

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 20 of 2016

REPUBLIC.....PROSECUTOR

VERSUS

MUSA SAKA.....ACCUSED

JUDGMENT

1. The accused person was charged with two counts of the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that on 27/02/2016 at Chepkemel Village, Chepsaita Location in Eldoret West District, within Uasin Gishu County, he murdered **Mary Kadesa Musa** and **Fefa Musasia**, his own 2 children aged 11 and 2 years, respectively.
2. The accused was initially represented by **Mr. Miyenda**, but upon the accused person's request for change of Advocate, **Mr. Mathai** was appointed to take over the defence case. For the Prosecution, its case has been handled by different Counsels, including **Mr. Oduor**, **Mr. Mokua**, and **Ms. Okok**. Currently, it is **Ms. Muriithi** who is appearing for the State.
3. The accused was arraigned on 14/03/16 and after some delays caused by hitches in securing mental assessment, he eventually took plea on 18/05/2016 before **G.K Kimondo J**. He denied the charges and plea of not guilty was entered in each count. The trial eventually commenced on 2/07/2019 before **H. Omondi J (as she then was)** who took the evidence of all the 6 Prosecution witnesses, **PW1-PW6**, after which the Prosecution closed its case. Upon the Judge being transferred, **Ogola J** took over hearing of the case as from 17/11/2021 and by his Ruling delivered on 26/05/2022, he returned a verdict of case to answer against the accused. It is upon transfer of **Ogola J** that I took over hearing the case as from on 19/04/2023, and subsequently heard the defence case on 9/04/2025 on which date the accused testified. Needless to state, I may just confirm that at each time of a new Judge taking over hearing of the case, directions under **Section 200(3)** of the **Criminal Procedure Act** were taken, and on each occasion, the defence elected not to ask for recall of any witnesses and proposed that the trial proceeds from where it stopped before the previous Judge.

4. I will now recount the testimonies given by the respective witnesses.
5. **PW1** was **David Vincent Mukhwana**, who introduced himself as a neighbour to the accused person. He testified that on 28/02/2016, at around 6.30 am, when he came out of his house, he found a neighbour's child by the name **Salome (PW4)** daughter to **Musa Saka** (accused) lying on a footpath next to his house, he approached and asked her what the problem was and she responded that "*my father has beaten me and given me poison*". He stated that the child appeared weak and in critical condition and so he called his wife and they carried the child into his house as it was very cold outside, on inquiring from the child the whereabouts of her other 3 siblings, she told them that they were inside their house. He testified that he called some neighbours and together they proceeded to the accused person's house which was a walking distance from his, when they got inside the house, they smelt a pungent odour of poison, the same smell he had detected from the **Salome**, the accused person was lying on a bed with 2 other children who were also in critical condition, and on checking around the house, in another room, they found another child lying on the bed unconscious. He testified that they decided to rush the children to Lumakanda Hospital using motorcycles, but 2 of the children, **Mary Kadesa** and **Favour Musasia**, aged about 7-8 years and 1-2 years old, succumbed on the way, and at the hospital, the other 2 children were referred to the Moi Teaching and Referral Hospital (**MTRH**) for treatment, upon which their mother, **Jacinta Saka**, who by that time had joined them, took over and he thus returned home. He stated further that on the previous night when he returned home, his wife had told him that their neighbour had really beaten his children and that she had heard yelling and screaming from the accused person's home. He also testified stated that the accused person used to quarrel frequently with his wife, and that the wife had left the home a few days before the incident herein. Under cross-examination by **Mr. Miyenda**, he reiterated that **Salome, PW4**, told him that the accused had beaten her and given her poison though she did not tell him the exact time that the incident took place. He stated further that **PW4** also told him that she had struggled to walk from their home to his so that she could tell him what had happened. He however agreed that **PW4** never mentioned that the accused had also poisoned the other children
6. **PW2, Alphonse Okanga** testified that on 28/02/2016, at about 6.00 am, he left his house at around 6.00 pm and went to his shamba, while there, a neighbour, **PW1**, told him that something had happened at the accused person's home, and together, and with other neighbours, they proceeded to the home. He testified that when they reached there, they

came across vomit and there was strong odour of a chemical, the accused person was lying in his room in between 2 children, all were all unconscious, and in a separate room, another child was also lying unconscious, while another one was outside. He testified that they decided to rush the children to hospital using motorcycles, although he did not accompany them, that he later learnt that 2 of the children had died while on the way to the hospital, and the other two had been referred to **MTRH**. He stated further that the accused and his wife used to be consistently engaged in quarrels and on the material narrated, the wife was not at the home as she had earlier fled the home and gone to live with her sister in Lumakanda.

