

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL CASE NO. E047 OF 2021**

REPUBLIC.....PROSECUTOR

VERSUS

STANLEY KIPLAGAT alias “MSANII”.....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 between the night of 27/07/2021 and 28/07/2021 at Marura Village, Kaptukuk Sub Location, Koitoror Location, Moiben Sub County, within Uasin Gishu County, he murdered one **Caroline Jepkorir Chesire**.
2. From the record, the accused took plea on 18/08/21 before **L. Kimaru J (as he then was)**. He denied the charge and a plea of not guilty was entered. After several adjournments, the trial commenced on 25/15/2022, from which date **PW1-PW3** all testified before **E. Ogola J**. Upon **E. Ogola J’s** transfer, I took over the matter as from 29/03/2023 and took the testimony of all the remaining witnesses as from 06/02/2025, namely, **PW4-PW7** and also the defence case after the accused was found to have a case to answer. 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 had stopped before **E. Ogola J**.
3. **Ms. Moronge** is on record as Counsel for the accused person having taken over from **Ms. Karuga**. On the part of the State, several Prosecution Counsels have handled the matter along the way. At present it is **Ms. Muriithi** who is handling the case, and previously there have been, among others, **Mr. Okaka**, and before him, **Ms. Okok**.
4. I had already recounted the witness testimonies in my Ruling on “case to answer” but I will nonetheless again do so.
5. **PW1** was **Solomon Kiplagat Kanji**. He testified that he is a village elder and knew both the deceased and her husband (the accused herein), that on 28/07/2021 at about 10.00 am, he received a telephone call from one **Maureen** (presumably **PW4**) informing him of the death of the deceased, upon which he rushed to the deceased’s house and found many people and the deceased was being removed from the house and put into a motor vehicle. He stated that the accused was carrying the deceased who had blood on her right eye and a swollen face

and the deceased was taken to hospital. He testified that when he later, on the same date, met the accused and asked him about the incident, the accused told him that the deceased had died, that he (**PW1**) then phoned the Assistant Chief and informed him about that fact, and who later arrested the accused and took him to the police. He stated further that he saw the body during the post-mortem exercise, and that the doctor told him that the deceased had been hit on the head. He then testified that the couple lived a normal life with ordinary marital challenges like any other couple. In cross-examination, he stated that he had known the couple for 3 years and that he once settled a dispute between them, that both used to drink alcohol.

6. **PW2 was Daniel Chesire Koech.** He stated that the deceased was his cousin, and that he viewed the body at the mortuary and later also attended the post-mortem exercise. He stated that the deceased had an injury on the right side of her head, and her head was swollen. He stated further that he had not known the accused before the incident.
7. **PW3 was Faith Cheptanui.** She stated that she works at Marura Medical Clinic as a nurse, that on 28/07/2021, the accused came to the clinic and requested **PW3** to go to his house to attend to his wife whom the accused said was unwell, that the accused's house was only about 200 metres and she agreed and went to the house together with a neighbour. She stated further that on reaching the house, she found the deceased seated on the bed but was unconscious, and she had visible injuries as her eye was swollen. She stated that she then asked the accused to go and get a vehicle to take the deceased to hospital but she went out and got one herself when the accused delayed to return, which vehicle, upon her instructions, then took the deceased to the **Moi Teaching and Referral Hospital (MTRH)**.
8. **PW4 was Maureen Chepchumba Sonkiyo.** She stated that she was a neighbour of the deceased and the accused, who were a couple, that on 27/07/2021, the deceased left her house at around 10.00 am and returned at around 5.00 pm, that at around 10.00 pm, the deceased went to her house (**PW4's**), and asked her for a matchbox which she gave to the deceased, and which deceased then used to light a *jiko*. She testified that around 11.00 pm, she (**PW4**) saw the accused opening the gate as he had returned home, and he went to his house which he shared with the deceased. She stated further that the following morning at around 10.00 am, the accused came to her house and asked her to go and help him check whether the deceased "*had gone*", and that the accused then clarified that what he meant by "*gone*" was that the deceased had died. She stated that the accused then went out to look for a nurse and came back with one, they (including **PW4**) entered the deceased's house where

they found the deceased seated on a bed but with her head facing the wall, that the deceased did not respond when called out and that she had a swelling on the head and a bruise on the left eye. She testified further that a motor vehicle was then brought, which took the deceased to hospital in the presence of a village elder (**PW1**) whom she (**PW4**) had called. She testified that the Chief later also came and took away the accused. She stated further that the deceased was fine when she spoke to her the night before when she came to ask for the match-box, but also that having lived with the couple as neighbours, the accused and the deceased had frequent fights. In cross-examination, she stated that she had lived with the couple as neighbours, opposite each other for about 4 months. She also stated that the place is well lit at night with security lights and she thus clearly saw the accused when he returned home at night.

