

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL CASE NO. 67 OF 2020**

REPUBLIC.....PROSECUTOR

VERSUS

JANE WAIRIMU WAMBUGU.....ACCUSED

**JUDGMENT**

1. The accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that on 27/10/2020 at Mutamaiyo area, Yamumbi within Uasin Gishu County she murdered one **David Wairire Muriuki**.
2. From the record, the accused took plea on 18/11/20 before **H. Omondi J (as she then was)**. She denied the charge and a plea of not guilty was entered. After several adjournments, the trial commenced on 09/03/2022, on which date **PW1-PW5** all testified before **E. Ogola J**. Upon **E. Ogola J's** transfer, I took over the matter as from 22/03/2023 and proceeded to take the testimony of all the remaining witnesses between 6/12/2023 and 11/06/2025, namely, **PW6-PW8**, and the accused who, upon being found with a case to answer, testified as **DW1**. Needless to state, before I took over the matter, directions under **Section 200(3)** of the **Civil Procedure Rules** were taken, whereof the defence, with the concurrence of the Prosecution, elected to proceed with the case before me from where it stopped.
3. **Mr. Omolo Aseso** is on record as Counsel for the accused person while several Prosecution Counsels have handled the case along the way on behalf of the State. At present it is **Mr. Leonard Okaka**, who succeeded **Ms. Emma Okok**, who is handling the case.
4. **PW1** was **Dr. Kibet Keitany**, a Pathologist at Moi Teaching and Referral Hospital (**MTRH**) Eldoret. He testified that he conducted a post-mortem exercise on the deceased on 5/11/2020, who was aged about 23 years old. He stated that upon examination, he noted a bluish dislocation of fingers and tongue which signified lack of oxygen, a bruise on the left arm of about 2 x 1 cm, and abrasions on the right pretibial and perioral region of about 5 x 3 cm. He also noted that there were blood clots and blood from the right ear, head-right partial skull fracture which was depressed and comminuted and of about 5 x 4 cm and which extended to the base of the skull - right temporal, internal bleedings within the right side of the brain, increased intracranial pressure on chest, abdomen, heart, liver, spinal cords were all normal. He testified that he formed the opinion that the cause of death was "**severe head injury due to blunt force trauma consistent with assault**".

5. **PW2, James Lugalo Edwin**, testified that the deceased was his landlord and a friend, and that he also knows the accused as the girlfriend of the deceased, and who had been staying with the deceased but he (**PW2**) barely knew her. He then stated that 23/10/2020 in the evening was the last time he spoke with the deceased, that 4 days later on 27/10/2020, he went outside at around 8:00 am when he saw the accused open the door to the house of the deceased, who went over and asked if he (**PW1**) had a phone number for any member of the family of the deceased, and that the accused alleged that they had been attacked the night before. He testified that the accused then led him into the house where he saw the deceased lying on the floor on a mattress with a lot of blood on his face and nose, the blood was dry and the eyes were open and red with blood. He stated that at that time, he was not sure whether the deceased was alive or dead, he went to seek help to take the deceased to hospital, the accused informed him that she was going to drop keys to her workplace and would return, that he spotted two police traffic officers metres away, whom he approached and asked for help. He testified that the officers went to the house and upon examining the deceased, declared that he was long dead, upon which he took his phone and informed the siblings of the deceased about the incident. He also identified several photographs of the building in which the house is located and of the body of the deceased, before it was taken away by the police. He stated that he had known the deceased from his childhood, that he (deceased) had lived with the accused between 5-6 months, and that he was not aware of any dispute between them. In cross-examination, he stated that the day when the accused told him about the alleged attack was on a Tuesday and the date of the alleged attack was a Saturday.
6. **PW3, Duncan Robo Gichui**, testified that the deceased was his neighbour and later his landlord for 2 months before he died, and that he had rented a shop from the deceased. He was shown some photographs of the building which he used to described the scene and explained that the shop he rented is on the front side and the deceased lived behind it. He testified that he also knew the accused as a friend to the deceased and they lived together, that he knew her when he became a tenant for the short period. He testified that on 24/10/2020 at about noon, he saw the deceased and the accused leave their house, he talked to them and they were fine, they were going to the Centre, that at around 8.00-9:00 pm, his son told him that some visitors, who turned out to be the deceased and the accused, informed him that they had lost their keys and requested to use **PW3's** key and door to get to their house, that he (**PW3**) did not come out the house and thus he did not speak to the deceased and the accused but he allowed them to use the key and door. He stated that the next day, a Sunday, the accused again used the same door and she was fine, that he (**PW3**) went to work