7. **PW3, Dinah Cherop** testified that on the 27/02/2016 around 10.00 pm, she was at her home when she heard the cries of a child but she was scared to go outside to check as it was at night. She stated that in the morning, **PW1** called and asked her to go and witness what had happened at the accused person's home, that together with other neighbours, including **PW1** and **PW2**, they went to the accused person's home where they found other neighbours, that one child, **PW4**, was outside crying and told them in Kiswahili that “***baba ametuuwa, ametupea sumu***” (***father has killed us, he has given us poison***). She stated that upon entering the house, they found the accused lying on a bed with 2 children, who appeared to be critical condition and weak, and had also soiled their clothing with diarrhoea. She testified that they decided to take the children to hospital after informing the area Chief but that the 2 children they had found lying on the bed died while on the way to hospital, that the other 2 were later referred to the **MTRH**, and the accused later joined them at the hospital. Under cross-examination, she appeared to concede that it is **PW1**, and not **PW4**, who told her that **PW4** had stated that she had been poisoned by their father, the accused.
8. **PW4** was the said **Salome Vodembe**, who introduced herself as a class 8 primary school-girl aged 15 years. She was taken through a ***voire dire*** examination upon which **Omondi J** determined that while she understood the need to tell the truth, she did not understand the meaning of taking an oath. When she testified, she stated that on 27/02/2016 at around 4.00 pm, she had just arrived from school together with her siblings, **Mary Kadesa, Ivy Kamoyi** and **Favour Musazi**, and their father, the accused person was at home, that she slept until 6.00 pm when she woke up and went to the kitchen to prepare supper, the accused left to go and buy cigarettes, that she, together with **Mary** (deceased) cooked ***ugali*** and ***sukumawiki*** (**kale vegetables**), and that the ***sukumawiki*** was from their neighbour, **PW1**, who had a ***sukumawiki*** farm, and it was not the first time to get the ***sukumawiki*** from him. She stated

that they all ate the food and that it was around 8.00 pm, after sometime, but the children started complaining of stomach pains and they could not sleep and then began to vomit. She testified that at that time **Ivy** and herself were still fine, that she told their father what was going on and he took the children to another room to give them medicine, when he came back, she told him that she, too, had also started experiencing stomach pains, upon which the accused told her that he was going to bring medicine. She stated that the accused had not gone far and he turned back due to loud wails from the children, and that they stayed until morning. She denied being beaten by anyone that night, and stated that in the morning, she went to **PW1**'s home and told him that they had not slept well as her siblings had spent the night crying due to stomach pains. She testified that she recorded her statement at **MTRH** when she was still confused and thus she could not recall what she had told the police, or what was written in her statement. She also stated that they did not eat anything else apart from the *ugali* and *sukumawiki*. In cross-examination, she reiterated that she could not remember what she told the police as she was confused. She then disowned most of the contents of the Statement, and denied telling the police or **PW1** that her father came home with a bottle of *chan'gaa (local brew)*, or that her father had given them poison - a chemical by the name *Cyclone* – after asking them for a spoon and forcing them to take it, or that the father started beating her when she resisted, matters which are captured in the statement. She also denied that her parents were engaged in frequent quarrels or fights but confirmed that their mother was not at home at the time of the incident as she had left the home in February 2016, but denied knowing why she left. In re-examination, regarding the Statement made at the police, she stated that she narrated her account while the officers wrote it down.

- PW5** was **Inspector of Police Ochenge Samson**, the Investigating Officer in this case at that time stationed at the Turbo Police Post. He testified that on 28/02/2016 while at the Post, he received a report from the Assistant Chief Chepsaita Sub-location of the incident herein and that the victims had been rushed to Lumakanda Hospital for treatment. He stated that he went to the hospital and found the accused person there, he learnt that 2 of the accused person's children had been rushed to the **MTRH** while 2 others had died, and that when the accused regained stability after receiving treatment, he was placed in the cells awaiting arraignment in Court. He stated that the children who died were aged 11 and 2 years respectively, that he visited the home of the accused person on the same day, where he saw vomit, diarrhoea, and faeces on the beds and he took samples of the vomit and faeces as a result of diarrhoea which were taken for analysis at the Government Chemist, and that

when post-mortem examination was conducted on the bodies, more samples were collected and taken to the Government Chemist. He then stated that in the course of his investigations, he established that the accused person's wife had left their home due domestic disputes leaving the children under the care of the accused, and that the children had told people that the accused had given them poison. In cross-examination, he stated that he found the accused also being treated at the same Lumakanda Hospital, and that he personally interviewed **PW4** who told him that the accused had forced them to drink the poison using cups, after which they started experiencing stomach pains and started wailing and screaming.

