

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO.E028 OF 2022

REPUBLIC.....PROSECUTION

VERSUS

BRIAN WAFULA BARASA.....ACCUSED

JUDGMENT

1. Brian Wafula Barasa, the accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on 17/10/2022 at Bondeni Baraton in Kiminini within Trans-Nzoia County he murdered Judith Nafula Konya.
2. The accused person denied committing the offence and the prosecution has presented 9 witnesses in support of their case. The prosecution's case on the overall is based on circumstantial evidence.
3. Barasa Andrew Wanjala (**PW1**), the husband of the deceased and father to the accused testified that the deceased had harvested maize from one acre farm, shelled it and asked a casual labourer to dry it on 12/10/2022 and 13/10/22. That on 13/10/2022 she went back and found 2 bags missing. **PW1** stated that the deceased called him and informed him about the two missing bags. That he told her to inquire from the accused. That the deceased inquired from the accused where the 2 bags were and

that because the deceased had put the speaker of her phone on, he could hear the conversations and that he heard the accused threatening the deceased that he would silence her. That he was hardened after killing several people and would kill her if she shared the information with anyone.

4. He stated that the deceased was afraid and that the following day while at school where she worked, she expressed her fears to him. He stated that he called the accused on phone and he admitted threatening the deceased after stealing her maize. That he updated the deceased about what the accused had admitted and all was well.
5. He testified that the deceased later called him and told him that the accused was not talking to her. That they later met in Kitale Town and proceeded to their other home in Kesogon. He stated that on 17/10/22 which was a Monday the deceased went back home at Baraton and agreed with her that on Wednesday they would go and report the matter to the police. He stated that he spoke with her at around 5pm as she was leaving school where she worked.
6. He stated that on 18/10/22 the deceased did not call him in the morning as it was usual. That at around 11am he called her but she was not picking and tried 64 times to reach her in vain. That he called his daughter at Kiminini to call her but she also could not get through. That the daughter called the school where the deceased worked and she was told that she had not reported to school. He stated that he told the daughter to call neighbours and go and find out what was happening at home.

7. He stated that the daughter got a neighbour but on reaching home all the doors were locked. He stated that he had tried the whole day calling the accused without any success because he was not picking calls. That he went to Toll police station and reported the matter and he was given two police officers to accompany him home at around 9.30pm. He stated that his daughter and her other brother from his first wife also arrived. That they opened doors of all houses and inspected but did not find the deceased. That the main house was orderly made with everything arranged but when they opened the house occupied by the accused they found it disorganized and it appeared that the accused left in a hurry because the suit case was opened with clothes strewn all over.
8. He stated that they searched the compound in vain and decided to report the matter at Kiminini police station before heading to Kesogon to spend the night.
9. He stated that as he was on his way, the DCIO called him and he went back to Baraton home. He stated the DCI conducted a fresh search and even searched the pit latrine in vain. That the following day more search was conducted and in the bedroom, they noted that the bed sheets had some urine and the mosquito net and duvet were missing. He stated that his daughter, who is a nurse informed him that the urine could be a sign of strangulation.
10. He stated that a further search revealed that a barbed wire around the compound had been cut and that by that time many people including staff from St Joseph Girls Secondary School had joined in the search adding that the search had led them to think

that the body of the deceased may have been disposed of in river Kiminini which had a deep end. He stated that the river was about 1.5KM away from his house. That they conducted a search including at the river but in vain.