9. **PW5** was **Simon Kipkering Korir**, the area Assistant Chief. He testified that on 28/07/2021, he received a phone call from the area village elder (**PW1**) who told him that a couple had fought at night and in the morning, the wife was found badly injured, and was taken to the hospital but had died. He stated that he reported the matter to the police and rushed to the couple's house, and when he entered, he noted evidence of disturbances. He stated further that he convinced the accused to accompany him to the police station, which he did, and upon arrival at the station, the police arrested him. He stated that he knew the accused even before the incident, and that he used to be referred as "**Msanii**", but he did not know the deceased.

10. **PW6** was **Dr. Walter Nalianya**, a Pathologist from the **MTRH**, who conducted the post mortem. He stated that the body had a swelling on the right side of the face with multiple bruises on the right orbital region, the eyelids were swollen and both hands had bruises. He testified that on dissection, massive haemorrhage was found between the skin of the skull and the right side of the skull, and massive blood on the surface of the brain, and the brain was compressed. According to him, the cause of death was "**severe head injury caused by assault**".

11. **PW7** was **Police Corporal Rosemary Nyokabi**, from the Directorate of Criminal Investigations (**DCI**) Ainabkoi, the Investigating Officer in the matter. She testified on 28/07/2021 at around 2200 hours, she was informed by her superior of the occurrence of the incident herein, who also informed her that the suspect (accused) had already been arrested and was at Chepkanga Police Station. She testified that she was then directed to take over the case, upon which she visited the scene (the couple's house) on 29/07/2021 at Marura Centre

where she noted that the house was a rented iron single room with no partitions, and with only a bed and utensils, and that the bed and mattress had blood stains, and the house was disarranged. She stated that she recorded witness' statements and from her investigations, she established that the couple also had a 2 year old child, that they had a fight on 27/07/2021 at around 2200 hours, that the deceased was seen by a neighbour as she had gone to the neighbour to borrow a match-box which she used to light a *jiko*, and the neighbour confirmed that the deceased had no injury at that time, and also that the accused was seen returning home at around 2300 hours. She stated that she also established that in the morning the accused had sought assistance from a neighbour (**PW4**) whom he informed that the deceased "was gone" and that he also went and brought a nurse (**PW3**) to check on the deceased, and it is the nurse who advised that the deceased be taken to **MTRH**. She then produced the mattress. In cross-examination, she stated that the utensils in the house included *sufurias* with cooked food, and the mattress had no beddings. She also agreed that no weapon was found at the scene. She also confirmed that she was present during the post-mortem exercise where she noted that the deceased had a bruise on the upper right part of the eye, and the head was swollen.

12. As aforesaid, by my Ruling dated 19/07/2024, I found the accused as having a case to answer and put him to his defence. Through his Counsel, he opted to give sworn testimony in his defence, which he then did as **DW1** on 6/02/2025.

13. The accused, in his defence confirmed that the deceased was his wife and stated that they married in 2014, and they had a son aged 2 ½ years old at the time of the incident herein. In a lengthy narrative, he stated that on 27/07/2021 he returned home from work at around 9.00 pm and he brought some "shopping" which he left with the deceased, who had tuberculosis and ate liver twice a week. He stated that he gave the deceased money for the liver and he then went out for some entertainment, leaving the deceased in the house, and that he took alcohol. He stated that he returned home at at 9.00 pm and found the door unlocked and he entered the house, he tried to turn on the lights but there were no tokens so he lit a candle. He testified that he saw the deceased lying on the bed making merry while their child was asleep on the sofa, although the deceased had bought the "shopping", he lit the *jiko* and made food by himself, that when he invited the deceased to eat, she declined, and that as he was waiting for the water to boil, the deceased picked some dirty water and poured it on the boiling water. He stated that the baby had woken up and was almost burnt by the water but he intervened by pushing the deceased away from the fire, and the deceased fell on the bed as she had lost a lot of weight due to the tuberculosis and drinking. He testified that he

cleared the mess and lit the *jiko* again, and started cooking afresh, he then fed the child but the deceased declined to eat, and that it was her habit to refuse eating when drunk. He stated that they all then slept on the bed, in the morning, at 6.30 am, a friend of the deceased, one **Purity**, came and borrowed a basin to go for a bath, which she was given, he later heard **Purity**, after she had finished bathing, talking to the deceased but he went out for work and did not check.

14. He stated that when he met his boss, he told the accused that there was no work on that date and he thus returned home at around 8.00 am, that on his way he found his son at a shop, and who told him that he had nothing to take tea with, the accused bought him some mandazi and his son then told him that the deceased had not woken up. He testified that he accompanied the child to the house where he found the deceased who had no strength, she had a swelling on the right side of her head and was talking incomprehensibly, and that at that point, his friend, one **Ken** came and advised him to give the deceased some sugar solution to drink as she had not eaten anything since the day before, which he did, and the deceased drunk it while seated on the bed. He stated that he did not know what caused the head of the deceased to swell, and he speculated that as there are a lot of stones in the compound, she may have fallen down when drunk. He stated that he then called a neighbour, **Mama Kiprop**, and explained to her the situation, and who advised him to go and get a nurse, and that he then went to Marura clinic where he got a nurse whom he came with to the house. He stated that when the neighbours asked him why he did not take the deceased to hospital on the night before, he told them that it is because he only learnt of the injury in the morning. He testified further that he then went out and got a vehicle in which the deceased was taken to **MTRH** but 2 hours after arrival at the hospital, he was informed that the deceased had died. He stated that the hospital staff asked him to go and bring the deceased's hospital card, on his way back home to do so, he met **PW1**, the village elder whom he had earlier phoned and informed about the matter, they spoke about it, and they parted, but the village elder later called and told him to wait for the Chief. He stated that the Chief then came and requested him to accompany him to Chepkanga Police Station where they went and he was referred to DCI and he agreed he would go the next day, but the Chief later came to his house and took him back to the police station, and on the next day the officers took him back to the house, where they took photographs and also collected a mattress that contained blood.

15. In cross-examination, he denied that he got angry and beat up the deceased because of returning home and finding her drunk, and finding that she had not cooked food, and she had left the child hungry. He however agreed that in his statement, he stated that he had slapped

the deceased several times. He then stated that the next morning, he left home for work at around 6.00 am, and that the doctors at the hospital told him that the swelling on the head of the deceased put pressure on her brain and was the cause of death. He reiterated that he did not have any major marital differences with the deceased

16. In re-examination, he stated that he is not a temperamental person and that he had never beaten the deceased or even slapped her, not even once. He reiterated that on the next morning, he left home for work at around 6.00 am, and returned around 8.00 am. He agreed that **PW1** was her neighbour, and stated that he never saw any swelling on the head of the deceased at night.

17. After close of the trial, the parties filed Written Submissions. The defence Submissions is dated 27/03/2025, while the State's is dated 4/07//2025.

### **Defence Submissions**

18. **Ms. Moronge**, Counsel for the accused submitted that there is nothing to link the accused to the death of the deceased. She urged that the accused was never subjected to forensic investigations to match his fingerprints or handprints to the bruises indicated in the Post-Mortem Report, and that there was therefore no reference to any DNA match. Counsel also submitted that the witnesses, including the Pathologists, gave contradictory testimonies on the side of the eye and/or the head that was swollen or injured. She quoted the witnesses, and urged that the inconsistencies and contradictions go to the core of the case. She cited the Nigerian Court of Appeal case of **David Ojeabou v Federal Republic of Nigeria**, and also observed that none of the witnesses saw the accused commit the alleged offence. She also observed that although **PW4** stated that the couple had frequent fights, she did not provide any evidence to that effect such as reports made to the police, and thus termed the allegations as hearsay. Counsel submitted further that "circumstantial evidence" is not enough to secure a conviction, citing the case of **Mwendwa versus Republic (2006) 1 1KLR 133**. She also urged that although **PW7**, the Investigating Officer, stated that she visited the scene (couple's house) where she noted that there was blood on the mattress, the house was disarranged, and that she established that the couple had a fight, the scene was never secured, and that the Investigation Officer admitted that she visited the scene a day after the incident had occurred. She contended that given the interruptions that occurred on that day, and the presence multiple persons, there is a high likelihood that the evidence was interfered with. She also observed that neither the blood stains on the mattress, nor the blood stains found on the bed were subjected to forensic investigations. He faulted the Investigating

Officer for quickly concluding that the couple had a fight without subjecting the accused to interrogations and thus maliciously inferring the offence of murder against the accused. According to her, the evidence presented is not enough to sustain a conviction as it was malicious and based on shoddy investigations. She cited the case of **Sawe versus Republic (2003) KLR 35**. On “malice aforethought”, she referred to the definition in **Section 206** of the **Penal Code**, and also the case of **Republic vs Tubere s/o Ochen (1945) 12 EACA 63**.

19. She also observed that no weapon was recovered to insinuate that there was malice aforethought, and submitted that although the Post-Mortem Report indicated that the deceased died from severe head injury as a result of assault, there is no proof of the accused attacking or assaulting the deceased. According to her, the conduct of the accused was of an honourable person, that once he noticed that the deceased was unwell, he went out and sought services of a medical practitioner who came and established that the deceased was alive but unconscious, that **PW1** testified that the accused carried the deceased and she was taken to hospital. Counsel urged that if the accused had any ulterior motives, he could have deserted the deceased leaving her to die but out of compassion, and humanity, he took the deceased to hospital.

### **Prosecution Submissions**

20. **Ms Muriithi**, on her part, appreciated that for the Prosecution to secure a conviction on a charge of murder, it has to prove three ingredients against an accused person, namely, death of the deceased and its cause, that the accused committed the unlawful act which caused the death, and that the accused had malice aforethought. She cited the Court of Appeal case of **Anthony Ndegwa Ngari vs. Republic [2014] eKLR**. She then observed that the death of the deceased and its cause are not disputed and was proved by the post mortem Report. On whether the accused committed the unlawful act that caused the death, she cited the Court of Appeal case of **Ernest Abanga Alias Onyango vs. Rep CR. A No. 32 of 1990 (UR)** in which, she submitted, the principles to applicable in a case of circumstantial evidence were set out. She recounted the testimony of **PW4** that she saw the deceased around 10.00 pm on 27/07/2021 when the deceased came to her home to borrow a matchbox, that during that interaction with the deceased, she never saw any injuries on her, that before she went into her house, she saw the accused person entering the gate and going straight into his house which he shared with the deceased, that the next morning, the accused came and requested her to go to his house and assist him in assessing the health status of the deceased whom he

though was dead. She further recounted **PW4's** testimony that she later found the deceased inside the house with a bruise over the right eye and the head was swollen.

21. She submitted further that since the accused confirmed in his defence that he returned home that night and found the deceased and their son in the house, and that they ate, and later slept, and in the morning is when he saw the injuries on the deceased, the accused was the last person to see the deceased, and that the deceased was found with the accused, having sustained the serious injuries. She contended that the time gap between the time **PW4** saw the deceased without any injuries, to the time the accused came to her in the morning to seek help, and her seeing the deceased now with injuries was almost instantaneous. She also observed that the accused never stated that at any point in the night he or the deceased left the house to suggest the possibility that the injuries suffered by the deceased were inflicted elsewhere. She cited **Section 111** of the **Evidence Act** which, she submitted, provides that when a fact is within the knowledge of a person, in this case the accused, the burden is upon to him establish his innocence. She also cited the Supreme Court case of **Republic v Ahmad Abolfathi Mohammed and another Petition No. 38 of 2018**, and urged that part of the Prosecution evidence comprises of a situation that is only within the knowledge of the accused person and the accused therefore has an explanation to make of how the injuries suffered by the deceased were inflicted. She stated that in the absence of such explanation, the only inference is that the accused was the one who committed the unlawful act that led to the injuries suffered the deceased, which then contributed to her death. On “malice aforethought”, she cited **Section 206** of the **Penal Code**, and contended that the nature of the injuries and the parts of the body targeted were a clear indication that death was intended.

### Determination

22. **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.”**

23. 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.**

24. In this case, the death of the deceased and cause thereof are not disputed. According to the post mortem Report produced by the Pathologist, **PW6**, the cause of death was “***severe head injury due to assault***”.

25. According to the post mortem Report, external examination of the body of the deceased revealed a swollen right side of the face with multiple bruises, including on the right orbital region, the right eye-lids were also swollen head, and there were other bruises on the right temporal area, and on the hands. The Report also reveals that internal examination revealed massive sub-cutaneous haemorrhage (***bleeding just beneath the skin in the region of the temple and the side of the head***), massive subdural haematoma on the right parietal, and flattening of gyri and narrowing of the sulci (***increased pressure on the brain causing its compression***). The nature of these injuries suffered by the deceased leave no doubt that she was physically assaulted by being hit on the head. It was established that it is these injuries that then resulted in massive haemorrhage around the skull. 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.

26. 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.”**

27. In this case, it is not in disputed that there is no eye-witness on how the deceased suffered the injuries 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 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.

28. 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.”***

29. 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."**

30. The Court of Appeal, in **Joan Chebichii Sawe v Republic [2003] eKLR**, also 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 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."**

31. 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*).

32. In this case, the accused, in his defence, testified that he returned home at night only to find the deceased drunk and lying on the bed with no food made for the family. He further stated that he had no choice but to light the *jiko* and make food as the baby and himself were hungry. He stated that as he was boiling water on the *jiko*, the deceased poured dirty water thereon and in response, he pushed her away and she fell on the bed. He stated that the baby was almost burnt by the water but he intervened by pushing the deceased away from the fire, and that the deceased fell on the bed because she had lost a lot of weight due to her tuberculosis ailment, and drinking of alcohol. The insinuation here is therefore that the deceased suffered her fatal injuries when she fell on the bed after the accused pushed her away. The accused also advanced a second theory that as there are a lot of stones in the compound, the deceased may have fallen down when drunk and hit her head. The gravity and nature of the injuries as described in the post-mortem Report clearly indicates much more than just a mere push or a fall. The injuries were evidently a result of a vicious and deliberate assault by another person. The Area Assistant Chief, **PW5**, also testified that when

he arrived at the scene and entered the house after being informed of the incident, he noted evidence of disturbance inside the house. The admission by the accused of an altercation between him and the deceased is indication that he indeed physically assaulted the deceased, either using his bare hands, or banging her head against a hard object, or by use of a blunt object as a weapon. The fact that no weapon was found at the scene does not change this fact.

33. The testimony of **PW4** is evidence that the deceased was alive and well the last time she spoke to the deceased, on the very same night of 27/07/2021 when the deceased went to her house to ask for a matchbox at around 10.00 pm, which **PW4** then witnessed the deceased using to light a *jiko*. **PW4** was emphatic that she later saw the accused return home at around 11.00 pm and enter the house that only he shared with the deceased and their baby. **PW4** testified that the place was well lit at night with security lights and she thus clearly saw the accused when he returned home at night. The accused also confirmed that neither he nor the deceased left the house at any time during the night, nor that anyone else came to the house during the night. How then was the deceased, in the morning, found unconscious with the visible and severe injuries. It is not lost on me that when pressed in cross-examination, the accused conceded that in the statement that he made at the police station, he stated that he slapped the deceased several times. The fact that this disclosure only emerged at cross-examination stage also indicates that the deceased had deliberately concealed or suppressed this fact from the Court. Slapping a person, particularly several times, is itself an act of assault.

34. I also note that the accused person himself confirmed, in his defence, that the police, in his presence, collected from the house a mattress that contained blood. He also stated that before he returned home, he had been taking alcohol at an entertainment spot. The area village elder, **PW1**, also testified that he had known the couple for 3 years and that he once settled a dispute between them, and that both used to drink alcohol. **PW4** also testified that she had lived with the couple as neighbours, opposite each other, for about 4 months, and that the accused and the deceased had frequent fights. Although the accused claimed that they had a happy marriage, it is clear that this was not true. Their life was marred by frequent violent fights well known in the neighbourhood.

35. I note that the charge against the accused is heavily premised on the “*last seen*” doctrine as the accused was the last person seen entering the house he shared 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.**

**36.** In this case, it is clear that the deceased was the last person to be seen entering the house where the deceased resided and by his own admission, he spent the night with her until morning. No person other than the accused entered the house after the deceased. Further, before the accused entered the house as aforesaid, the deceased was seen alive and well, without any injury. The house is also said to be a single room with no partitions, and with only a bed and utensils. There is therefore no possibility that a third person could have been lurking inside hiding unnoticed. The accused's conduct in the morning after is also telling. According to **PW4**, when the accused appeared at her house in the morning seeking her assistance regarding the deceased's situation, he told **PW4** that the deceased "*was gone*" which phrase he then clarified to **PW4** to mean that the deceased had died. Only the accused can therefore explain how the deceased, having gone to bed well and with no visible injury, in the morning, turned out with a swollen face with multiple bruises, swollen eyelids, and bruises on both hands.

**37.** Despite there being no eye-witness, the assault was obvious. I find that the chain of events and the witnesses' testimonies establish that there are no circumstances that could destroy the inference of guilt of the accused person. The evidence against him was credible, cogent and irresistible to point at the accused as the only person who was with the deceased when she suffered her fatal injuries, and more so in a violent matter. In view thereof, I am satisfied

that the Prosecution proved that the accused is the person who committed the act that resulted into the death of the deceased.

**38. Ms. Moronge**, Learned Counsel for accused argued that the accused was never subjected to any forensic tests to match his fingerprints or handprints to the bruises indicated in the Post-Mortem Report, and that there was therefore no reference to any DNA match. In light of the overwhelming evidence presented against the accused, this argument, in my view, turns on nothing.

**39.** Counsel also submitted that the conduct of the accused was that of an honourable person because once he noticed that the deceased was unwell, he went out and sought services of a nurse to come and attend to the deceased. She also urged that if the accused had any ulterior motives, he could have deserted the deceased leaving her to die but out of compassion, and humanity, he took the deceased to hospital. Again, this argument falls flat since from the evidence, it is clear that the accused only did the above when the reality of the extent and consequences of his actions finally dawned on him.

**40.** The Prosecution having proved the *actus reus*, the next issue is whether “*malice aforethought*” can be inferred from the actions of the accused. This is because the offence of murder is only complete when “*malice aforethought*” is established if, as prescribed in **Section 206** of the **Penal Code**, the evidence proves any one or more of the following circumstances:

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) An intent to commit a felony;**

**(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

41. In the case of **Hyam v DPP {1974} A.C.** the Court held *inter alia* that:

**“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”**

42. In the case of **Bonaya Tutu Ipu & another v Republic [2015] eKLR**, the Court of Appeal stated as follows;

**“..... In the persuasive decision of *Chesakit v Uganda, CR App No 95 of 2004*, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”**

43. Having found that the fatal injuries suffered by the deceased were a result of a violent assault, my finding is that the element of **“malice aforethought”** is easily inferred from the nature and extent of the assault executed against the deceased. **“Malice aforethought”** is also inferred from a consideration of the part of the body targeted - the head. The accused was obviously aware that hitting the deceased on the head could lead to her death, or at the least, cause her grievous bodily harm. Indeed, the autopsy describes the injuries suffered by the deceased as a swelling on the right side of the face with multiple bruises in the right orbital region, swollen eyelids and bruises on the right side of the head and both hands. Considering these factors, I am convinced that that it was the intention of the assailant to completely stuff life out of the deceased, or at least, to cause her maximum injury. To my mind, these facts easily establish the existence of **“malice aforethought”** on the part of the accused person.

44. Under the above circumstances, I am satisfied that the Prosecution has through the presented facts and evidence, proved the charge of murder beyond reasonable doubt. There is irresistible evidence that the accused person was the culprit in the act of murder of the deceased. His defence only bolstered that conclusion as it never advanced any plausible or believable explanation.

45. For the above reasons, I find the accused person guilty of the charge of murder contrary to **Section 203** of the **Penal Code** and I, as a consequence, convict him accordingly.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 17<sup>TH</sup> DAY OF DECEMBER 2025**

.....  
**WANANDA JOHN R. ANURO**  
**JUDGE**

**Delivered in the presence of:**

**Accused present physically in Court**

**Ms. Moronge for the Accused**

**Ms. Mwangi for the State**

**Court Assistant: Brian Kimathi**