10. PW6 was Dr Edward Vilembwa, the Pathologist who conducted the post-mortem exercise on the bodies of the 2 deceased children. His findings were that externally, the bodies had no injuries, but internally, there was presence of organo-phosphate (***Triatix***) in the children's stomachs which he had also detected from the pungent smell, and that the boy's body (2 years old) had "***petechial haemorrhage***" and "***cyanosis***", and the girl's (11 years old) had evidence of a "***recently broken hymen***" in the vagina and also "***diarrhoea stool on both legs***". He opined that the cause of death for both children was "***cardiopulmonary arrest due to organo-phosphate poisoning***". He then produced the respective post-mortem reports dated on 1/03/2016. He stated that samples taken from both bodies were to be submitted to the Government Chemist for analysis, that is; a piece of the kidney, liver, urine, blood and stomach contents. He further stated that ***organo-phosphate*** is a chemical name, and is commonly known as ***Triatix***, and that it is used for tick control. He further stated that once it is mixed with water it becomes whitish like milk, but while in the bottle it is brown in colour. He stated that the stomachs had the whitish liquid and emitted the pungent smell.

11. As aforesaid, the Prosecution then closed its case and the Court returned a verdict of case to answer against the accused. The defence hearing was then conducted on 9/04/2025 in which only the accused testified by giving unsworn statement, and was thus not cross-examined.

12. The accused, testifying as **DW1**, stated that on 27/02/2016, he left home in search of work leaving his 4 children at home, he returned at around 8.00-9.00 pm but did not find his wife, the children told him that their mother (his wife) had gone to visit her own mother and that she had left around 4.00-5.00 pm, and told them to proceed to cook food for themselves in case she was late. He stated further that the children told him that their mother told them to

get food from **PW1**, a neighbour. He stated that he found the children cooking the food, which they then served and they all ate together, but after a while, the children started complaining of stomach-aches, that he got worried and he, too, started experiencing similar stomach-pains, he lost energy and lay on the bed but lost consciousness, and later woke up in hospital handcuffed to the bed. He stated that when he inquired, he was informed that he was the prime suspect in the killing of his children. He stated that he and **PW1** had differed over a land dispute and **PW1** had therefore given false testimony. He also stated that his wife used to spend too much time in **PW1's** home and when he cautioned her, she told him that he if he were not careful, he would find himself in prison or he would die, which information he shared with his mother who later came with an uncle and solved the matter. He stated that the same date when the alleged case of poisoning is reported to have occurred is the same day his mother and uncle came and settled the matter. He also observed that the alleged poison he is alleged to have given the children was not produced in evidence.

13. Upon close of the trial, the parties filed Written Submissions. The Prosecution, through State Counsel **Ms. Claire Muriithi**, filed the Submissions dated 2/07/2025 while the defence, through **Messrs Mathai Maina & Co. Advocates**, filed the Submissions dated 10/07/2025.

Prosecution Submissions

14. Counsel for the State restated the principle that in criminal cases, for the Prosecution to secure a conviction on a charge of murder, it has to prove 3 ingredients against the accused. She cited the Court of Appeal case of **Anthony Ndegwa Ngari vs. Republic [2014] eKLR**, in which the 3 elements were summed up as (a) the death of the deceased and its cause; (b) that the accused committed the unlawful act which caused the death of the deceased; and (c) that the accused had malice aforethought. On death of the children died, she submitted that **PW2** and **PW3** confirmed that the children died on their way to hospital, and the post-mortem forms produced by **PW6** revealed that both children died due to “*cardiopulmonary arrest due to organophosphate poisoning*”. She acknowledged that the Prosecution closed its case without tendering a toxicology report on the findings of the samples forwarded to the Government Chemist for analysis but urged that this omission does not affect the case. She urged that while a toxicology report was a crucial piece of evidence in determining presence of specific toxic substances in the samples and how it found its way into the body, its absence herein is not fatal because the post-mortem reports were sufficiently conclusive as to

the presence of *Triatix*, a toxic substance, in the stomachs of the children which could only have been ingested. She thus submitted that the cause of death was conclusive and not merely speculative, that even if the toxicology report was produced, it could only have corroborated, and not contradicted, the cause of death, and that the defence has not raised any doubts as to the cause of death nor they questioned the expertise of **PW6**.