11. That on Wednesday, one David Okoro, a cousin to the accused called his daughter and informed her that the accused had taken 1500/- from him at his work place and disappeared. He stated that he notified the DCI who posted his photograph of accused as a wanted person.
12. He stated that the following day the DCI called him to Kiminini police station where they showed him a black laptop bag/rack sack with some items inside including, a bunch of 2 keys for the main house, an extra key for his house, several pieces of gloves, a bandage, a jungle jacket, a pair of grey trousers, perfume, phone, pair of socks, a wallet containing 2 ID cards, ATM card (I&M), ATM card (KCB), Election card, a roll of container with powder which had the effect of chloroform with a masking tape. He identified the items as all belonging to his son, the accused herein.
13. He stated on 22/10/22 on Saturday at around 4pm a young boy went home and reported seeing a body in the river. That they rushed to the river and actually found the body belonging to the deceased floating in the river. He stated that he paid a diver to go and retrieve the body which he did and that they used a blanket to carry the body to a vehicle and took it to Mt Elgon Hospital Mortuary in Kitale.
14. He stated that the body was stripped naked at the mortuary and the body was in a night dress, a biker and underpant. He

stated that the skin was peeling off and that the legs appeared apart as though she had been raped.

15. He stated that at around 7pm some women went to him and informed him that the accused had been arrested at Mtwapa Mombasa and was being held there.
16. He further stated that on 28/10/2022 he went to the morgue to identify the body of the deceased before post mortem was conducted.
17. He testified that the accused had been problematic ever since he was circumcised adding that he used to be violent to the deceased and had made numerous reports to the police in that regard. He stated that the accused and the deceased used to reside in the Baraton home and were the only persons staying there at the time.
18. When cross-examined by defence counsel, the witness insisted that the accused was always problematic and had been expelled in previous schools he attended and that though he managed to obtain C+ and went to the university he only attended college for one semester and was always a problem to the family.
19. Bendetta Wanjala Misiko (**PW2**), a neighbour to the deceased testified that on 14/10/2022, the deceased called her to her house asking her to help her with drying of maize. She stated that she went and found the accused seated outside and did not assist them in the work of drying the maize. She stated that she left shortly and that later the deceased passed by her home telling her that she was headed to Kesogon to see her husband. That she asked her to help in milking the cows incase the

accused does not do so. She recalled that it was a Friday adding that the accused milked the cows on Saturday, Sunday and Monday.

20. She further recalled seeing the deceased on Monday evening but says she did not talk to her. She stated that the cows were not milked on Tuesday morning and there was no one at home.
21. She stated that a daughter to the deceased later called her to go and find out if deceased was home as she had not reported for work. That she went and found all houses locked with padlocks. She stated that she informed the daughter that the cows had not been milked.
22. She stated that the body of deceased was later found in a river adding that they had spent so much time looking for her expecting to find her alive. She further recalled that the deceased loved the accused and supported him a lot. She added that the deceased had told her that she had differed with the accused over maize.
23. Susan Kakai Wabole (**PW3**) a colleague to the deceased who worked as a librarian at St Joseph Girls School stated she met the deceased on 17/10/2022 at school corridors and even greeted her. She stated that in the evening she left the deceased at the gate waiting for a vehicle to take her home and that was the last time she saw her alive because she never reported to work the following day on Tuesday.
24. She added that it was unusual for her not to report at work where she worked as a laboratory assistant. She stated that she

was a close friend to the deceased and did not know what happened to her.

25. Davies Okoro (**PW4**) testified that the accused was a cousin to him and recalled that on 18/10/22 at around 7am the accused called him telling him that he was from Nakuru and was on his way to Eldoret to do some online business.
26. He further stated that the accused then told him he was already in Eldoret, was tired and wanted to rest. That he directed him to his house to go and rest. That he called his sister Damaris and notified her accordingly by adding that he gave her the mobile number of the accused. That he also sent her money for breakfast.
27. He stated that he returned home at around 7pm and found accused there, that they had dinner together and later retired for sleep. That in the morning, the accused told him that he was going to do his online work and he left him and went for work.
28. He stated that the accused later called him and asked for Kshs.3000/- which he did not have. That the accused later went to his place of work and he gave him 1500/- and directed him to a cyber café because he had told him that he wanted the money for his online work.
29. The witness stated that he went home at 8pm but did not find the accused as expected. That he had left his bag behind. He stated that he got surprised and called the sister to the accused named Martha who in turn told her that the accused had issues with his mother (deceased) and both of them were missing.