and never again saw either the accused or the deceased and on Tuesday - 27/10/2020 - at about 8:00 am, when he went to the shop, he found a group of people, including neighbours and traffic police officers gathered at the premises, and upon inquiring, he was informed that the deceased had died. He testified that he saw the body of the deceased lying on a mattress in the room, the eyes were open but he was not breathing, and that he did not look at the body closely so he did not see any injuries. He testified that he had never witnessed any conflict between the accused and the deceased.

7. **PW4, Steve Gichuhi Robo**, **PW3's** son basically reiterated **PW3's** testimony. He stated that on 24/1/2020 about 9:00 pm the accused and the deceased came to their house and requested for **PW3's** key to use to enter their house, they told him that they had been attacked by thieves who took away their key, they stated that they were injured but not so much, and that there was some dirt on the clothes of the deceased but he had no visible injuries. He stated further that the accused was also fine as she had no visible injuries, that he (**PW4**) then informed his father (**PW3**) of the request, who allowed him to give out the key, which he did. He stated that on 25/10/2020 - the following day - he saw the accused entering her house but he did not talk to her, and that he learnt of the death of the deceased on 27/10/2020 in the morning. He testified that he did not know of any conflict between the deceased and the accused. In cross-examination, he reiterated that the deceased told him that they had been attacked and robbed, and lost their keys in the process, and that it was around 8.30 pm and a little dark. He further stated that the deceased "**did not look so good**" while the accused "**looked shocked**" but they were sober and alright, and in re-examination, he stated that the deceased "**looked exhausted**".
  8. **PW5, William Maina Muriuki**, testified that the deceased was his step-brother, and he was present when the post-mortem was conducted on 5/11/2020. He stated that he identified the body before the exercise, that it had a few physical injuries, and that the doctor informed them that there was an injury on the head.
  9. **PW6** was **Inspector Evelyn Jemeli**, who testified that she was in charge of Crime Scene Investigations, Eldoret. She stated that on 27/10/2020, she visited the crime scene at Yamumbi where there was someone suspected of having been killed, they found the person lying in the house dead, and that he had visible bruises on the face and had discharge from his mouth and nose. He stated that she examined the scene by taking photographs showing the residence, and also the body lying on a mattress on the floor, and which photographs she certified and which she then produced (10 in total). She stated that the scene had not been tampered with because the body was still on the mattress, and that she was accompanied to
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the scene by **Sergeant Sophia Hassan**. In cross-examination, she stated that from the photographs, one cannot tell the nature of the injuries. She also stated that there was no blood at the scene, and that hers was only to document the scene and not to make conclusions.

**10. PW7** was **Sergeant Sophia Ibrahim Hassan**, attached at Eldoret South, Langas Police Station. She testified that she is the Investigating Officer in this matter, that on 27/10/2020 she received a phone call from the Officer Commanding (**OCS**) Yamumbi Police Station, informing her that there was a dead body in a house within Mutamaiyo-Yamumbi area, she proceeded to the scene where she found the OCS and other officers already there and together, they accessed the house where the body was lying, and the neighbours identified the body as that of the deceased. She stated that she also found some traffic officers as it was near a roadblock and that the accused was also at the scene as she had been arrested by neighbours. She testified that they secured the scene, the body was lying in the deceased's room which he shared with his partner- the accused, it was covered, and had some bruises that were visible on the hands and around the cheeks. She testified that she then contacted the Scene of Crime Department, **PW6** came and documented the scene, they interrogated the persons at the scene who had been in touch with the deceased and they established that he had been last seen on the night of 24/10/2020 with the accused. She stated that they then removed the body, took it to the mortuary and took the accused person to Langas Police Station, and that health-wise the accused was fine.