15. On the unlawful act by the accused which caused the death of the children, Counsel urged that the Prosecution relies on circumstantial evidence, in line with the conditions laid out in the case of **Ernest Abanga alias Onyango v Republic CR, App NO. 32 of 1990(UR)** for circumstantial evidence to sustain a conviction. She urged that **PW4** stated that she and her sister **Ivy** prepared dinner which they all ate, including the accused, that neither herself or her other siblings ate anything else that evening, that a while after eating the *sukumawiki* and *ugali*, the children started complaining of stomach pains and could not sleep, and shortly after they began to vomit. Counsel pointed out that **PW6** testified that the cause of death was “*cardiopulmonary arrest due to Organophosphate poisoning*”, and that the question that begs answers is; was the poison self-administered akin to committing suicide or was it administered by someone else? She acknowledged that **PW4** who was meant to be the Prosecution key witness, recanted most of the contents of the written statement she had made to the police on grounds that she was confused at the time of recording the statement, and that most importantly, she denied that the accused administered poison on them. She pointed out that **PW4** was not declared a hostile witness and therefore her evidence can still be relied upon by the Court, and that the Prosecution has a duty in criminal matters to make available all necessary witnesses for the purpose of establishing the truth even where such witnesses may bring evidence that will undermine the Prosecution case. She further submitted that the Prosecution’s is corroborative evidence, not only relying on **PW4**’s evidence, but also other evidence. She contended that the Court has a duty to test if a witness is believable and invited the Court to scrutinize the evidence of **PW4** in light of all the other evidence adduced by the Prosecution. She observed that the evidence reveals that the children were wailing and crying due to stomach pains, that **PW1** stated that on the 28/02/2016 around 6.30 am when he got out of his house he found **PW4** lying on the foot-path, and that she appeared weak and in critical condition. According to Counsel, if the presumption is that the children intended to commit suicide and therefore administered the poison upon themselves, then they would have suffered the aftermath of the poison quietly without the need to seek any

help but that is not the case herein, and that this points to the fact that the poison must have been administered by someone else. She thus contended that the children died as a result of an unlawful act.

16. On whether the accused committed the unlawful act, Counsel pointed out that **PW4** stated that the *sukumawiki* they prepared for dinner was from a neighbour, **PW1**, who used to farm *sukumawiki* and that it was not the first time for them to procure the *sukumawiki* from **PW1**. Counsel thus refuted the possibility that the poison could have been administered through the *sukumawiki* by **PW1** and questioned why, if this were the case, do it then and not any other days when he had supplied the *sukumawiki*? She then submitted that from the testimony of **PW4**, the only persons in the house from the time when she came from school with her siblings to the time they took their dinner was herself, the deceased children, her sister **Ivy** and the accused person. She observed that in his defence, the accused claims that on 27/02/2016, he left home in search of work leaving his wife and children at home, that he returned at around 8.00 pm and found his wife had left, that he found dinner had been prepared already and so **PW4** served all of them. Counsel urged that the accused blatantly lied before the Court since **PW4** testified that their mother was not at home having left days before the incident, a fact that was also confirmed by **PW5** in the course of his investigations. Counsel thus submitted that it is clear that the children were solely under the care of the accused, that **PW5** stated that the accused was admitted in hospital and received treatment as a result of the poisoning and that the accused tried to commit suicide by taking the poison.

