



IN THE COURT OF APPEAL

AT MOMBASA

{CORAM: NAMBUYE , OKWENGU & KIAGE, JJ.A}

CRIMINAL APPEAL NO. 376 OF 2012 (R)

BETWEEN

BARISA WAYU MATAGUDA.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Odero, J) dated 20th September, 2012

in

H.CCR. NO. 6 of 2008)

JUDGMENT OF THE COURT

The appellant was arraigned in the High Court at Mombasa vide Criminal Case No. 6 of 2008 on the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that *Barisa Wayu Mataguda* alias *Abdul* on the 9th day of February; 2008 at Karama Guest House in Mwembe Tayari Mombasa District within Coast Province murdered *Eunice Mwelu Kingoo*.

The appellant denied the offence. The prosecution tendered evidence through thirteen (13) witnesses, whereas the appellant who gave an unsworn statement, was the sole witness for the defence.

The brief facts of the prosecution case are that, the deceased was a daughter to PW7 *Bernard Kingoo Mutiso*, niece to PW6 *Veronica Mweni James* and sister to PW3 *Willy Mutiso Mulandi*. She lived in Mombasa with a young brother who was schooling at Kongowea Secondary School. It is not clear from the record what she was engaged in as a source of living. In the month of August, 2007 the deceased had taken the appellant and his father to her home and introduced him as her husband-to-be and his father as the father-in-law-to-be. The appellant was introduced by one name only "*Abdul*" and appellant's father by the name "*Wayu*"

On 9th day of February, 2008 at 1.00 p.m PW1 in the course of her daily routine at her place work at Karama Guest house owned by PW4, booked in room 211 a guest who had come in accompanied by a lady covered in a bui bui, and one who introduced himself verbally by the name of Baya Kahindi and ID

Card No. 21571035. On the same day at 8.00 p.m or thereabout the body of the deceased was discovered in the same room 211 covered in a blanket with blood splattered on the wall. A phone recovered in the room enabled police to get through to PW6, whose particulars had been saved in the said phone under the title "Aunt". She in turn alerted PW3 and PW7 and informed them of the death of the deceased.

With the help of images on the CCTV device installed at the Quest house, PW1, PW7, PW6 and PW3 were able to identify the appellant to police as the man who booked himself in at the Quest house with an unidentified lady in a bui bui and the man seen on the CCTV Camera leaving room 211 alone at about 5.00 pm on the same day. This information led to the arrest of the appellant. Post mortem carried out on the body of the deceased by PW9 Doctor Mandalya revealed presence of a superficial cut on the neck, foam in the mouth, massive bleeding internally transection of the major blood vessels, fracture of the 1st and 6th vertebrae. Cause of death was haemorrhagic shock due to cut wounds on the neck.

Upon the appellant's arrest, he was taken to the police station. An Identification parade was conducted whereby PW1 identified the appellant as the man who had booked himself into room 211 at the Quest house with a lady wearing a bui bui. The appellant's finger prints were taken and sent to the Registrar of persons to determine his true identity.

The search revealed that the true names of the appellant were *Barisa Wayu Motaguda* holder of ID card Number 21356448. He hails from Tana River. He was born in the year 1978 in Wanje Division, Kuna Kuba location, Maseharo Sub- location. The appellant's fathers' details were given as *Matagolo Wayu Wata*, while those of the mother were given as *Zena Nalako Wayu*. The ID card number given at the Quest house reception as number 21571035 belonged to a different person by the name *Juma Japhet Mweri*.

The appellant gave unsworn evidence denying involvement in the commission of the offence.

At the close of the entire trial, the learned trial Judge, Maureen Odero J, assessed, evaluated and analyzed the evidence before her and then made observations thus:

"Having established the true identity of the accused and the fact that PW I has positively identified him as the man who booked into room No. 21 I with the deceased, there exists circumstantial evidence linking the accused to the death of the deceased, in that he was seen in the company of the deceased a few hours before her dead body was recovered. Additionally PWJ; PW6 and PW3 all relatives of the deceased all identify the accused as a man whom they knew by the name "Abdul" and they all tell the Court that he was the boy friends; lover to the deceased. In his defence as stated earlier, the accused concedes that the deceased was his girl friend whom he intended to marry as a second wife. PW7 the father of the deceased confirmed to the Court that in August 2007 the accused came to his home with his father seeking consent to marry his daughter the deceased. It is quite clear that the accused knew the deceased very well. Therefore it cannot be surprising that they were together booking into a hotel on the material day"

The learned trial Judge then went on to state further thus:

"Although the CD was not introduced into evidence there is testimony from several witnesses who personally viewed the CCTV footage. The accused was seen leaving the hotel at 5.00 PM. PW4 the proprietor of the hotel did view the CCTV footage. She was able to positively identify the accused as the man she saw leaving the hotel at 5.00 pm. The investigating officer PW13 told the Court that he too viewed the CCTV footage and was able to identify the accused as the man on the tape. Likewise PW6 the deceaseds' aunt also viewed the CCTV footage and was able to identify the accused as the man thereon...."