30. He stated that later the DCI officers called him and told him not to interfere with the bag left behind by the accused. That the DCI officers later arrived and he led them to his home and they recovered the bag left behind by the accused. He stated that he later learnt that the accused had been arrested in Mombasa. He recalled that when he tried reaching the accused when he returned home in the evening after parting ways with him during the day, he could not reach him. He stated that when he checked at the bag left behind by the accused he got suspicious when he saw a bandage and gloves in the bag.
31. Damaris Okoyo (**PW5**) recalled that on 18/10/22 at around 8am, his brother (**PW4**) called her and told her to receive the accused in the house in Eldoret where she stayed with him. She stated that the accused arrived carrying a bag and she welcomed him and prepared breakfast for him.
32. She stated that the accused asked her to show him a chemist shop where he could buy a bandage, gloves and spirit. That he led him to a nearby chemist and he bought a bandage, 2 pairs of gloves and spirit. That she saw that the accused had a wound on left hand thumb. That she inquired what injured him and he reportedly told her that a motorcycle he had used to reach their house injured him. That he put on the gloves and cleaned the wound before bandaging it. She stated that the wound was fresh and was bleeding.
33. She stated that she overheard the accused calling several people asking them to host him. That she left him home after lunch and left to KVDA where she was on attachment.

34. She stated that she came back at 7pm and prepared dinner upon which the 3 of them took and thereafter slept.
35. She stated that the following morning they took breakfast adding that the accused looked very unsettled moving from the sitting room to the bedroom which surprised her. That she later accompanied the accused to the shop where he bought a Telkom line and credit for the same line. That she heard the accused calling a lady named Kate asking her to host him but the lady declined. That the accused asked her if she could help him with Kshs.1500 urgently but she did not have any money.
36. She stated that the accused then left the house. That she later left for attachment and when she returned in the evening she did not see the accused but found that he had left a bag.
37. Kevin Simiyu Wenani **(PW6)**, a boda boda rider residing within Baraton stated that on 14/10/2022 at around 2pm the deceased who was a neighbour requested him to assist her get her maize out of her house. He stated that he assisted her and in the process the deceased complained to him that her 2 bags of maize had been stolen. That as he helped her, the accused was just seated outside his house. That he was paid Kshs.50/- for the job and was to return later. He added that the deceased also told him that she had differed with the accused and asked him to help her milk the cows incase the accused refused to milk the cows. He however stated the accused milked the cows as usual so he did not milk the cows the following day.
38. Martha Nekesa Barasa **(PW7)** a daughter to the deceased and a sister to the accused told this court that she was a nurse by profession and that on 14/10/2022 which was a Friday, the

deceased called her on phone and told her that she was undergoing difficult moment. That she reported to her that on 13/10/22 when she returned home from work she found her 1 ½ sacks of maize missing. That she had given the job of drying maize to neighbours namely Bendetta Wanjala (**PW2**) and Kevin Simiyu (**PW6**). She further stated that the deceased told her that the accused could not help her in drying of the maize and was very hostile to her and suspected that he smoked bhang. That the deceased confided to her about frustrations she was facing and the accused told her that she was bad for reporting him to his dad who in turn reported him to the police.

39. She stated that she calmed the deceased and told her to share the issue with **PW1**. That she told her she was going to see **PW1** that Friday and would return on Monday. That on Monday 17/10/22 she sent her a parcel and informed her she would be busy at school as National Examinations were going on at the time. That she talked to her in the evening and she informed her that the accused was home that evening. That she tried calling her at 8pm but her phone was off. That she tried reaching her the following day on 18/10/22 but her phone was still off. She stated that at 11am she received a call from her father (**PW1**) inquiring about the deceased.

40. She stated that she called the school secretary to inquire about her whereabouts but was told that the deceased had not reported to school that day. That she then decided to call the accused but his two lines were both off. That she called **PW2** at 5pm to go and find out at home if the accused and deceased

were at home but got information that all the houses were locked with no sign of anyone.

41. She testified that she called her dad to go home and find out what was happening as she also asked her other brother at Webuye to go and pick her and take her home. That they eventually arrived home at around 9pm and found her dad with police officers in their home compound. That padlock to the main house were broken and when they entered they found the room with no sign of disturbances. That she went to the bedroom and found the deceased's handbag with medicine, spectacles and other personal items like NHIF Card, ID Card and her ATM Card for Co-operative Bank. That she got curious and checked keenly at the bedroom and noticed that a bed sheet and a mosquito net were missing. She clarified that it was a duvet that was missing.
42. She stated that the following day she returned back to the house with DCI officers from Kiminini. That inside the bedroom she noticed that the bed sheet remaining had signs of urine but had dried up. That as a nurse she instantly knew the deceased was dead because people usually urinate prior to death. That she was then certain that the deceased had been killed.
43. She stated that at around 7pm same day, **PW4** a cousin who lived in Eldoret called her complaining that the accused had stolen Kshs.1500/- from him and disappeared. That she notified the DCI officers about the developing news.
44. She stated that on 20/10/2022, the accused's mother in law, called her and told her she had received a strange message from someone informing her that the deceased had been confirmed dead when the search was still ongoing. She stated that the

body of deceased was found later in a river. She stated that she never got on well with the accused because he used to insult the deceased and even slapped her on one occasion in her presence. She stated that several complaints were reported to the police regarding the conduct of the accused and that **PW1** attempted reconciliation in vain.

45. She denied framing the accused and denied suggestions of having any sexual relations with **PW1**. She stated that she had previously witnessed the accused threatening the deceased over a phone.

46. Dr Lilian Lipesa (**PW8**), the doctor who performed autopsy on the body of deceased testified that she did so on 28/10/22 at Mount Elgon Hospital Mortuary. That the body was identified by the deceased's husband (**PW1**) and Jane Francisca Kituyi.

47. She stated that the body was decomposed and covered with a piece of cloth commonly referred to as a '**Lesso**'. She stated that the skin was beginning to peel off. She stated she made the following observations;-

(i) Externally

- (a) Body was stiff and cold.
- (b) No obvious sign of trauma.
- (c) Skin peeled off.
- (d) Mouth eaten away.
- (e) Head, upper limbs and lower limbs normal.

(ii) Internally the following were observed.

- (a) Tracheal rings collapsed. That there was breakage of trachea.
- (b) Lungs appeared normal.

(c) No water in the lungs (indication of not drowning).

(d) Heart normal.

48. Based on the above findings the doctor opined that the cause of death was strangulation and dumping of the body into the river. He tendered the Post Mortem report as **PExhibit 2**.
49. PC Zaddock Wafula (**PW 9**) the investigating officer in the case testified that on 19/10/22 he took over a case of missing person reported at Toll police station within Kiminini. That the report of a missing person was made by Andrew Wanjala (**PW1**), the husband to the deceased. That the report was booked vide OB No.3/18/10/2022.
50. The investigating officer stated that he visited the home of the deceased together with other police officers and found houses locked from outside. He stated that he took hacksaw and cut the padlock to gain entry into the main house where they found two plates with cooked green grams. That the 2 plates indicated that 2 people were eating.
51. He stated that he proceeded to the bedroom and found it messy. That he saw a bed sheet stained with urine. That they went to an adjacent house reported to belong to the accused and found clothes and other belongings with no shoes. That the accused was not there.
52. He stated that he took the mobile phone number of the accused which was 0703475801 but the same was switched off completely. That the other number the accused used was 0769038712 and when he tried to locate it, the number was traced to be in Eldoret Town. That he kept switching the phone

on and off. That he suspected that the accused was trying to hide.