17. She also observed that **PW1**, **PW2** and **PW3** all stated that when they went to the accused person's home, they found him inside the house while the children lay unconscious. Regarding **PW4**'s recanting of her initial statement to the police that it was the accused person who administered poison on them, Counsel submitted that **PW4** decided to lie in Court about this fact in bid to protect the accused. She also pointed out that the accused stated that shortly after taking dinner, the children started complaining of stomach aches and were taken to bed by **PW4**, and they just slept till morning. Counsel wondered whether such is the reaction expected of someone who was really concerned about the health of his children. She thus urged that the conduct of the accused before the death of the children is wanting. She also observed that **PW4** stated that she told the accused that the children were complaining of stomach pains and that all they had taken was the *sukumawiki* and *ugali*. According to Counsel therefore, it is evident that the children's stomach pains, vomiting and

defecating happened after they ate the food. She submitted that as the accused did not seek for help from his neighbours, or rush the children to hospital, it is not a far-fetched conclusion that indeed he administered the poison on the children and then attempted to take his own life by taking the same poison, that his inaction tends to prove that he was waiting out for the poison to take its full effect and that is why he never took any steps to help the children, and that there is therefore an indisputable link of chain of events leading to the conclusion that the children met their death as a result of an unlawful act by the accused. On “*malice aforethought*”, Counsel referred to the definition in **Section 206** of the **Penal Code** that “*malice aforethought*” it is established where the evidence proves any one or more of the following circumstances: (a) an intention to cause the death 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; and (c) an intent to commit a felony. She thus urged the Court to find that the Prosecution has proved all the ingredients of murder as against the accused person and proceed to convict him accordingly.

Defence Submissions

18. Defence Counsel **Mr. Mathai**, after reciting testimonies of the respective witnesses, restated the principle that the burden of proof fell upon the Prosecution to prove its case beyond reasonable doubt, which burden never shifts and there is no onus on the accused to prove otherwise. He cited the case of **Republic vs Ismail Hussein Ibrahim [2008] eKLR**. He, too, then restated the elements of the offence of murder, namely: (i) death of a human being, (ii) unlawful causation having been done with malice afterthought and (iii) participation of the accused in causing the death. He acknowledged that death of the 2 children and the cause of death is not disputed since the post mortem reports were produced showing the cause of death as “*cardiopulmonary arrest due to organophosphate poisoning*”, and that therefore the deaths were not natural but due to poisoning. On whether the accused caused the deaths, Counsel observed that there were no eye-witnesses and that the Prosecution evidence was therefore entirely circumstantial. He urged that for circumstantial evidence to work, it must be inconsistent with the accused person's innocence, and he cited the case of **Ahmad Abolfathi Mohammed and Another Vs- Republic [2018] eKLR**, and also **Sawe vs**

Republic [2003] eKLR 364. He pointed out that **PW4**, the accused person's daughter denied having seen her father administer poison on her siblings, and that police took a statement from her at the hospital while she was still confused, that the statement was taken from her 4 days later, and she recanted the statement that the accused came to the house with a bottle of *chang'aa (poison)*, or that the accused gave her *Cyclone* poison.

19. Counsel also submitted that **PW4's** testimony that the "pains started after eating" raises unanswered questions. Regarding the testimony of **PW5**, the Investigating Officers, Counsel submitted that although he narrated events surrounding the incident and testified that he recorded statements from witnesses, nothing tangible comes from his testimony since he did not record any evidence that directly points out the accused person as the one who administered poison to the children and the accused himself. He submitted that although the medical evidence from **PW6** confirms that there was a substance called *organophosphate (OPP)* poison in the 2 children's bodies, and although **PW6** stated that samples were sent to the Government Chemist for analysis, the Government Chemist was not called to produce any report arising therefrom. He cited the case of **Republic vs Kipkering arap Kosgei and Another (1949) EACA 135** and also **Simion Musoke vs Republic (1958) EA 715** on the application of circumstantial evidence and urged that **PW4's** evidence is very crucial as she did not tell the police about poison having been given to them by the accused. He quoted **PW4's** testimony that some things in the statement written by police are not true, and denied that her father gave them poison. He observed that the accused was himself also rushed to hospital and admitted in the same hospital as the children. He further submitted that the Court cannot be expected to assume that there was attempted suicide without any evidence to prove such conclusion. He observed that although **PW5** stated that a bottle of poison was recovered from the house, the Prosecution did not establish through evidence who brought it to the house and when it was brought. He submitted that even where the doctrine of "*last seen*" is applicable, the same must be supported by other corroborating evidence. He cited the case of **Republic -Vs- Elizabeth Anyango Ojwang eKLR**. On "*malice afterthought*", Counsel cited **Section 206 of the Penal Code**, and also the case of **Republic vs Juma Mwarabu Cahai Alias Juma Kazungu & another 2022eKLR**, and also the case of **Joseph Kimani Njau Vs- Republic eKLR**. According to him, the post-mortem reports cannot be taken as conclusive evidence of poisoning in the absence of a toxicology report.