The evidence clearly shows that the accused booked into a hotel room with the deceased at 1.00pm. He left a few hours later at 5.00pm alone. Later the deceased is found dead in the room with blood splattered all over the wall No other possible explanation can be drawn from this set

of facts other than that the accused killed the deceased inside that hotel room. If the deceased met with some misfortune or accident inside the hotel room then why did accused not alert the hotel management or call for help? The fact that accused calmly walked out of the room leaving the deceased injured or dead proves that he inflicted the injuries that killed her. No other person was seen to enter or leave room 211. In his defence the accused whilst admitting that he spoke to the deceased on the material day denies that he went to the hotel room with her. However as discussed earlier, the evidence convincingly proves that it was the accused who went into that hotel room with the deceased. He was clearly seen and identified by PW1 not to mention the testimony of the witnesses who saw accused on CCTV footage leaving the hotel. None of the witnesses had any reason or motive to try to frame the accused. I am convinced that they were telling the truth of what they had seen with their own eyes. For this reason I do reject the accused's defence. Based on the weight of circumstantial evidence, I find that it was the accused who inflicted the fatal cut on the deceased. As such, I am satisfied that the actus reus of the offence of murder has been proved."

Turning to the ingredients of malice aforethought, as set out in Section 206 of the Penal Code and while relying on the testimony of PW3, PW6 and PW7, the learned trial Judge concluded thus:-

"It is quite clear that this was an unhappy union. Each party had grievances against the other. Whilst there is no direct evidence on what transpired between the two in the hotel room, it is not far fetched to post that a quarrel or argument could have ensued leading to the attack by the accused on the deceased. The accused has not claimed that he was provoked nor did he raise the issue of self defence. Given that the accused left the room unarmed yet the deceased was badly cut and killed, it is only logical to conclude that accused was the aggressor. The savageness of the cut (major blood vessels in the neck were severed and the fact that blood was splattered on the walls makes it clear that accused's intention was to kill the deceased. I am satisfied that mens rea has been proved. On the whole I am satisfied from the evidence on record that the charge of murder has been proved beyond all reasonable doubt. I therefore convict the accused of this charge of murder"

The appellant was aggrieved by that decision and he has appealed to this court citing five grounds of appeal. These can be summarized as follows:

(i) That the High Court judge erred in accepting the evidence of identification by PW1 without considering that Chapter 46 of the standing orders had been contravened by PW1 seeing the appellant before the identification parade, by failure to indicate the position the appellant took on the parade and lastly by the investigating officer assisting the parade officer with the conduct of the parade.

(ii) The learned judge wrongly relied on circumstantial evidence which had not been proved considering that PW1 contradicted herself, the evidence of PW3, PW6 and PW7 should not have been given any weight, and lastly that the evidence was wrongly received in evidence.

(iii) By misdirecting her judicial mind by forming her own opinion contrary to law.

(iv) By wrongly connecting the appellants arrest in connection with the offence and yet nothing was recovered from him that connect him to the commission of the offence; and by failing to give adequate consideration to the appellants defence which was reliable and created a doubt in the prosecutions case which doubt should have been resolved in favour of the appellant.

In his oral submission to Court, Mr. Ngumbau Mutua learned counsel for the appellant arguing all the five grounds globally urged us to allow the appellants appeal and set him at liberty. To learned counsel, the prosecution's evidence was not water tight. PW1's evidence on identification was faulted because, she stated that she could not recall all the customers who came to the Quest house on the material date. As such there was nothing peculiar in the appellant which could have made her recollect his appearance. That

she identified appellant on the identification parade because she saw him in the office just before she was called to the identification parade to identify him.

Learned counsel also faulted the identification of the appellant through an alleged entry of an ID card on the room list because, there was nothing to link the appellant to that entry. Further, that the finger prints of the holder of the ID card bearing the number entered in the room list were not taken for verification and that no explanation was given for the use of one receipt number 9822 more than once.

On the evidence of the CCTV footage, learned counsel argued that once the learned trial Judge declined to admit in evidence the CD containing alleged footage images retrieved from the CCTV device, she should not have accepted the evidence of the witnesses who allegedly viewed the said footage on the CCTV device and used it as a basis for adding weight to the evidence of identification of the appellant in connection with the offence in issue; that the evidence of the relatives of the deceased namely PW3, PW6 and PW7 should have been treated with caution as they were out to do all they could to nail the appellant; that the evidence of these witnesses on the identification of the appellant in connection with the deceased's death through the CCTV footage was not water tight and should have been ignored; that neither the alleged murder weapon nor the blood of the deceased provided any incriminating value against the appellant; that the photographs tendered in evidence were of no evidential value as they were taken at the morgue and not at the scene of the murder.