**11.** She stated further that she then singled out witnesses whose statements she recorded, the accused alleged that the deceased sustained injuries after an attack that was unreported, they found the explanation unconvincing as the accused alleged that the attack had occurred at Kipkaren but from witness' statements, the witnesses had given an account of how the deceased was seen with the accused on the night of 24/10/2020 when they went to a neighbour (**PW4**) to request for keys to access their house, and that **PW4's** father (**PW3**) also confirmed that his son (**PW3**) and informed him that the accused and the deceased had come to request for keys because they had been attacked and lost some items, including keys. She testified further that after compiling the evidence, she arraigned the accused before Court, she attended the post-mortem exercise, and the cause of death was determined to have been "**severe head injuries**", and that COVID test was also positive. She stated that she then forwarded the file to the Office of the Deputy Public Prosecutor (**ODPP**) which recommended that the accused be charged with murder, and she then charged the accused. She also stated that she established that the accused and the deceased had been cohabiting as partners. In cross-examination, she stated that since the alleged mugging was not reported,

she formed the view that it never happened but conceded that she did not carry out investigations to establish whether it had actually happened. She stated that the accused's explanation was scanty, that the accused stayed in the cells for 3 days then complained of some pain, and they took her to hospital where she was treated and also given a P3 Report.

12. She agreed that the accused must have sustained her injuries before her arrest, she had bruises on the ears and forehead, that according to the P3 Report issued to the accused, she had been hit with a blunt object, and in respect to the deceased, the post-mortem, too, established that the cause of death of the deceased was "***severe head injury due to blunt force trauma consistent with assault***". She thus conceded that both the deceased and the accused suffered head injuries. She stated further that the deceased was about 162 cm about the same height as the accused, the deceased was 23 years old and there was no evidence that he was intoxicated, and that no toxicology samples were taken because the deceased was COVID positive. She conceded that she had a duty to produce all relevant evidence including that which could exonerate the accused, and as such, she ought to have also produced the P3 Report issued to the accused. She however stated that her omission to produce the P3 was an oversight. She also agreed that she did not establish evidence of any domestic violence between the couple.

13. At this juncture, **Ms. Okok** informed the Court that the doctor who was to produce the P3 issued to the accused had not shown up. Upon the Prosecution's application, and as the defence had no serious objection, I allowed **PW7** to be recalled to produce the P3.

14. When so recalled, **PW7, Sergeant Sophia Ibrahim**, stated that the findings in the P3 Form dated 30/10/2020 were that the accused sustained injuries on the forehead and on the left ear. In cross-examination, she confirmed that according to the P3, the approximate age of the injuries suffered by the accused was about 6 days, which period was consistent with the date of the alleged attack of 24/10/2020.

15. **PW8, Stephen Gichohi Ngigirigi**, testified that the deceased was his neighbour and the accused was the deceased's girlfriend, that his uncle (**PW3**) operated a rented firewood-selling stall which he (**PW8**) used to assist in opening in the mornings since he lived nearby, that this is what he had gone to do on 27/10/2020. He stated that when he reached the stall, at around 7:00 am, he found the accused there, who told him that the deceased was unwell, from the stall one could gain entry to the house occupied by the deceased and the accused since they were in the same building, when he peeped through the door, he saw the deceased lying on a mattress, he came out and consulted neighbours, who came and upon looking at

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the deceased, declared that he was not alive. He testified that they went outside and saw Traffic Police Officers whom they informed about the incident, the officers came and confirmed that the deceased was dead, they called officers from Yamumbi Police Station who also came, and that the Traffic Officers had detained the accused and so she was still at the scene.

**16.** Upon **PW8** testifying, the Prosecution case closed. By my Ruling dated 1/03/2024, and as already stated, I then found the accused as having a case to answer and put her to his defence. Through her Counsel, she opted to give sworn testimony in her defence, which she then did on 28/01/2025 as **DW1**.