Determination

20. **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. Under these provisions, the Prosecution 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*”. The Sections read 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.

21. For the Court to determine 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(s) committed the unlawful act which resulted in the death of the deceased:** and, **(c) malice aforethought.**

22. The above being the ingredients of the charge of murder was reiterated by the Court of Appeal, in the case of **Roba Galma Wario v. Republic [2015] eKLR**, as follows:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

23. In this case, the death of the 2 children and cause thereof are not disputed. The children are said to have died on the way to hospital as stated by **PW2** and **PW3**. From the post mortem report produced by **PW5**, the cause of death is indicated to be “*cardiopulmonary arrest due to organo phosphate poisoning*”. These have not been disputed.

24. The evidence in the case is clearly circumstantial as there are no alleged eye-witness who claim to have seen the accused administer the poison in the food eaten by the children, and also no one claims to have seen the accused procuring the poison. 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.”

25. As to how **“circumstantial evidence”** may be established such that it can sustain a conviction, the Court of Appeal, 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.”**

26. 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 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.”

27. 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. 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*).

28. Further, the Court of Appeal, in the case of **P.O.N. v Republic [2019] eKLR** reiterated the following caution in respect to a charge founded on “*suspicion*” that an accused person committed an offence:

“..... no amount of evidence based on suspicion, no matter how strong may be a basis for a conviction. Suspicion, even reasonable suspicion is a legal standard of proof not known in our criminal law. Either a fact is proved beyond reasonable doubt or it is not”

29. In this case, the intended star witness was **PW4**, a daughter of the accused who survived the poisoning. According to **PW1**, when he came out of his house in the morning, he found **PW4** lying along a footpath near **PW1**'s home, struggling, and when he asked her what the problem was, **PW4** told him that that “*my father has beaten me and given me poison*”. This piece of testimony was corroborated by **PW2** who confirmed that this is what **PW1** reported to her as being what **PW4** told him. **PW3**, too, testified that when she was called and rushed to the accused person's house, **PW4** repeated the same statement that their father had beaten them and given them poison and this, **PW4** did by uttering in the Kiswahili language that “*baba ametuwa, ametupea sumu*” (*father has killed us, he has given us poison*). **PW5**,

the Investigating Officer, too, testified that this is exactly what **PW4** also told him when he recorded her statement. 3 witnesses therefore confirmed the statement made by **PW4**.

30. According to **PW1**, when he went to check in the accused's home, he found the accused and his children lying on a bed unconscious, and weak, and there was a strong pungent chemical smell around the house, the same pungent smelt smell he had detected from **PW1**. He also testified that the children had soiled themselves with faeces and diarrhoea, and there was also vomit. As aforesaid, 2 of the children died on the same day on their way to hospital. The post mortem report revealed the cause of death to be "*cardiopulmonary arrest due to organo phosphate poisoning*", and there was presence of the insecticide known as "*Triatrix*" in the bodies. It is therefore clear that the children were poisoned, either deliberately or accidental.
31. The elephant in the room is however the fact that **PW4**, for all intents and purposes, while testifying, recanted the statement she is said to have made to the police after the incident. She thus recanted her statement that the accused beat them at night and then gave them poison. She claimed that she made the statement while in hospital and was still confused by the whole incident. I do not believe her. She clearly recanted the statements simply to protect her father. The explanation that she was confused when she recorded the statement is not convincing at all. She also contradicted herself on whether her position is that she never made the statements at all to the police or whether she made them but is now disowning the same. She gave both positions which just strengthens the impression that all she wanted to do is to protect her father. **PW1**, **PW3** and **PW5** cannot all have simply ganged up to allege that she expressly told them that her father is the one who gave them the poison. What motivation would **PW1**, **PW2** and **PW5** all have to manufacture such serious allegations and all point at **PW4** as being the source of that information? Would the witnesses realistically all conspire to come up with even baptising the poison used as "*cyclone*", or come up with the story that the accused came home with a bottle, or that he fed the children the poison using a spoon if that information did not come from an insider? I note with keen interest that **PW4** did not deny the rest of the accounts given by **PW1**, **PW3** and **PW5**. Is it possible that **PW1**, **PW3** and **PW5** were truthful in reporting everything else that they observed or what **PW4** told them save for only the part that **PW4** told them that it is her father who administered the poison? I do not think so. Although I did not see any of the Prosecution witnesses testifying, from my assessment of the record, I am persuaded that **PW1**, **PW3** and

PW5 were all very consistent in the accounts they gave and displayed sufficient credibility for them to be believed.