Turning to the appellant's defence, learned counsel argued that since it was undisputed that both the appellant and the deceased were lovers and they were planning to get married, there was no reason for the appellant to book himself and her in a hotel room and then give a false name, identity card number and also cause her death. That we should ignore allegations of existence of any bad blood between the appellant and the deceased as this piece of evidence came from the deceased's relatives who were prepared to do anything to nail the appellant.

On exculpatory evidence in favour of the appellant, learned counsel argued that the appellant had sufficiently exculpated himself from responsibility for the commission of the offence charged as the evidence on identification of the appellant in connection with the commission of the offence was not water tight; that evidence on ill motive had been sufficiently negated; that the falsity of the appellant's identity in booking room 211 for purposes of the commission of the offence stood controverted and lastly that both mens rea and actus reus which are necessary ingredients for proving of the offence of murder were absent.

Mr. Robert Oyiembo Assistant Director of Public Prosecutions appearing for the state opposed the appeal and urged us to dismiss it. To learned counsel, there was sufficient evidence to support the conviction. This is borne out by the fact that PW1 was confident about her identification of the appellant in connection with the commission of the offence as she interacted with him thrice; that is, when the appellant and the deceased inquired about hiring a room and secondly when he came to pay for the room; thirdly when he came to ask for a towel. The interaction took place in broad day light, the environment was friendly, there was no crowding. As such there was nothing to impede PW1's positive registration of the appellants appearance and identity.

Mr. Oyiembo urged us to believe the evidence of PW1 that the appellant was accompanied by a lady in a bui bui; that bui bui was found in the room where the deceased was found murdered; that the appellant was known to the family of the deceased, sufficiently to enable them to identify him on the CCTV footage; that there is nothing to suggest that these witnesses were prepared to do anything to nail the appellant as they all testified that they knew the appellant by the name of *Abdul* to which he responded as an alias; that the knife was the murder weapon as it was found in the room hidden under the mattress, where the deceased's body was lying; that the blood stains on it matched the blood group of the deceased found on the pillow and towel; that malice aforethought was established by the nature of the injury inflicted as the person who inflicted the injury clearly intended to cause the death of the deceased.

This being a first appeal our mandate is as set out in Rule 29(1) of this Courts Rules namely to re-appraise the evidence and to draw our own inferences of fact. The appellant is therefore entitled to

expect from us a fresh, thorough and exhaustive assessment, appraisal and analysis of all the evidence that was before the trial court so as to arrive at our own independent conclusion on the guilt or otherwise of the appellant.

In *Mrs. C Figgies versus Rex* [1940719 KLR 32, the Court of Appeal for Eastern Africa while quoting with approval the decision in the case of *Coghlan versus Cumberland* [189871CH, 704 had this to observe:-

?..... The Court of Appeal has to bear in mind that its duty is to re-hear the case and the Court must reconsider the material before the judge with such other material as it may have decided to admit. The Court must then make up its own mind not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overturning it if on full consideration the Court comes to the conclusion that the judgment is wrong. When as often happens much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of a witness from written deposition and when the question arises which witnesses is to be believed rather than another, and that question turns on the manner and demeanor of a witness the Court of Appeal always is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstances quite a part from manner and demeanor which may show that a statement is credible or not, and these circumstances may warrant the court in differing from the judge even on a question of fact turning on the credibility of witnesses whom the court has not seen"

The evidence we have re-appraised, re-assessed and re-analyzed raises the following crucial issues for our determination in the disposal of this appeal, first, proof of both the fact of death and cause of death of the deceased; secondly the identity of the person or persons responsible for that death; and thirdly proof of existence of malice aforethought in the causation of the death of the deceased.

With regard to proof of both the fact and cause of death, we agree with the learned trial Judge that this was borne out by the evidence of PW2, PW3, PW4, PW6, PW7, PW9, PW11 and PW12, which all went to demonstrate that the deceased was alive when she walked into Karama Guest House in the company of a man later identified as the appellant; the appellant was seen leaving that room 211 at 5.00pm alone; that her body was later found in room 211; that the body had a deep cut on the neck; it was covered in a blanket; there was blood splattered on the wall. The body was removed to the mortuary and post mortem carried out on it by PW9 confirmed the cause of death as the injury inflicted on the deceased's neck.