53. He stated that he recorded statements from the father of the accused, the sister and neighbours and that from the statements he was able to trace the genesis of the differences between the accused and the deceased which he stated began on 14/10/22 when the deceased noticed that her maize had been stolen and on trying to inquire from the accused, he turned hostile.

54. He stated that he further established that the deceased and the accused were the only persons in that house at the material time. He stated that after the incident the accused escaped to Eldoret and later to Mombasa. That he was arrested in Mtwapa Kilifi adding that he kept on switching his phone on and off and changing mobile numbers. He gave the numbers as;

- (i) 0781655838
- (ii) 0799360999
- (iii) 0731366561

He stated that the accused kept on interchanging the numbers and switching the phone on and off. That when they arrested the accused he still had the key to the main house at home. He tendered the key as **PExhibit 1(b)**.

55. That they recovered a masking tape which he suspected he used to cover the mouth of the deceased. He also tendered the 2 plates he recovered from the main house which he stated had food remains of green grams.

56. He stated that when he got information on 23/10/2022 that the accused had been arrested at Mtwapa, he proceeded and recovered personal items from the accused. That he had 2 ID Cards with the following names;
- (i) Brian Wafula Barasa
ID No.33998921 issued on 1/1/2016.
 - (ii) Brian Wafula Barasa
ID No.33996921 issued on 6/8/2016.
57. That he also recovered Telcom Card, KCB Visa Card, Voters Card and Visa Card. That the items were in his wallet. He stated that he prepared an inventory of all the items recovered and he tendered it as **PEXhibit 4**. That he escorted the accused to Kitale.
- 58.** He stated that he also recovered personal clothes from the accused including black shorts. He tendered it as **PEXhibit 1(b)**, masking tape **PEXhibit 5**, and perfume spray **PEXhibit 6**, 2 pairs of socks **PEXhibit 7**. A grey trouser **PEXhibit 8**, a jungle jacket **PEXhibit 9**, mobile phone Techno **PEXhibit 10**, Padlock and 2 keys **PEXhibit 11**, Bandage **PEXhibit 12**.
59. He stated under cross-examination that the body of deceased was found in a river which was about 200 metres away from the home. That he saw a path to that river and was certain that that is the path used to carry the body of the deceased to the river. He conceded that there were 2 other suspects who escaped to Uganda and still on the run. He insisted that only the deceased and accused resided in that homestead.
60. When placed on his defence the accused Brian Wafula Barasa denied the charge on oath. He stated that he used to

work in Mombasa in a company as a salesperson. He stated that on 10/10/2022 he had traveled back home in Kiminini from Mombasa as it was a holiday.

61. He stated that he had an issue with his father relating to a woman the father had married who to him was a relative. He stated that his father was married to 2 wives with the 2nd wife being his mother. He stated that the 1st wife was an aunt to his mother and that when he asked his father for an explanation he turned hostile and told him to get out of his compound.
62. He further claimed that his dad was at one time found in a compromising situation with his sister, **(PW7)** in a lodging in Mois Bridge. That his mother was unhappy and quarreled **PW7** over the same. He stated that when he quarreled with his father, the father left to Kesogon where his 1st wife resided and left him with his mum. He denied quarreling with his mother (the deceased) and that he never threatened her.
63. He stated that on 17/10/22 he was in Eldoret where he had gone to see his girlfriend known as Faith.
64. He stated that Davies **(PW4)**, a cousin to him connected him with his girlfriend. He stated that he met his cousin **(PW4)** on 18/10/22 in Eldoret.
65. According to him, he left home in Kiminini on Sunday the 16/10/22 and stayed with Faith the whole day on 16/10/22. That on Tuesday 18/10/22 he met Davies **(PW4)**. That he left home on 16/10/2022 when deceased was not home. That he met Damaris after he had an accident on a motorbike. That Damaris took him to a chemist to buy bandage. He denied stealing Kshs.1500/-

from Davies saying that Davies gave him the money. That he asked him to support him with fare to Mombasa.

66. He denied running away insisting he was going to Mombasa to work. He denied killing his mother insisting that she was his best friend.

67. He conceded in cross-examination that Davies (**PW4**) and Damaris (**PW5**) are his cousins and had no reason to frame him. That he spent a night on Tuesday 18/10/22 in their place in Eldoret. He stated that Damaris saw him making calls but insisted that the calls were normal calls. He stated that he quit his job in Mombasa in August 2022 before he traveled home in October 2022. He stated that he got another job but did not give details. He stated that he received the news of the death of his mother when he was under arrest.

68. This court has given a summary of the evidence tendered by the prosecution and the defence put up by the accused. As I have observed above the accused was charged with the offence of murder contrary to section 203 of the Penal Code.

69. For an offence of murder to be sustained, the prosecution is required by law to establish and prove the following elements beyond reasonable doubt. The ingredients are;

- (i) Fact of death and its cause.
- (ii) Actus reus or that the unlawful act of commission or omission by accused caused the death.
- (iii) Malice aforethought.

70. (i) **Fact of death and its cause.**

In this case, the fact of death and its cause is uncontested. From the evidence of the husband of the deceased (**PW1**), the daughter (**PW7**) and other prosecution witnesses, the body of the deceased was found in a river. Dr. Lilian Lipesa the doctor who performed autopsy on the body of the deceased opined that the deceased was murdered and the cause of death was strangulation and that the body was dumped into the river when the deceased had already died because she found the lungs clear with no water. She tendered the Post Mortem report as **PExhibit 2**. The fact of death and its cause were therefore established by the prosecution beyond reasonable doubt.

71. (ii) **Actus reus.**

The cause of death as observed above is uncontested in this case. What is contested is the person who caused it. The accused person through written submissions by learned counsel Mark Peter .M. Khisa & Co Advocates dated 3/7/25, submits that the deceased was strangled and dumped in a river by an individual who unlawfully deprived the deceased person life. He however submits that the prosecution had the burden to prove that he is the one who committed the offence and according to him the prosecution has failed to prove its case beyond reasonable doubt. He relies on the case of **Elizabeth Waithiegeni Gatimi -vs- Republic (2015)eKLR** and **Pius Arap Maina -vs- Republic (2013)eKLR**.

72. The prosecution's case with respect to the element of actus reus is solely reliant on circumstantial evidence as there was no eye witness to the incident. When a criminal case rests entirely on circumstantial evidence, a number of conditions must be

satisfied. It is now well settled through several authorities. In the case of **Abanda Alias Onyango -vs- Republic (Cr. App No.32 of1990(UR)** the court held as follows;

“It is well settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy 3 tests;

(i) The circumstances from which an inference of guilt is sought to be drawn must be cogent and firmly establishes.

(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.

73. The same position was taken in the case of **Sawe -vs- Republic (2003)KLR 364** where the Court of Appeal made the following observations;

“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 any 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”.

74. Now turning to the facts or evidence laid before this court, this court finds that the following facts were established by the prosecution and it clearly implicated the accused or linked him to the commission of the offence.

- (i) The evidence of **PW1** the father to the accused and husband to the deceased showed that only the deceased and the accused resided in that compound at the material time. That evidence/fact is corroborated by **PW7** the sister to the accused, the neighbours **PW2** and **PW6**. The evidence of the investigating officer (**PW9**) particularly that he found 2 plates (**PExhibit 3(a)**) in the main house with some cooked green grams in my view is a clear indication that on the Monday evening or night of 17/10/22, there were only 2 people taking dinner. The 2 people as indicated by **PW1, PW2, PW6** and **PW7** were only the accused and the deceased. Both of them were seen on Monday evening in their compound. **PW6** saw the deceased returning home from work on 17/10/22. **PW7** called the deceased in the evening of 17/10/2022 and she told her she was home with the accused but at 8pm she tried calling her but her phone had been switched off. It is also apparent from the evidence of the neighbours (**PW2 and PW6**) that in morning of Tuesday 18/10/22 both the deceased and accused were not at home. They were both missing and the cows had not been milked. This court finds that on the basis of the above

evidence, the deceased and the accused were the only people at home that fateful evening.

75. (ii) Secondly according to **PW1** and **PW7**, the accused and the deceased at the material time were not in good terms. **PW1** states the deceased reported to him that about 2 sacks of her maize were stolen while she was away in school and suspected the accused because again he was the only person at home that time. The deceased inquired from the accused but the accused reacted with hostility. **PW1** says that the deceased reported to him about threats to kill issued by the accused and directed at the deceased. **PW7** says that on 14/10/22 the deceased called her and shared her frustrations/difficult moments the accused was subjecting her to. That her 1 ½ bags of maize had been stolen and that the accused had refused to dry the rest of maize. **PW2** and **PW6** the neighbours corroborated the same. Both went to assist the deceased to dry the maize and though the accused was present he did not give a helping hand. That conduct is quite contrary to his assertions in defence that he loved his mother and had no issues with her. Certainly a son who cares of a parent would not sit there watching neighbours helping a parent. He should have been in the forefront but was not.

76. The issue of hostility was further elaborated by **PW1** and **PW7**. They said that the accused was of bad character. **PW1** stated that he had overheard over the phone on several occasions the accused threatening his mother (the deceased). **PW7** stated that the deceased confided to her that the accused smoked bhang and was dangerous and that is why he advised her to go to Kesogon on 14/10/22 to share the same concerns

with **PW1**. **PW7** stated that she had also witnessed the accused threatening the deceased over a phone. That she also witnessed him insulting and slapping the deceased. This is what she put in during cross-examination.

“We are not friends. He used to insult the deceased and he even slapped the deceased at one instance”.

77. The accused attempted to pour cold water on the evidence of **PW1** and **PW7**. That the father (**PW1**) had a sexual relationship with the daughter (**PW7**) but no evidence was laid before me. **PW7** categorically denied any such unsavoury relationship. She also denied that the father (**PW1**) got married to a close relative as 1st wife.

78. The fact of hostility and threats were therefore well established by the prosecution and that is material in this matter because it creates a link between the accused and the offence.

79. (iii) The evidence by the accused that he left home on 16/10/22 is contradicted by the evidence of his cousin Davis Okoro (**PW4**) and Damaris Okoyo (**PW5**). According to **PW4**, the accused called him on 18/10/22 and informed him that he was from Nakuru headed to Eldoret and wanted a place to rest because reportedly he was tired. The evidence is supported by **PW5** who stated that the accused found her in the house in Eldoret and told her he was from Toll or home. The accused himself concedes that he met **PW4** and **PW5** on 18/10/22. That he had no issues with **PW4** and **PW5**. That obviously means that the witnesses were telling the truth and had no reason to lie. The only person who was lying was the accused himself why would he

tell **PW4** that he was from Nakuru when he was from home in Baraton. Why would he borrow Kshs.1500/- under the pretext of online business when he knew he was borrowing money to use as fare to Mombasa? He certainly had something to hide which was the crime he had committed.

80. Fourthly, the accused arrived at the house of **PW4** in Eldoret with an injury on his thumb. **PW5** stated that it was fresh and still bleeding. The accused stated that he had an accident on the motorcycle but that explanation in my view held no water because no explanation was given on how the accident occurred and how come that thumb was the only part of the body injured. He did not state if he fell from the motorcycle or if the motorcycle itself was involved in an accident. This court finds that it is more probable that the injury on the thumb was occasioned to him as the deceased struggled for her life.

81. The other issue well established are the observations made by **PW5** on the unusual behavior by the accused are quite telling. She stated that the accused was quite unsettled and appeared uneasy. That he was making frequent calls. That he went and bought a new Telkom line and loaded it with credit. That she overheard him trying to get someone called KATE to host him but the lady declined. That the accused kept moving from one room to the other which kind of surprised her.

82. It is also apparent that the accused left his bag with his personal items in Eldoret in the house of **PW4** because after getting Kshs.1500/- from him he decided to leave for Mombasa in a hurry and did not want the cousins to know.

83. The defence narrative that he went to Eldoret on 16/10/22 to stay with his girlfriend called Faith is not believable in light of the evidence tendered by both **PW4** and **PW5**. Furthermore if the accused wanted to really rely on alibi as a defence why did he not call the said Faith as his witness because after all he says she was a girlfriend? He did not mention to either **PW4** or **PW5** that he was also visiting a girlfriend named Faith. Again if he had a girlfriend to host him, why was he overheard by **PW4** frantically calling people to host him in vain? Why did he want to be hosted if he had a secure job in Mombasa? Why did he switch off his phone from 17/10/22 and only switched it on using a new Telkom line bought in presence of **PW5**?
84. The evidence of the investigating officer **PW9** indicates that the accused person kept switching his phone on and off using different lines. That conduct in my view is a conduct of a person trying to hide and the reason for hiding in this instance was the heinous crime committed on 17/10/22.
85. The State in its written submissions dated 17/7/25 contends that the evidence tendered and highlighted above cumulatively form a strong chain implicating the accused as the person with the knowledge of events that led to the horrific death of his mother. Mr Mugun submits that from the conduct of the accused inference of guilt can be drawn and rely on the case of **Roba Galma Wario -vs- Republic (2015) KECA 521 (KLR)** where the accused kept away from his usual place of residence after the murder. That the Court of Appeal upheld conviction because it found that the act of running away was indicative of the fact that he was conscious of the wrong committed. The State points out

that the accused left home in a hurry as indicated by the state of his house and borrowed money under the pretext that he was using it in a cyber café. This court finds that indeed the conduct of the accused both before the incident and after is indicative of a person who was conscious of what he was about to do and what he had done.

86. This court based on the above facts is satisfied beyond any reasonable doubt that the circumstantial evidence placed before this court unerringly points at the accused and positively links him with the commission of murder. The element of actus reus is proved to the required standard. I am not persuaded by the defence claim that absence of DNA analysis or forensic evidence linking accused with phone calls negates inference of guilt.

87. (iii) Malice aforethought (mens rea)

The accused in his submission denies threatening the deceased and that she was his friend. That he could not harm her. He submits that the element of malice or his culpability in causing death was not established. However from the manner in which the deceased was strangled to death and her body thrown into the river, malice can be inferred. Section 206 of the Penal Code provides as follows;

“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.....”.

88. From the evidence tendered by the prosecution this court finds that the accused did not relate well with the deceased. The threats may not have been reported to the police but that alone does not mean it did not happen. Many families do not report threats especially from family members as they usually prefer reconciliation. This court finds that the manner in which the deceased was strangled to death and dragged 100 metres before being dumped into a river shows that the person who committed the heinous act was actuated by extreme malice. He never intended the body to be found. I am satisfied that the element of mens rea has been established and proved as provided for under section 206 of the Criminal Procedure Act and from the conduct of the accused at the material time and his previous conduct.

He committed a heinous crime against his own mother and ended her life prematurely. The prosecution’s case against the accused has been proved against him beyond reasonable doubt. He is hereby found guilty as charged and is convicted accordingly.

**DELIVERED, DATED and SIGNED at KITALE this29th .
..... day ofOCTOBER....., 2025.**

HON JUSTICE R.K. LIMO
KITALE HIGH COURT

Judgment delivered in open court

In the presence of

Mafumbo for the accused

Mugun for the State

Brian Wafula Barasa -the accused person

Duke/Chemosop - court assistants