32. The fact that the accused beat up the children was corroborated by **PW1** who stated that when he returned home at night, his wife narrated to him how the accused had beaten up his children who kept on wailing and screaming loudly. **PW3** also confirmed that she, too, heard the screams and wailing but she did not go out to check because she was scared. As also correctly pointed out by **Ms. Muriithi**, the only person in the house from the time when the children returned from school up to the time they took dinner was the accused, the deceased children, her sister **Ivy** and the accused person
33. One other reason why I am convinced **PW4** was not truthful is the fact that while all the Prosecution witnesses were categorical that the accused and his wife were known in the neighbourhood to frequently engage in quarrels and fights, and that by the date of the incident, the wife had even fled the home to go and live elsewhere because of these domestic disputes, **PW4** attempted to give a different picture. She went to great lengths to try and show that her parents were very cordial and never quarrelled. This was an outright lie, and no wonder she could not feigned ignorance on the reason why her mother left the home. I say all this to show that **PW4's** purported recanting of the statement to the police that it is the accused, her father, who gave them the poison, was nothing but an attempt to save him from being convicted.
34. Coming to the accused person's testimony, I also refuse to buy it. He, too, obviously lied. Although he attempted to give the impression that **PW1** had framed him because they had a land dispute, and that he suspected **PW1** of having an affair with his wife, this claim was not convincing at all. First, the existence of the alleged land dispute was not substantiated and secondly, it was never brought up earlier, not even during cross-examination of **PW1**. Introduction of the claim at defence stage when the Prosecution had no way to respond to it and furthermore, via unsworn testimony which could not be tested by cross-examination, indicates the claim to be nothing but an afterthought. In any event, to settle scores by way of successful poisoning an enemy's children and blaming the enemy for the same would have required serious meticulous arrangement by **PW1** to pull through. To successfully carry out the plot, **PW1** would also have had to rope in **PW3**, and **PW5**. Nothing on record suggests that such plot existed, leave alone executed.

35. The conduct of the accused after the fact also does him in. His testimony and that of **PW4** is that despite the dire condition of the children caused by the poisoning, he still spent the night with them in the house without making any attempt to seek medical assistance. I agree with Prosecution Counsel **Ms. Muriithi** that such would not be the conduct expected of a responsible parent whose children, and even himself, were collectively writhing in pain, vomiting, experiencing bouts of diarrhoea, and soiling themselves with faeces all night. The accused did not give any explanation why he never sought assistance even from his neighbours. The excuse that he, too, immediately became unconscious and found himself in hospital when he woke up is not entirely the truth. From **PW4's** testimony, it is clear that the accused was well for a very long time and had so much time to take intervening action. There is evidence that the children wailed and screamed for so long that even neighbours heard them, and all this time the accused was fine and strong enough to act but did not do so. If he truly became unconscious as he alleges, then that must have happened much later, almost towards the morning. He simply made no effort whatsoever to save his family.
36. In view of the above, I refuse to consider the possibility that the poison could have been poured into the food either accidentally or purposefully by the children or another individual, or that the *sukumawiki* came from **PW1** already laced with poison. All indicators reach a confluence point that it is the accused who poisoned the children. The fact that he, too, was later affected by the same poison and was hospitalized cannot turn him into a victim. On the contrary, it is proof that he wanted his entire family, including himself, dead, perhaps as a punishment or a lesson to his wife for causing him marital problems and leaving the matrimonial home. His was clearly a case of an attempted suicide.
37. **Mr. Mathai** contended that the Prosecution's failure to produce a toxicology report even after admitting that samples of blood, urine, kidney, liver and stomach contents were taken from the deceased children's body during post-mortem exercise for purposes of taking them for analysis by the Government Chemist is fatal to the Prosecution case. I digress. As correctly by **Ms. Muriithi**, while a toxicology report may well be a crucial piece of evidence in determining presence of specific toxic substances in the samples, the effect of its absence depends on the circumstances of the case at hand. In this case, absence of the toxicology

report cannot be fatal since the post-mortem reports confirmed presence of *Triatix*, a toxic substance, in the stomachs of the children.

38. 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.

39. 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 17TH DAY OF DECEMBER 2025

.....
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Appellant present physically in Court

Ms. Mathai for the State

Court Assistant: Brian Kimathi