased were in a romantic relationship and he was the last person seen with the deceased before her death.
58. It is clear from the above that there is no direct evidence linking the accused to the murder of the deceased. The case is based on purely circumstantial evidence and the doctrine of last seen.
59. The Court of Appeal in *Chiragu & Another v. Republic* [2021] KECA 342 (KLR) cited with approval the decision in *Abanga alias Onyango v. Republic* CR. App NO. 32 of 1990 (UR) which set the factors that a court faced with circumstantial evidence must consider. It was stated that:

“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.”

60. And in *Sawe v Republic* [2003] KLR 364, the Court of Appeal amplified on the above thus:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

61. The circumstantial evidence on record tending to link the accused to the crime was that he was found with the body of the deceased, his conduct after the fact and the conflicting information he gave on how the deceased met her death. He escaped from the scene of crime, driving kilometres away and in an effort to conceal his tracks and he disguised the registration number of the deceased’s car.
62. Being the person last seen with the deceased when she was alive, the doctrine of last seen sets in. The Court of Appeal in *Mwambegu v Republic* [2023] KECA 866 (KLR) enunciated the doctrine of last seen as follows;

“This Court (*Makhandia, Mbogholi-Msagha & Omondi, JJA*) explained the application of the doctrine of “last seen with” as follows in *Chiragu & Another vs Republic* (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR):“24.....Regarding the doctrine of “last seen with” we will revert to Nigerian case of *Moses Jua v. The State* (2007) LPELR-CA/IL/42/2006. The court, while considering the ‘last seen alive with’ doctrine held:

“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.” In yet another Nigerian case considering the same doctrine, in *Stephen Haruna v. The Attorney-General of The Federation* (2010) 1 iLAW/CA/A/86/C/2009 the court opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.” Quoting from another jurisdiction, to be specific India, the courts there have developed the doctrine further. In the case of *Ramreddy Rajeshkhanna Reddy & Another v. State of Andhra Pradesh*, JT 2006(4)SC 16 for instance the court held:

“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.”

Therefore, for “the last seen with” doctrine to be applicable, there should be overwhelming circumstantial evidence and corroboration that exclusively links the accused person to the death of deceased both in terms of timing and cause.”

63. The doctrine is also explained by the Supreme Court of India in the case of *Anjan Kumar Sarma v State of Assam Criminal Appeal No. 560 of 2014* where the court held that;

“In *Kanhaiya Lal v. State of Rajasthan*, (2014) 4 SCC 715 this court held that; The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime.”

“There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant... It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance 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 circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.”

64. Under the proviso to Section 111(1) of the *Evidence Act*, the prosecution having established that the deceased was found dead in the hands of the Accused after they had left the homestead healthy, the accused is deemed to be having special knowledge of what may have happened to the deceased in the intervening period, from the time she was seen with the deceased and the time the body of the deceased was recovered. This shifted the evidential burden upon the accused to explain what happened in that intervening period if, indeed, he was not responsible for the deceased’s death.
65. The circumstantial evidence herein irresistibly points at the guilt of the Accused and meets the threshold set by the Court of Appeal in *Chiragu & Another v. Republic* [2021] KECA 342 (KLR) and, further, applying the doctrine of last seen, there is enough evidence to the required threshold in law to hold the Accused culpable.



66. In light of the above, it has been demonstrated by way of evidence that the death of the deceased was as a result of an unlawful act by the Accused.
- iv. The Accused had malice aforethought
67. On the question whether the Accused had malice aforethought, the manner of the hitting of the deceased with a blunt object by the Accused falls perfectly within the meaning ascribed to malice aforethought in Section 206 of the Penal Code.
68. The evidence on record establishes an intention to cause the death of or to do grievous harm to the deceased; knowledge that the act or omission causing death will probably cause the death of or grievous harm to the deceased; and an intent to commit a felony. The conduct of the Accused after the fact demonstrates a mind with clear malice aforethought.
69. From the foregoing, I reach the inescapable conclusion that the prosecution has proved all the ingredients of the offence of murder against the Accused. I find him guilty as charged and convict him under Section 322(2) of the Criminal Procedure code.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 31<sup>ST</sup> DAY OF OCTOBER, 2025.**

**A.K. NDUNG’U**

**JUDGE**