With regard to the question as to who was responsible for the deceased's death; the prosecution fronted the appellant as the person responsible for the death of the deceased. The learned trial Judge after assessing, appraising and analyzing the evidence that had been tendered before her arrived at the conclusion that the appellant was the man who committed caused the death of the deceased. We have been called upon by the appellant to overturn that finding and by the State to affirm that finding.

As observed by the learned trial Judge in her judgment sought to be impugned, there was no eye witness to the commission of the offence. The prosecution relied entirely on circumstantial evidence. The parameters within which a Court of law can both receive and rely on circumstantial evidence to found a conviction have now been crystallized by case law. To quote a few, See the case of *Rex versus Kipkering Arap Koske & Kimire Arap Matatu* 26EACA 135, *Simon IMusoke versus Republic* [1958] EA 715 and more recently *Sawe versus Republic* [20031 KLR 364.

The central thread running through all the above cited decisions among numerous others is that the inculpatory facts established by the prosecution against an accused on the basis of which that accused is sought to be convicted, must be such that lead irresistibly to the conclusion of the accused's guilt incapable of explanation on any other reasonable hypothesis other than the accused's guilt and are incompatible with the innocence of that accused.

The inculpatory facts fronted by the prosecution as against the appellant are those relating to facial identification at the Guest house; identification through the room list kept at the Guest house; PW1s identification of the appellant in an identification parade conducted by PW8 and lastly identification in the footage of the CCTV device installed at the quest house.

It was PW1s testimony that the appellant was the man who called at Karama quest house in the company of a lady wearing a bui bui. He talked to PW1 and inquired of a room; It was day light between 12.00 noon and 1.00pm; PW1 gave him the liberty to choose a room of their choice; the appellant and his woman companion left to choose the room; the appellant returned alone; and informed PW1 that they had settled for room 211. He paid Kshs.600.00 and he was issued with a receipt No.9822. Shortly thereafter the appellant came back again and asked for a towel. PW1 handed him one. It is this threefold facial encounter which PW1 alleged formed the basis of her positive identification of the appellant on the identification parade conducted by PW8.

When cross-examined, PW 1 had this to say:-

"The lady customer who accompanied the accused had a bui bui. It was black and I could not identify her. The man had something like a shirt and a jacket. The jacket was bluish but I cannot exactly recall"

The testimony in-chief of PW8 No.232185 IP Joel Kange in chief in part is as follows:-

"I prepared a team of 8 members. The suspect was 9th. I personally explained to the suspect the purpose of the parade. He did not raise any objection. I conducted the parade with one witness. The witness identified the suspect by touching. The witness had not seen the suspect before the parade. I asked the suspect for comment on how the parade had been conducted. He did not object. He signed the identification parade forms. I also signed the form"

When cross-examined, PW8 had these responses to make:-

"I indeed conducted the parade. It is not true that the parade took place in the crime office. The witness never saw the suspect before the parade. The open place is in the cells premises but not in the cells. I was in an open place in the cells premises. They are accused in the cells usually. But for the parade I had the suspect. I selected members of similar height, physique and same complexion. Two members were cancelled and I counter signed for the cancellation because the two were different

.....

"I wrote what the suspect told me in reported speech. He said he was satisfied with the parade and I recorded accordingly"

The appellant in his unsworn statement was silent about the evidence of facial identification at the Guest house, but had this to say about the identification parade:-

"While I was in the cells, I was taken out to the office where a lady was seated. Later a parade was conducted. The same lady identified me."

The observations of the learned trial Judge on the evidence of identification were as follows:-

"The accused came to the Hotel at 1.00 p.m.it was broad day light. PW1 spent ample time in his presence talking to him and recording his details. I am satisfied that PW1 had a clear and unfettered view of the accused and was thus able to give a positive and reliable identification. This identification of the accused is reinforced by the fact that PW 1 was able to positively identify the accused at a police identification parade on 17th day of February, 2008 at central police station by PW8 inspector Joel Kange. The accused voluntarily participated in the parade. PW8

told the Court that PW1 did identify the accused by touching him. The accused registered no complaint about the manner in which the identification parade was conducted"

Our own analysis of the evidence on facial identification is that, it was indeed correctly observed by the learned trial Judge that the two customers who called on PW1 at the Quest house seeking a room did so in broad day light at 1.00pm. Only the lady concealed her facial appearance with a bui bui (veil). She did not also engage PW1 in a conversation. The man customer had not concealed his face. He talked to PW1 thrice. There was no crowd on each of the three occasions when the man customer talked to PW1.

The appellant has sought to fault this evidence on the basis of the responses PW1 gave in cross-examination over her ability to identify the customers who came to the Quest house at that particular time. PW1 had this to say:-

"I had attended to customers before 1.pm but I cannot remember the No. Some came in but two others were single. I cannot remember any of those customers. I however remember a Tanzanian who was a regular customer..."