**17.** The Accused, in her defence, stated that the deceased had been her boyfriend for 5 months, that on 24/10/2020, a Saturday, they had gone to relax at a *miraa* place at around 2.00 pm where they stayed until around 7.15 pm, while returning home, 3 people emerged and attacked them and as it was dark, she was unable to recognize them. She stated further that the attackers hit her on the face, and the deceased, who was also hit on the head fell down, but she did not know whether the attackers had weapons. She recalled hearing one of the attackers asking the others whether they had taken the phones (*mumechukua tenje?*) after which they fled, the deceased then woke up, struggled to walk until they reached home, but on searching his pockets, he did not find his keys. She stated that the building they resided in had two entrances and they had a neighbour who also had keys to the entrance, which they then went to ask him for, the neighbour's son opened the door for them, and the deceased told him about the attack and the loss of the key, and that the boy told them that the padlock did not require the key after which they left. She testified further that they got home and slept despite both having pains which she stated were however manageable, that when she woke up on 25/10/2020, she went to her parents' home in Kipkaren where her mother gave her money for breakfast, some of which she used to buy medicine for themselves, that she then returned home and she took breakfast with the deceased, together with the medicine she had purchased. She contended that nothing major happened on that date, and on 26/10/2020, she left the deceased at home as she went to work, and when she came back, she prepared supper but the deceased did not eat.

**18.** She stated that on 27/10/2020, she realised that the deceased did not look okay as he was not speaking, and she then went to seek help at St. Brigit's Hospital which was 100 meters away, that she asked whether they could come and pick him with their ambulance but they responded that they could not do so as the ambulance was grounded, she then went to

Kipkaren estate to seek assistance and she was able to get a vehicle to come and pick the deceased but on returning home, she found a big crowd outside the house and one officer named **Sophia**, told her that the deceased had died. According to her, about 45 minutes in total lapsed from the time she went out to look for assistance and the time she returned with the vehicle. She stated that she was then taken to Langas Police station where was later taken ill on 30/10/2016, she was given medical sheets and a P3 Form, both which she produced. She pointed out that the P3 showed that she sustained scratches that were approximated to be 6-7 days old, and she stated that she had never had any fights or quarrels with the deceased.

**19.** In cross-examination, she stated that at that time, she used to work at a construction plant in Kapseret, and that on 25/10/2020, she woke up and left for home, and on 26/10/2010, she woke up and went to work, and she was arrested on 27/10/2010. She confirmed that on 25/10/2010, she told **PW4** who that they (deceased and herself) were okay. In conclusion, she stated that in the area where they resided, being attacked by thugs was normal, and she therefore, did not deem it necessary to report the attack to the police, and that in the same year 2020, she had also been pickpocketed of his phone. Regarding the P3 issued to her, she agreed that it does not state that she had taken any medicine or painkillers after the attack. She then urged that if she had any fight with the deceased, neighbours would have heard, but she agreed that she had nothing to show that she had gone to a health facility to seek assistance for the deceased on the morning she was arrested, 27/10/2020, and also no witnesses.

**20.** Upon close of the defence case, the trial of the whole case, too, by extension closed. The parties then filed written Submissions. **Mr. Aseso**, through **Messrs ORB & Co**, filed the Submissions dated 17/02/2025 for the defence, while the State, through **Mr. Okaka**, filed the Submissions dated 17/03/2025.

### **Defence Submissions**

**21. Mr. Aseso** submitted that the Prosecution evidence does not meet the burden of proof required in criminal matters of proof beyond reasonable doubt. He urged that the facts, as narrated by the accused, that on the evening/night of 24/10/2020 at around 7:30 pm, they (the deceased and herself) were waylaid by thugs, beaten and stolen from, and in the process, they lost their house keys, money and phones is not disputed and this sequence of events is also corroborated by **PW4, Steve Gichuhi Robo** and **PW3, Duncan Robo Gichuhi**. He recounted **PW4's** narration on how the accused and deceased (while appearing traumatized) came at their residence at around 8 30 pm, that it the deceased spoke to him by narrating what had transpired while borrowing house keys to enable them access their house, and that

the reason for borrowing of the keys was well illustrated by the witnesses, including the accused, in terms of the structure of the dwelling that the accused and the deceased shared with **PW3**. Counsel also recounted **PW7's** (Investigating Officer) testimony that the accused also had bruises that were consistent to what had been narrated to her, and that she escorted the accused to obtain a P3 Form Counsel further submitted that the accused also produced treatment chits, which, together with the P3 Form confirmed the age of the injuries sustained by the accused as being consistent with the time frame of the attack. According to him, the only possible oversight from the accused was underestimating the severity of the injuries sustained by the deceased, and thus not insisting on both of them seeking medical help.