It is our stand that this narrative relates to events before 1 .00pm. Nothing peculiar happened in connection with the rooms rented out by PW1 before 1.00PM. This room 211 rented out at 1.00pm was however peculiar and events culminating in its rental could easily be registered and recalled by PW1 . Our reasons for saying so are, one, a couple was involved; two, they requested to view the rooms first; three, only the man customer engaged PW1 in a conversation thrice. We therefore agree with the finding of the learned trial Judge that PW1 s view of this male customer was unimpeded and allowed room for the registration of the customer's appearance as events narrated took place in broad day light.

As regards the mode of the conduct of the identification parade, the identification parade form was produced as an exhibit. PW8 was firm that he complied with all the prerequisites set out in the said form. The learned trial Judge believed him. We have no reason to fault the learned trial Judge on that belief. Our reason for saying so are that, the appellant cannot be believed when he alleges in his unsworn statement that the witness saw him in the crime office before the parade.Had this been the case, he would have remarked so when asked if he had any objection to make on the conduct of the identification parade. The appellant has not mentioned that he tried to raise this complaint and PW8 brushed it aside.. We are satisfied that the learned trial Judge rightly rejected this belated complaint. PW8 had no reason to doctor the entry in the parade form against the appellant whom he did not know before.

Regarding the identification of the appellant through entries on the room list, PW1 s testimony is that when the male customer returned alleging that he had liked room 211, PW1 rented it out to him; that she asked the appellant for his name and ID card; the appellant replied that he had not brought his ID card but knew his names and ID card number off head. The appellant gave the name *Baya Kahindi* and ID card number 21571035. The carbon copy of the receipt No. 9822 was produced as an exhibit. The entries bear the date of 9th February, 2008, *Baya Kaahindi*, amount of Kshs. Six hundred only, A/C Room 211, time 1 .05 pm and ID Card number 21571035. The room list was also produced as an exhibit. The room had been booked for the period of 9th February, 2008-10th February, 2008.

The appellant took issue with this evidence asserting that the evidence is unreliable because the list had entries of different rooms bearing same receipt numbers inclusive of room 211 subject of this appeal. The learned trial judge's observation on the above evidence were that the appellant gave to PW1 his name as *Baya Kahindi* and gave his ID card details as 21571035; that PW13 P.C Paul Nganga the investigating officer had testified that upon the appellant's arrest, PW1 recovered appellant's work identity card exhibit 11 . This bore the names of *Barisa Wayu Mataguda ID. Card No.21356448*; that *PW5 Evans Maragaa Oyori* a finger print officer with the Registrar of Persons received the finger prints of the appellant and carried out investigation and confirmed that the appellant had been registered with the registrar of persons under the names *?Barisa Wayu Mataguda ID Card No 21356448*; that further investigation by the same registration officer revealed that ID card number 21571035 actually belonged to one *Juma Jopheth Mwari*. Then the learned trial judge went on thus:-

?The defence made no attempt to challenge or rebut this evidence. Indeed the names to which the accused has responded each time he had come to this court are Barisa Wayu Mataguda

.....

It is quite evident that the accused gave PW1 a false identity when he registered at Karama Hotel. In his defence, the accused said that he was a married man. Given that he was booking into a hotel room with a woman who was not his wife, it is not difficult to see why he preferred to give a false identity"

The above observation of the learned trial Judge when considered in totality with the evidence of facial identification by PW1 which we have already accepted as being positive and reliable, leads to the conclusion that the issue of double entry of one payment receipt as evidencing payment of rental hire charges for two different rooms was apparently not put to PW1 in cross-examination. As such we have no explanation on the record for it. However, to us the possibility that this may very well have been a case of false accounting cannot be ruled out. It does not however rule out the possibility of room 211 having been rented out to the appellant and his companion at 1.05pm, considering that the other entry related to a hiring out which took place earlier in the day at 11.40 am. It may very well have been for a short stay if indeed the same was hired out at 11.40 am.

The learned trial Judge was therefore right when she ruled that this room was rented out at 1.05pm by PW1 to the appellant and his companion. The positive facial identification of the appellant by PW1 as the person who rented room 211 on this particular day and time indicated supports the learned trial Judge's findings that the appellant rented the said room under a false name and identity. PW1's assertion and explanation that her failure to insist on the appellant's production of his ID card accounts for the presence of the false entries made, is a reasonable explanation .

PW13's move to establish the true identity of the appellant was reasonably informed by the fact that the entries of the names and identity of the persons who rented out room 211 on the material day differed from the names and identity of the appellant as demonstrated on his employment identity card. Since investigation carried out from the records held by the Registrar of Persons revealed that the appellant's true names and identity were as per the entries on his employment card, the learned trial judge cannot be faulted in her findings that the appellant booked himself in room 21 1 at the named guest house on the material day and time under a false name because he was not yet married to the deceased.

The appellant's submission against the above last finding was that, since the appellants' and deceaseds' relationship was an open secret and they had in fact intended to get married, there was no need for the appellant to hide his identity. The evidence we have on record however is that this relationship was known to the deceaseds' relatives. It was undisputed and indeed conceded by the appellant himself that he had a wife and two children. It is on record that both the appellant and the deceased lived separately. The appellant with his wife and children. The deceased with her brother. There is no evidence that the deceased was known to the appellant's wife or that the two had or could freely spend the night or consort in the other places openly and freely. Considering that although PW6 stated that the two could live together and at other times separately, she did not elaborate where the two lived together and if it was openly or secretly. In the absence of proof that the appellant and the deceased had at any one particular time ever lived together openly, the learned trial Judge cannot be faulted on her findings that the appellant chose to hide his true names and identity because he had booked himself into a room with a woman who was not yet his wife.

The last evidence on identity is the evidence touching on identification through the CCTV device installed at the Guest house. PW1 had this to say about this evidence:-

?There are CCTV cameras but they cannot be easily seen"

And in cross-examination

'The CCTV faces the entrance ... It also takes photos of those in the corridors'

PW4 had this to say:-

?However I informed them (police) that there was a CCTV camera in the guest house. We went to the computer room with the police. We found that room 211 had received two guests a woman and a man. The TV further had recorded the entry of the two. It had also recorded that at 5.00 pm the man had left. TV showed that the woman had a veil (bui bui) and the man had a jacket...

When cross-examined, PW4 had this to say:-

"The CCTV took movements on the corridors....the CCTV showed that the man left at 5.00pm....the CCTV showed many people. The CCTV showed movement to all the rooms including 211.

PW6 stated this:-

?He is the person I saw in the video camera at the Karama Guest house"

(Pointing to accused)

PW11 No.67933 Charles Chirchir had this to say:-

?We were shown the footage of the CCTV camera. We saw a man and a lady enter the room No.211. The man later left the room alone. He was a brown man wearing a cap. A blue jacket and yellow T-shirt.... He was of a similar colour and height as the man we saw on the CCTV camera. One Veronica a relative of the deceased identified the man in the CCTV footage as Abdul" who she said was a boy friend of the deceased"

In cross-examination PW1 added:-

" I saw a man who looked like the accused on the CCTV camera footage. The person who booked room 211 was one Baya Kahindi. The accused's name is Barisa Wayu...

We were trying to search for the blue jacket and yellow T. shirt which we had seen the man on the CCTV camera footage wearing. PW, 13, No. 69648 P.C. Paul Nganga had this to say:-.

"We showed the relatives the CCTV footage showing the accused and deceased entering the hotel. The relatives did identify the accused as Abdul a boy friend to the deceased ..."

The learned trial Judge's observations on this aspect of the evidence are as follows:-

?PW4 the proprietor of Karama Hotel told the court that on the material day CCTV cameras were on and were recording in the hotel lobby. The attempt made by the prosecution to produce a CD of this CCTV was objected to by the defence counsel Mr. Kirui. In my ruling dated 22nd July, 2011 I did uphold this objection. Although the CD was not introduced into the evidence there is testimony from several witnesses who personally viewed the CCTV footage that the accused was seen leaving the hotel at 5.00pm. The investigation officer PW/3 told the court that he too viewed the CCTV footage and was able to identify the accused as the man on the tape. Likewise PW6 the deceased's aunt also viewed the CCTV footage and was able to identify the accused as the man thereon.

.....

“Although PW4 and PW13 did not know the accused before this incident, PW6 told the Court that she knew the accused very well as the boy friend of her niece. She has told the court that the name

by which the accused introduced himself to her as "Abdul". They have positively identified him in court. This was a person who was well known to them and I find no possibility of a mistaken identity. I have no doubt that "Abdul" was a nickname by which the accused was known and I am satisfied that him "Abdul" and the accused are one and the same person"

The appellant has taken issue with that evidence arguing that once the learned trial judge declined the tendering in evidence of the CD containing the CCTV footage images, she should not have gone ahead to rely on the oral testimony of the witnesses as regards what they had seen on the CCTV footage, when they viewed it. On our analysis of this evidence, we have come to the conclusion that it was not in dispute that PW4, the owner of the business in Karama Guest house had, in fact installed, CCTV Cameras; that these cameras from their location could capture images of , movements at the entrance to the Quest house and in the corridors.