22. He urged that this oversight will torment her for eternity as it caused her to lose young blossoming love and about 4 years of attending Court. Counsel thus submitted that from the evidence tendered, the Prosecution has failed to prove its case beyond reasonable doubt, and thus, the Court should acquit the accused.

### **Prosecution's Submissions**

23. **Mr. Okaka**, Prosecution Counsel, submitted that expert opinion on the fact of death as presented by **PW1** who conducted the autopsy, and the testimony of **PW5** who identified the body, were not controverted, and thus there was basis for accepting the explanation that the cause of death was established as "**severe head injury due to blunt force trauma consistent with assault**". Regarding the limb of an unlawful act or omission, he submitted that the doctrine of "**last seen with**" by dint of **Section 111(1)** of the **Evidence Act** was applicable. He cited the case of **Beatrice Musimbi v Republic [2023] KECA 287 KLR**, and submitted that according to **PW2**, **PW3**, and **PW4**, only the accused had been "**last seen**" with the deceased alive, that 3 days later, the accused led **PW3** to the body inside a room only she was sharing with the deceased, and that none of the neighbours saw the accused actually leave the premises until after discovery of the body. He also submitted that glancing at the evidence before and after discovery of the body, one could easily find the explanations proffered by the accused to be far from satisfactory.

24. He refuted what he described as **alibi** defence raised claiming that the accused went home, met her mother, and later proceeded to work between 24/10/2020 and 27/10/2020, terming it belated, and cited the case of **Ganzi & 2 others v R [2015] 1 KLR 52**. He submitted that the 3 witnesses who placed the accused at the scene, bore no grudge with the accused, nor were they shaken in cross-examination, and that the credibility of their testimonies should easily displace the **alibi** defence. Regarding the unreported mugging, he urged that had the

deceased been seriously injured on 24/10/2020, one would expect the accused, at first instance, to either disclose severity of injuries to her first Responders who testified, or seek prompt treatment at the St. Brigit health facility that she alleged, and also reported the matter as soon as possible. He submitted further that what the accused however did before and when **PW2** discovered the deceased was dead on 27/10/2020 was contrary to every expectation in law and common sense. According to her, the accused immediately lied to **PW2** that she instead had been attacked a day before 26/10/2020, not 24/10/2020, and that she had assured **PW3** that they were fine on 24/10/2020, so much so that **PW4** saw no visible injuries on the deceased then, but his body inexplicably turned up on 27/10/2020, visibly bruised around the cheeks and hands.

25. Counsel observed that neither her own assurance nor the fact that the deceased had been seen injury-free was challenged in cross-examination, and that lying and being elusive or scanty with the Investigating Officer over the supposed mugging should be deemed as conduct incompatible with innocence. He also observed that only after the accused's arrest on suspicion of murder did she seek treatment, 7 days later. On the issue of "*malice aforethought*", Counsel cited **Section 206** of the **Penal Code**, and also the case of **Bonaya Tutu Ipu & Another v R (2015) eKLR**, and urged that the same may be inferred from the surrounding circumstances. He then submitted that the accused intended that the deceased should not live, given the severity of bodily harm she inflicted on him, and also that being a murder charge, by dint of **Section 9(3)** of the **Penal Code**, proof of her motive should be irrelevant. She cited the case of **Karukenya v. Republic [1987] KIR 458**.