There is also no dispute that the functioning of the CCTV device depended on the continued supply of electricity to the device. PW1 who was on the day shift at the premises was firm that there were no black outs. The witnesses who viewed the CCTV were firm in their testimonies that the device recorded not only the movements of patrons but also the timings. The device functioned throughout that day. What the Court rejected was the lifting of the information from the CCTV device into the CD for purposes of production as evidence into Court for the reasons given by the learned trial judge. The Court did not however reject the evidence viewed by the witnesses on the CCTV device itself as being worthless. Neither did it doubt the truthfulness of the content of what the witnesses had viewed on the CCTV device footage. It is not disputed that it is the identification of the appellant through this device that led to his arrest. He was identified by the name "Abdul" a boy friend of the deceased since 2007. As found by the learned trial Judge PW7, PW6 and PW3 all relatives of the deceased all identified the appellant as a man whom they knew by the name "Abdul" and whom they knew as the boy friend or lover of the deceased. They all stated and the court was satisfied that "Abdul" was a person they knew very well and the Court was right in arriving at the conclusion that there was no possibility of any mistaken identity. We find no fault in the learned trial Judges finding that "Abdul" was a nick name by which the appellant was known and the "Abdul" referred to by the relatives of the deceased was in fact one and the same person as the appellant who was before her.

In her concluding observations on the evidence on the identification of the appellant in connection with the commission of the offence, the learned trial judge had this to say:-

"The fact that PW1 has positively identified the appellant as the man whom she booked into room No. 211 with the deceased, there exists circumstantial evidence linking the accused to the death of the deceased in that he was seen in the company of the deceased a few hours before her dead body was discovered..

The evidence clearly shows that the accused booked into a hotel room with the deceased at 1.00pm. He left a few hours later at 5.00pm alone. Later the deceased is found dead in the room with blood splattered all over the wall. No other possible explanation can be drawn from this set of facts other than that the accused killed the deceased inside that hotel room. If the deceased met with some misfortune or accident inside the hotel room then why did accused not alert the hotel management or call for help? The fact that accused calmly walked out of the room leaving the deceased injured or dead proves that he inflicted the injuries that killed her. No other person was seen to enter or leave room 211. In his defence the accused whilst admitting that he spoke to the deceased on the material day, denies that he went to the hotel room with her. However as discussed earlier, the evidence convincingly proves that it was the accused who went into that hotel room with the deceased. He was clearly seen and identified by PW1 not to mention the testimony of the witnesses who saw accused on CCTV footage leaving the hotel. None of the witnesses had any reason or motive to try to frame the accused. I am convinced that they were telling the truth of what they had seen with their own eyes. For this reason, I do reject the accused defence. Based on the weight of circumstantial evidence, I find that it was the accused who

inflicted the fatal cut on the deceased. As such I am satisfied that the actus reus of the offences of murder has been proved."

The above findings when considered in light of the totality of the evidence analyzed above, confirms that the learned trial Judge arrived at the correct conclusion on the evidence of identification of the appellant in connection with the commission of the offence subject of this appeal. Our reasons for saying so are as follows: We have already confirmed the finding that PW1 was in a position to positively identify and in fact did positively identify the appellant as the person who booked into the hotel room 211 with the deceased. This positive identification was confirmed by the positive identification of the appellant on the identification parade, the identification parade was properly and procedurally conducted. The appellant had an opportunity to book himself in the hotel under a false name and identity because as at the time he booked himself and the deceased in, the deceased was not with him. She had been left in the room upstairs. The reason that the learned trial judge advanced as the possible reason for the appellant to book himself in the hotel with the deceased under a false name and identity was because they were just friends or lovers and although their relationship was an open secret to the deceased's relatives, we have no evidence that it was known to the appellant's wife. The appellant therefore had a reason not to reveal his true identity. Another plausible reason for this conduct on the part of the appellant was that he knew what was to happen to the deceased ultimately. He therefore had to do all he could to conceal his tracks, especially considering that the record does not show that there was advance warning to the customers that there were CCTV cameras in use. The appellant assumed he could accomplish his mission and get away unnoticed.

The testimony of the witnesses who viewed the CCTV device fortifies the evidence of PW1. It is the same evidence which led to the arrest of the appellant. This arrest was based on sound grounds and was not mistaken. Indeed the clothes that the appellant allegedly wore on this fateful day were never recovered. However considering the length of time between the date of the commission of the offence and the date of the arrest, there was sufficient opportunity to the appellant to conceal or dispose them off in one way or another. A person who can have the ingenuity to conceal his true name and identity card in the process of preparation to commit a crime would not surely take the risk of retaining the very attire he was in when he committed the crime. The failure to recover this clothing does not in any way water down the cogent evidence on facial identification of the appellant in connection with the offence.