### Determination

26. **Section 203** and **204** of the **Penal Code** under which the accused is charged provide for the offence of murder and the punishment for it. The provisions are premised as follows:

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

**204. Any person who is convicted of murder shall be sentenced to death."**

27. The Prosecution, to secure a conviction, has a duty to prove, beyond reasonable doubt, that the accused, by an unlawful act or omission caused the death of the deceased through "*malice aforethought*". For the Court to make a finding that an accused person committed the offence of murder, the Prosecution must therefore establish the following elements; **(a) death of the deceased, (b) proof that the accused person committed the unlawful act which resulted in the death of the deceased: and, (c) malice aforethought.**

28. In this case, the death of the deceased and cause thereof are not disputed. The deceased was found dead in his house in the morning hours of 27/11/2020 with visible injuries, and from the post-mortem Report on record, the cause of death was established to be “***severe head injury due to blunt force trauma consistent with assault***”.
29. The nature of the injuries suffered by the deceased leave little doubt that he was physically assaulted, and hit with a blunt object. That he was killed is therefore almost obvious. The first question is therefore whether there is proof that it is the accused person who committed the “***unlawful act***” which resulted in the death of the deceased.
30. As aforesaid, being a criminal charge, the Prosecution bore the duty to prove the charge beyond any reasonable doubt. The term “***beyond reasonable doubt***” was described and/or explained in the leading case of **Woolmington v Republic 1935 AC 462**, as follows:

**“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.”**

31. In this case, it is not in disputed that there is no eye-witness to the killing of the deceased alleged to have been committed by the accused. The Prosecution case against the accused person is therefore based primarily on “***circumstantial evidence***”. The Prosecution, to secure a conviction, must therefore satisfy the Court that the “***circumstantial evidence***” presented does not amount to mere suspicion. This is because, as has held in many cases, including in the Court of Appeal case of **Mary Wanjiku Gichira v Republic 1998 eKLR**, suspicion alone, however strong, cannot provide a basis for inferring guilt, which must be proved by evidence.
32. As to what constitutes “***circumstantial evidence***” and in what manner it can sustain a conviction, the Court of Appeal, in the case of **Ahamad Abolfathi Mohammed & 2 others v Republic (2018) eKLR**, stated the following:

**“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -**

**“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”**

**33. As to how “*circumstantial evidence*” may be established such that it can sustain a conviction, the Court of Appeal, again, in the case of *Abanga alias Onyango v Republic Criminal Appeal No. 32 of 1990*, guided as follows:**

**“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 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.”**

**34. The Court of Appeal, again, in the case of *Joan Chebichii Sawe v Republic* [2003] eKLR, the Court observed that**

**“..... 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 on. The burden of proving facts that justify the drawing of Eldoret High Court Criminal Case No. 67 of 2020**

**this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”**

35. It is therefore generally agreed that for “*circumstantial evidence*” to carry the day, the Prosecution must establish that there are no other co-existing circumstances which could weaken or destroy the inference of guilt of the accused person. It is also agreed that in a case reliant on “*circumstantial evidence*”, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge (see *Mwangi & Another V Republic (2004) 2 KLR 32*).

36. In this case, the Accused, in her defence, stated that the deceased had been her boyfriend for 5 months, that on 24/10/2020, a Saturday, they had gone to relax at a *miraa* place at around 2.00 pm where they stayed until around 7.15 pm, while returning home, 3 people emerged and attacked them and as it was dark, she could not recognize them. She claimed that the attackers hit her on the face, and the deceased, who was also hit on the head fell down. She recalled hearing one of the attackers asking his colleagues whether they had taken the phones (*mumechukua tenje?*) after which the attackers fled. She testified that the deceased then woke up, struggled to walk and they managed reached home, but on searching his pockets, he did not find his keys. She stated that they thus went to a neighbour (**PW3**) to request for his (**PW3**) keys to the entrance which they were allowed to use and thus used to access their house. She stated that it is the neighbour’s son (**PW4**) who opened the door and whom they spoke to. She stated that during their conversation with **PW4**, they informed him about the attack and the loss of the key during the ordeal.

37. The next part of the accused’s defence is that when she and the deceased got home, they slept despite both having pains which she stated were however manageable, that when she woke up on 25/10/2020, she went to her parents’ home in Kipkaren where her mother gave her money for breakfast, some of which she used to buy medicine for themselves, she then returned home and took breakfast with the deceased, together with the medicine she had purchased. She contended that nothing major happened on that date, and on 26/10/2020, she left the deceased at home as she went to work, and when she came back, she prepared supper but the deceased did not eat. She stated that on 27/10/2020, she realised that the deceased

had deteriorated as he was not speaking, and she thus went to seek help at St. Brigit's Hospital which was about 100 meters away, she asked the personnel there to go and pick the deceased with their ambulance but they told her that their ambulance was grounded, that she then went to Kipkaren estate to seek assistance and she was able to get a vehicle to come and pick the deceased but on returning home, she found a big crowd outside the house and police officers present told her that the deceased was dead.

38. According to her, she was gone for about 45 minutes from the time she went out to look for assistance and the time she returned with the vehicle. She clarified that at the material period, she used to work at a construction site in Kapseret, and that on 25/10/2020, she woke up and left for home, and on 26/10/2010, she woke up and went to work, and she was arrested on 27/10/2010.
39. The Prosecution doubted the accused's above account by wondering why she never sought medical assistance for the deceased immediately after the attack on the night of 24/10/2020, and only sought to do so 3 days later in the morning of 27/10/2020. The Prosecution also wondered why the accused never reported the attack to the police. My understanding of the argument by the Prosecution is therefore that the alleged attack by thugs is a fiction that never occurred, and that even if it occurred, the injuries suffered by the deceased were not serious such that they could result to death. The implication is therefore that having been the last person to be seen with the deceased, and that since the two were living together alone, the injuries that led to the death of the deceased and caused by a blunt object must have been inflicted by the accused.
40. On why she did not report the attack to the police, the Accused claimed that in the area where they resided, being attacked by thugs is normal and she therefore, did not deem it necessary to report the attack. She also claimed that earlier in the same year 2020, she had also been attacked and robbed of her phone.
41. In commenting on the above rival contentions, I note that the charge against the accused is heavily premised on the "*last seen*" doctrine as the accused was the last person seen with the deceased. The "*last seen*" doctrine is a combination of circumstantial evidence and application of **Section 111** of the **Evidence Act. Section 111(1)** which casts the burden of proof on the accused person in certain circumstances, and which provides as follows:

**(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.**

42. My observation is that the part of the accused's claim that she and the deceased went to **PW3's** house on that night to request for the **PW3's** key and that it is **PW4** who opened the door and whom they spoke to and informed of the attack and loss of is key was indeed corroborated by both **PW3** and **PW4**. In fact, according to **PW3**, the accused and the deceased told him that they were injured but not severely. He also estimated the time that the accused and the deceased went to their house to request for the keys to have been about 8.30 pm, thus consistent with the time-frame alleged by the accused. He also observed that although both the accused and the deceased had no visible injuries, the deceased had some dirt on his clothes. He further stated that the deceased "**did not look so good**" while the accused "**looked shocked**" and "**exhausted**", although they were both sober and appeared to be fine. The accused also stated that after her arrest, she was taken to Langas Police station where she was later taken ill on 30/10/2016, and that she was given medical sheets and a P3 Form. Indeed, she produced both, and it is true that the P3 indicates that she sustained bruises on the forehead and also behind the left ear, inflicted by a blunt object just as she had alleged. The P3 also approximated the injures to be 6-7 days old, again consistent with the time-frame she alleged. The Investigating Officer (**PW7**) indeed confirmed all these matters and she, too, produced the same P3 Report when she was recalled.

43. In the absence of any other controverting or conclusive evidence, the version alleged by the accused that they (the deceased and herself) were attacked and assaulted by thugs while on their way home at around 7.15 pm-8.30 pm on the night of 24/10/2020, and lost their keys in the process therefore sounds believable to a large extent. The date and time of the death of

the deceased was not ascertained in the post-mortem Report and is indeed recorded as “**unknown**”. None of the Prosecution witnesses, not even the doctor, however, alluded that the injuries that led to the death of the deceased could not have been inflicted on 24/10/2020, the date the accused alleges they were attacked.

44. As already stated above, the Prosecution case is based on circumstantial evidence. In my view however, the evidence on record fails to surmount the hurdle of mere suspicion to graduate to the level of solid evidence that meets the threshold of satisfying the standard of sustaining a conviction. It is very possible that indeed it is the accused who inflicted the injuries that led to the death of the deceased. It is also very possible that after the attack by thugs on 24/10/2020, if at all it occurred, the accused subsequently also attacked and further injured the deceased while they were in the house. However, in this case, it cannot, in my view, be conclusively stated that this is what happened.
45. The inference of guilt and/or the inculpatory facts on record are, in my view, not conclusively incompatible with the guilt of the accused, or incapable of explanation upon any other reasonable hypothesis than that of her guilt. They are not, as there are several other possible explanations of what could have possibly happened.
46. It is also true that all the Prosecution witnesses who testified as neighbours to the deceased and the accused, stated that they never heard or noticed any fight or quarrel between the two. They also agreed that due to the proximity of the houses, they would most likely have heard if there had been any such fight or commotion inside the house occupied by the deceased and the accused. Further, although **PW2** stated that there was dry blood at the scene, the Scene of Crime Officer (**PW6**) who documented the scene, was emphatic there was no blood. The Investigating Officer (**PW7**), also conceded that she did not carry out any investigations to establish whether the attack alleged by the accused actually took place.
47. Assessing all the facts and circumstances cited above, in my view, there are various other co-existing circumstances, apart from what the Prosecution has alleged, reasonably weakening the inference of the guilt of the accused. I am therefore unable, from the facts on record, to justify drawing of any inference that completely excludes any other reasonable hypothesis on the guilt of the accused.
48. **Mr. Okaka** correctly pointed out that according to **PW2**, the accused, on 27/10/2020, told him that the attack by thugs occurred on the night before, which therefore meant 26/10/2020, and thus contradictory to, and inconsistent with the date of 24/10/2020 that the accused told

other witnesses. While it is true that **PW2**, in his evidence-in-chief, indeed, stated that on 27/10/2022, the accused told him that the attack was “*on the night before*”, in cross-examination, he quickly clarified that the date when the accused told him about the alleged date of attack was on a Tuesday, the date when the body was discovered and the accused arrested, but the accused told him that the day the attack took place was on a Saturday. This was therefore clearly 4 days later, and thus substantially aligned with the date of 24/10/2020 that the accused consistently alleged.

49. According to **Mr. Aseso**, Counsel for the deceased, the only oversight that may be attributable to the accused was her underestimating of the severity of the injuries sustained by the deceased, and thus not insisting on seeking medical help immediately after the attack. He urged that this oversight will torment the accused for eternity as it caused her to lose young blossoming love and 4 years of attending Court. Considering the evidence on record, I find this argument quite plausible.

50. Weighing the evidence in totality therefore, I find that there is substantial doubt on whether the accused caused or inflicted the injuries that resulted into the death of the deceased. Whereas she was obviously casual about the attack by thugs and the extent of injuries suffered, this alone is not sufficient to base an inference of her guilt. There is scarcity of evidence to satisfy the element of unlawful cause of death. In this situation the Prosecution has clearly fallen short of meeting the threshold of sufficiency of circumstantial evidence to attach culpability against the accused. The benefit of the doubt will therefore tilt in favour of the accused.

51. The upshot of my findings is therefore that the Prosecution has failed to prove, beyond reasonable doubt, that the accused is guilty of the offence of murder.

52. The Prosecution having therefore failed to prove the *actus reus*, the next issue of whether “*malice aforethought*” can be inferred from the actions of the accused person does not arise.

53. In the circumstances, I find in favour of the defence and enter a verdict of not guilty. I therefore hereby acquit the accused under **Section 306 (1)** of the **Criminal Procedure Code**. She is to be set at liberty unless otherwise lawfully held.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 22<sup>ND</sup> DAY OF OCTOBER 2025**

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**WANANDA JOHN R. ANURO  
JUDGE**

**Delivered in the presence of:**

**Accused person present in open Court**

**Mr. Aseo for Accused person**

**Ms. Muriithi for the State**

**Court Assistant: Brian Kimathi**