The appellant after booking himself in the hotel came for a towel. A towel was found stuffed in the deceased's mouth. PW1 saw nothing in the hands of either the deceased or appellant as they inquired for a room for hire. There is no doubt that the towel the appellant came to ask for is the same towel that was used to stuff the deceased's mouth with.

Although the appellant denied booking himself with the deceased in the room where the deceased was later found dead, we are satisfied as was the learned trial judge that the totality of the evidence on the record placed him at the scene of the murder and points to him irresistibly as the person who committed the offence of murder of the deceased. The inculpatory facts outlined above are in capable of explanation on any other hypothesis other than the appellant's guilt and are in compatible with his innocence.

The last issue to be dealt with is the issue of proof of existence of malice aforethought which is a necessary ingredient and or element in proving the offence of murder. The elements of malice aforethought have clearly been set out in Section 206 of the Penal Code. All that we are required to demonstrate here is that the learned trial Judge was alive to this requirement, and applied the applicable law to the facts before her and was properly satisfied that it had been proved to exist before finally settling for a conviction for the offence charged as murder. Section 206 of the Penal Code defines malice aforethought as follows;

?Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances...

(a) An intention to cause the death of or to do grievous harm to any person. Whether that person is the person actually killed or not.

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by in difference 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)....,

In arriving at the conclusion that malice aforethought had been established, the learned trial Judge had this to say:-

It is quite clear that this was an unhappy union. Each party had grievance against the other. Whilst there is no direct evidence on what transpired between the two in the hotel room, it is not far fetched to post that quarrels or argument could have ensued leading to the attack by accused on the deceased. The accused has not claimed that he was provoked nor has he raised the issue of self defence. Given that the accused left the room unharmed yet the deceased was badly cut and killed. It is only logical to conclude that accused was the aggressor. The savageness of the cut (major blood vessel in the neck were severed) and the fact that blood was splattered on the walls makes it clear that accused intention was to kill the deceased. I am satisfied that the mens rea or murder has been proved. On the whole I am satisfied from the evidence on record that the charge of murder has been proved beyond reasonable doubt. I therefore convict the accused of this charge of murder"

On our own, we are satisfied as was the learned trial Judge that malice aforethought had been proved beyond reasonable doubt. Issue of provocation and or quarrel or argument between the appellant and the deceased is ruled out. This is borne out by the fact that if there was any commotion in that room definitely PW1 who signed off duty at 6.00pm or any other person would have heard it. There was no evidence of any struggle in the room. The deceaseds' items other than being under the bed were not scattered. The beddings were not scattered. As found by the learned trial Judge, the appellant was unharmed. There were no blood stains noticed on his clothes on the images viewed on the CCTV device. The knife which was the murder weapon mysteriously found its way into the room. There is nothing to show that the deceased had it on her. PW1 did not say that customers are inspected before entry into the guest house. Upon accomplishing its use, it was nicely tucked under the mattress. This is conduct of a person who had planned its use well in advance. Definitely it was concealed upon entry into the room. Upon using it for the purpose for which it was intended namely murder, the handler could not have definitely taken it with him due to fear of being given away because of the presence of blood stains on it. It had to be tucked away and concealed beneath the mattress.

The towel the appellant collected from PW1 thirty (30) minutes after he had booked himself and the deceased into room 211 was found stuffed in the deceaseds' mouth. Considering the extent of the injury that was inflicted on the deceased upon the stuffing of the towel into her mouth, it is clear evidence that the appellant intended to silence the deceased, prevent her from either calling for help or screaming in order to attract attention. The appellant did not care whether this action on his part would lead to a suffocation of the deceased to death or not. The fact of severing of major blood vessels on the neck of the deceased is a clear indication that the person who did it intended the deceased to bleed to death. This intention was achieved as the deceased was discovered dead hours after the appellant had sneaked out of the hotel room alone as shown by his image on the CCTV.

The issue of appellant being unhappy for spending a lot of money in the search of employment for the deceased as a source of disharmony in the appellant's relationship with the deceased featured prominently in the evidence of PW3, PW6 and PW7. This, the least affords a form of motive for the murder of the deceased. It is trite law however that motive however strong is never a mandatory ingredient in proving the offence of murder. It is only malice aforethought, which is a mandatory ingredient in proving the offence of murder. All the elements we have outlined above, demonstrate existence of malice aforethought beyond reasonable doubt.

The upshot of all the above assessment is that, we find no merit in this appeal. It is dismissed in its entirety. We accordingly confirm both the conviction and sentence by the learned trial Judge.

Dated and delivered at Nairobi this 27th day of February 2014

R.N. NAMBUYE

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JUDGE OF APPEAL

H.OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR