



**Republic v Mwanzia (Criminal Case 1 of 2017)  
[2024] KEHC 6316 (KLR) (31 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6316 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE 1 OF 2017**

**A. ONG'INJO, J  
MAY 31, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MUTUA MWANZIA ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused Mutua Mwanzia faces a charge of murder contrary to Section 203 as read together with Section 204 of the Penal Code.
2. Particulars of the offence are that Mutua Mwanzia on the 13th day of May 2016 at around 8.00 am at Ushindi area in Likoni Sub-County within Mombasa County murdered Mary Wanjiku Waweru.
3. The prosecution called 16 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

**Prosecution Case**

4. PW1, AW, a minor aged 8 years old, underwent voire dire examination, was affirmed and she stated that she lived with her dad, mum and sister V. She said that her dad would take her to school but her sister V would go to school on her own. PW1 said that one day, she left home with her dad and went to school, and that her mum bid her bye and went back to the sitting room to sleep. That when she returned, her aunt, cousin and grandmother went and took her and her sister V to their aunt's place. She said that from her aunt's place they went back home. She said that her parents used to quarrel and fight, sometimes in her presence, and that her dad would beat her mum.
5. PW2, V W, a minor aged 13 years old, underwent voire dire examination, was affirmed and she stated that she lived with her dad, mum and sister A. She said that on 13.5.2016, she went to school and left



- A, dad and mum in the house. That her mum was on the bed with A and at 2.00 pm, her dad went with uncle N and S, her cousin, to get her from school. That they were taken to a hotel and later to Mama M – the sister to her father. That when they went back home later, their mother was not there and that they were told their mother had died. PW2 said that her mum and dad used to fight before them and sometimes while they were alone. PW2 said that on that day, she did not hear them fight. That Sr was her cousin on her dad's side and that she used to go to their home.
6. PW3, N CW, said that on 13.5.2016 at 9.45 am, he was called by the Accused and asked to go to Likoni as soon as possible. That the Accused did not tell him the reason and that PW3 told the accused that he was on duty and that he would find time and go. That the accused called again and told him that the deceased was not there but PW3 did not understand what he meant. That both the Accused and the deceased would call him whenever they fought. PW3 said that in 2015, he went there four times. That one time, the deceased was unwell and that she went to PW3's place and said she was very sick and that the Accused had not taken her to hospital. That the deceased went to her aunt in Kiembeni and stayed there because PW3 had a small house. That PW3's parents were called and they did a case and the deceased went home. That again in 2015, the Accused beat her and told her to go to the police, and that she was injured on the head. That at the police station the deceased said they would solve the problem.
  7. PW3 testified that on 13.5.2016, he was called by his mother from Murang'a and that before crossing the ferry to Likoni, the Accused called him and told him to wait at Nakumatt. PW3 said that a saloon car arrived and that the Accused with his brother Samuel were inside and that the Accused told him that the deceased had killed herself. That they went to Makadara and the body was taken to the mortuary. That he asked the Accused what happened and he told him that they had disagreed over money when Mpesa did not balance and that he left her at home and he was called and told that she had committed suicide. That they went and picked the children from school and took them to Kiembeni.
  8. PW3 said that they went for postmortem and that he was a witness together with his uncle and the Accused. That PW3 asked if the deceased had ingested poison and the attendant said that if that was the case, her intestines would be puffed. PW3 said that he did not agree with the findings of the attendant and that the attendant called them and told them that he would give them a permit. That they later went to Kenyatta University Hospital and had the second postmortem. That they were given a report that the body had a bruise at the back of the head. That at the time of death the deceased was unconscious. That the Accused did not attend the funeral and the children were also not released to attend. That the deceased told PW3 that the Accused had threatened to kill her.
  9. PW4, Sr Kangwelele, said the deceased, Mary, was her aunt, a close friend and that she used to visit her. She said that on 13.5.2016 at 9.00 am, she went to Mary's shop near Ushindi Baptist and that she did not find her. That she decided to go to the house where she found the door closed. That she knocked three times but there was no response. That she opened the door but did not find anyone and that she went out to collect money. That she went to the place they were to meet for Jamaa and that the deceased's name was called but PW4 did not have the money to pay for her. She said she did not call Mary because she knew she would show up.
  10. PW4 said that the Jamaa told her to get Mary's contributions and that she returned to her house for the 3<sup>rd</sup> time and that when she entered, she did not find anyone in the sitting room. That when she entered the bedroom, she did not find anyone on the bed and that when she turned to the window, she was her near the window. That she was shocked as the body was lying down but the neck was raised. That she moved closer and saw a wire on her neck. PW4 said that she returned to Jamaa and told them what she had seen and that they all went back to the house and saw the body. PW4 said that she called the Accused and informed him what she had seen and told him to go to the house. That PW4 then went to the police station and reported, and that the police went and took the body to Makadara Hospital.



- That the Accused arrived when pictures of the body had already been taken and the body removed from the scene.
11. PW4 further informed court that they went to school to collect the children and planned where the children would be taken. That Nderu, the cousin of the accused told PW4 to go with the children and that she did not attend the deceased's funeral because she stayed with the children for 4 days at Nderu's home. That she recorded her statement at Likoni Police Station as well as the office of the CID. PW4 said that she did not know the deceased had problems in her marriage.
  12. PW5, Mweo Kalimbo Mwero, said that he worked in a barber shop belonging to the Accused. He said that on 12.5.2016, they worked as usual and that on 13.5.2016 when he reported to work, he found the door to the barber shop still closed and that he decided to go take tea. That later, Amadi his colleague called and asked where he was and he thought customers were waiting. That when he got there, he found a group of people outside his boss' house. That he was told the wife of his boss had committed suicide. That he wanted to enter but the door was locked from the inside and that he waited outside until arrival of the police and his boss. That when the body was removed, there was a rope around the neck. He said that the relationship between the accused and the deceased was good.
  13. PW6, Amadi Kombo Zaidi Mbese, testified that he worked with Karisa in a barber shop belonging to the Accused. That he used to report to work at 8.30 am and would leave at 9.00 pm. That the deceased, the wife of the boss would open the barber shop and that she used to stay opposite the shop and that she also had an Mpesa shop. That on 12.5.2016, he was on duty and that they closed shop at 9.00 pm and on 13.5.2016 at 8.30 am, she heard people saying Mary had died through suicide. That he went to the house and found a lot of people outside the plot. PW6 said that he called the Accused and told him what he had heard and that the Accused told him to break the door and enter. He said that there were people who had entered and that he saw the body of the deceased hanging on the window with a computer cable. That he went outside and waited for the police.
  14. PW7, Peter Mungai Gacheru Ndutere, said that on 15.5.2016, he received a call from a woman at Likoni Police Station and that Mama Gikonyi who was also at the station told him to go to the police station immediately. That while at the station, he was shown a photograph of Mama Waweru who had been strangled in the house. That there were funeral arrangements and that the women wanted the burial permit withdrawn. That postmortem was conducted on 16.5.2015 and it was witnessed by family members at Coast General Hospital. That Mwaniki called and told him that they were not satisfied with the postmortem and that the body was taken to KU Hospital for a second postmortem. That results would be ready in 3 months but they were allowed to bury.
  15. PW7 said that on 24.5.2016, the body of the deceased was due for burial and that the brother to the deceased called PW7 to the Chief's office so that the deceased's husband could be informed of the date for burial. That the Chief wrote a letter which was delivered through the Village Elder asking the deceased's husband to meet them at the Chief's Office at 2.00 pm. That at 2.00 pm, a woman and 2 men from Mutua's side went and together with PW7, Mwaniki and Chege proceeded to the Deputy OCS's office as instructed by the Chief. That it is the parents of Mutua who showed up and when they started talking, they told them that they could not attend burial and that the children could also not attend. That if they needed the children and property of the deceased, then they could meet in court, and that they were not interested in the body. That the brother of the deceased and other family members decided to go and bury.
  16. PW8, Stephen Mutinda, the Government Analyst said that on 20.5.2016, PC. John Matiko No. 9358 submitted postmortem specimen to the Government Chemist for examination and they were indicated to have originated from the deceased person, Mary Wanjiku. That the specimens were



- accompanied by Exhibit Memo Form and that he was requested to carry out the full toxicological analysis. He said that he detected cyhlophrin, a synthetic pesticide which was detected in the stomach and liver samples. That this is a poisonous pesticide which indicates the deceased had ingested it and could have contributed to her death. PW8 prepared the report, signed it and produced it with a copy of the Exhibit Memo Form as ExP2(b) and ExP2(a) respectively.
17. PW9, No. 235210 CIP Klein Kulicha, Gazette Notice No. 5548 of 30.6.2015 said that on 13.5.2016 at around 1100 hours while on standby duties, he was called through control room to proceed to Likoni area. That on arrival, he was directed to a rental house where in one of the rooms there was a body of a female adult alleged to have committed suicide. That the body had an electric cable tied to the neck and the 2<sup>nd</sup> grill rod from the bottom of the window. That the body was slightly kneeling supported by the bed and that he documented the scene through photographs. He produced the bundle of photographs as ExP1 and the Report and Certificate dated 27.6.2017 as ExP3.
  18. PW10, Kasongo Minoti, attached at Mombasa DCIO at the time said that on 27.6.2016 during morning hours, his boss Mr. Macharia called him to his office and that he had a file which he briefed him about and ordered him to take over investigations from IP Yusuf of Likoni Police Station. That he visited the scene at Ushindi area in Likoni and that the body had already been removed from the scene and postmortem conducted on 15.5.2016. That he took over investigations a month after the incident and that the body had already been buried. He said that 2 postmortems had been conducted and that the family of the deceased were not satisfied with the postmortem conducted in Mombasa. That they suspected the husband of the deceased was involved in the murder as they had frequent domestic quarrels. That PW10 recalled the two children of the deceased to make further statements which he recorded. That he then went and recorded more statements from witnesses in Ushindi area in Likoni. That he then prepared a covering report and his recommendation as per the evidence of the witnesses and informed his boss of the findings. That he then forwarded the file to ODPP Mombasa for perusal and advise.
  19. PW11, Douglas Maina Muhoro, said he was a carpenter and the deceased was a neighbour and was operating an Mpesa shop in Likoni. He said that on 13.5.2016, at around mid-day, he left his place of work to go and get timber when he heard a woman crying and running. That she said there was a woman who had committed suicide. That PW11 went to the scene and found many people and that he saw that the deceased was hanged. That the boy who worked at the Kinyozi said that he had been instructed through a phone call to untie the rope that had been used to hang the deceased and that the deceased be taken to hospital. That PW11 took the phone and spoke to the person and asked how he expected a dead body to be taken to hospital.
  20. PW11 said that he then chased everyone from the house and told them to wait for the police. He said that the deceased was seated on the floor and her neck was tied to the window. That the rope used to hang the deceased was a cable for connecting DVD to power. That chief and village elder also went to the scene and that PW11 assisted in carrying the body to the police vehicle.
  21. PW12, No. 93518, John Matiko from Ruiru Police Station said that on 19.5.2016, Chief Inspector Kamiti, OCS Ruiru Police Station called him and informed him that some people had come from Mombasa and that their relative had passed away while in Mombasa and postmortem had been done in Coast General Hospital but they were not satisfied with the result. That the body of the deceased had been taken to Kenyatta University Funeral Home awaiting burial and that they decided to conduct further postmortem. That since KU was in their area of jurisdiction, the matter was reported at Ruiru Police Station.



22. PW12 said that the OCS instructed him to accompany them to KU Funeral Home to observe the autopsy exercise that was conducted by Dr. Oduor. That Dr. Oduor then suggested that they do full toxicology and that he removed some specimen from the body of the deceased. PW9 informed court that they went back to the station and prepared exhibit memo and forwarded the specimens to the Government Chemist for analysis. That later he collected the Government Analysis Report and handed it over to the DCI office in Mombasa together with his statement. PW12 produced the Exhibit Memo Form dated 20.5.2016 prepared at Ruiru Police Station as Exp2(a).
23. PW13, No. 86493, P.C. James Otieno Odida, said that on 13.5.2016, he was working at Likoni Police Station attached at the crime branch when one Sr Kikulu reported at about 0954 hours that she found her aunt one Mary Waweru Mutua hanging dead by the window in her house in Likoni. That PW13 informed his immediate supervisor OC Crime and one Sgt. Oyugi and together they proceeded to the scene. That they contacted Scenes of Crime personnel in Mombasa who met them at the scene. He said that the main door to the house was not locked. That after confirming that the body was in the house, photographs were taken. That the body was in a sitting position with an electric cable tied to the neck and on the window grill. That the body was then removed to Coast General Hospital Mortuary.
24. PW13 said that on 16.5.2016, at about 0900 hours, he attended postmortem which was conducted on the body of the deceased at Coast General Hospital. That the body was identified by Mutua Mwanzia - the husband to the deceased, Samuel Mwaniki - the brother to the deceased and one Jimmy Muguro. That after postmortem, the doctor inquired if the witnesses were satisfied or had an objection and none of the parties made any comments. That as they left the mortuary, a scuffle ensued between the family of the deceased and Mutua's family. That they had a verbal exchange in regard to how the exercise was carried out and they agreed to conduct another postmortem.
25. PW14, No. 235765, IP Yusuf Ibrahim, said that on 13.5.2016 at around 1000 hours, he received a report at Likoni Police Station and they immediately proceeded to the scene at Ushindi. He said that he was with Madam Sgt. Florence Oyugi and PC Otieno. That on arrival at the scene, they found one Mary Mutua hanging from the window of her bedroom. That there were no physical injuries on her body. He said that on 16.5.2016, postmortem was conducted at Coast General Hospital and it was attended by PC Otieno. That they collected the body after Scenes of Crime officers took photographs
26. PW15, Dr. Johansen Oduor, the Government Pathologist said that he had the Postmortem Report in respect of the late Wanjiku who died on 13.5.2016 and that he prepared the postmortem on 19.5.2016 at Kenyatta University Funeral Home in Nairobi. That the body was identified by N Chege and Benson Muthiga. That the deceased was found hanging by a computer cable tied to the neck. That a postmortem was performed at Coast General Hospital which indicated she committed suicide by hanging herself and that the relatives demanded for a repeat autopsy. The doctor observed that there were two parallel marks around the neck made by a ligature and the two parallel marks were merging on the side of the neck. That on internal examination, all systems looked normal. That from the findings, the doctor concluded that the deceased died of possible neck compression due to hanging. PW15 said that he retained samples for analysis which he gave the investigating officer. That the samples included blood, kidney, a portion of the liver, the stomach and its contents. That he signed the postmortem form and produced it as Exp5.
27. PW16, Dr. Abdul Aziz Mohamed from Coast General Hospital said that the postmortem was conducted by Dr. Mwachiti on 16.5.2016 but the doctor had been transferred to Kilifi Hospital. PW16 said that the body was identified by Mwanzia, the deceased's husband, and Naftaly Chege, the brother of the deceased. That postmortem was requested by Likoni Police Station and from the history given by the police, the deceased was found dead in a sitting position with an electric cable tied to a window



frame supporting the upper part of the body tied on the neck. On internal examination, the doctor observed that there was fracture of the trachea and that as a result of examination, Dr. Mwachiti formed the opinion that the deceased died due to asphyxia secondary to hanging. PW16 produced the Postmortem Report as ExP4.

### **Defence Case**

28. The accused, Mutua Mwanzia said that he was married to the deceased through Customary Law, that they had been husband and wife from 2005 to 2016, and that they were blessed with 2 daughters, V W Mutua and AW Mutua. He said that on 13<sup>th</sup> May 2016, he woke up to go to work as his children were going to school. That the deceased prepared the children for school beginning with V who was to report at 6.00 am while the accused was to accompany the youngest child to school on his way to work.
29. The accused informed court that they were operating an Mpesa business, kinyozi and juice parlour. That the accused and the deceased took accounts of Mpesa business where he found shortage and that they did not agree. That the accused told his wife that they would talk about the matter after work as the shortage at the Mpesa was too frequent. The accused said that his wife was temperamental and that he told her that he would be forced to employ someone else but the deceased told him that he wanted to take his mistress to the Mpesa shop. The accused said that this was at 6.30 am and that he went and dropped the second child at school and proceeded to his place of work at Mkomani.
30. The accused said that he arrived at the office and started working with his colleague James Munga. That after 3 minutes, another colleague went and requested for Mpesa deposit of Kshs. 700. That the accused called his wife but she did not pick and the accused assumed that she was busy with other chores. That at tea break at around 9.30 am while taking tea, the accused received a phone call but thought it was his wife. That S Kikulu, a distant relative was speaking in high tone. That when the accused asked what the matter was, she just said “Auntie! Auntie!” That when the accused asked what had happened, she hanged up. That after about 5 minutes, his worker called and asked where he was. That when he asked what the problem was, he told him that his wife had committed suicide. That the accused told him to go inside and try to help her but he informed him that it appeared the wife was already dead. That he also talked to an old man who confirmed that his wife had passed on. That the accused informed his mother what had happened and asked her to inform his in-laws.
31. The accused informed court that he got shocked and reported to his boss Mutinda who offered to take him home. That they crossed over to Likoni and on arrival, he found a crowd. That the old man he had spoken to on phone was by the door to the room where the accused’s wife had been found dead and that the old man allowed him to enter the room. That the accused saw his wife had hanged herself on the window and was in a sliding position. That by the time he arrived, the police had been called and that they went and took photographs and cut off the computer cable that his wife had used to hang herself. That they wrapped the body with bedsheets and transported the body to Coast General Hospital.
32. That the accused also proceeded to Coast General Hospital Mortuary in the company of his brother where he identified the body and postmortem was conducted. That the pathologist confirmed that the deceased had hanged herself and that if she had been strangled, there could have been signs of struggle. That the accused asked if there could have been a possibility of poisoning and the doctor opened the abdomen and confirmed that there was no poison. The accused said that they left when everybody was satisfied. That when they got out, the family members of the deceased said they were not satisfied with postmortem and wanted another one. That the police officer who was with them informed them that the next postmortem would be done after 2 days. That the 2<sup>nd</sup> postmortem was done in Nairobi where the body had been transferred. That the accused’s mother was in attendance and that the 2<sup>nd</sup>



postmortem had the same results as the first one. The accused said that Chief Inspector Kasango concluded that there was no evidence to implicate anybody for murder. That he recommended a Public Inquest. The accused produced the Covering Report as ExD1.

33. The accused said that in 2008, the deceased had tried to take her life again by an overdose of medication on allegations that the accused had been seen with another woman in town. That the deceased was taken to the dispensary where first aid was administered and she recovered. That she was interrogated by the doctor and counseled. The accused said that his wife had a bad temper and could do anything without thinking. He said that he did not commit the murder.
34. DW2, Alfred Nyamai Mutinda, said that in 2016, he was working at Spanfreight Shipping Ltd as a supervisor and that the accused was his colleague. He said that he can recall the attendance register of 13.5.2016 and that he is the one who certified it. He said that the accused reported to work at 0750 hours and that he was with the accused when the accused received news of his wife's death. He said he was in his office which is partitioned with glass and that the other workers were in an open office. DW2 said that it was around 9.30 am when he saw the accused scream and that he went to his office crying and told him that he had been informed that his wife committed suicide. DW2 informed court that he took the accused home. He produced the Attendance Register as ExD2.

### **Accused Person's Submissions**

35. The accused submitted that the cause of death of the deceased was clearly brought out by PW15 and PW16 through their medical reports which opined asphyxia secondary to hanging. That what remained for determination was whether or not the deceased person's death was as a result of the accused person's action or omission and whether there was malice aforethought. That indeed no one witnessed the accused kill the deceased and the case was based on circumstantial evidence. The accused submitted that to prove a case based on circumstantial evidence, the prosecution was required to satisfy the test of negative inference against the accused person as was set out in the case of *Musoke v R (1958) EA 175* where the court cited with approval the decision in *Teper v R (1952) ALL 480* which held as follows: -

“It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

36. The accused further cited the case of *Erick Odhiambo Okumu v Republic (2015) eKLR*, guided by the holdings in the case of *Abanga alias Onyango v Republic Cr. App No. 32 of 1990* where the Court of Appeal stated 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 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.”

37. On malice aforethought, the accused cited Section 206 and relied on the case of *Libambula v Republic (2003) KLR 683* that motive is that which makes a man do a particular act in a particular way, that a motive exists for every voluntary act and is often proved by the conduct of the person, and that motive



becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. He contended that the prosecution failed in meeting the threshold.

38. The accused argued that proof beyond any reasonable doubt means that the prosecution's case must be one which establishes all the ingredients of the charge which are mens rea and actus reus also known as criminal liability. That the evidence tendered must be convincing and leave no doubt on the guilt of the accused.

### **Analysis and Determination**

39. In consideration of the evidence of 13 prosecution witnesses and in consideration of the defence witnesses' sworn statements, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the Penal Code Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.

40. Section 203 of the Penal Code Chapter 63 of the Laws of Kenya under which the accused person was charged provides as follows: -

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

41. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of Anthony Ndegwa Ngari v Republic [2014] eKLR to include: -

- i. That the deceased died;
- ii. That the death was caused by an unlawful act or omission;
- iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
- iv. That there was malice aforethought.

### **Death of the deceased**

42. There is no dispute as to the death of the deceased Mary Wanjiku Waweru.

### **Death was caused by an unlawful act or omission**

43. Dr. Johansen Oduor, PW15, the Government Pathologist conducted the 2<sup>nd</sup> postmortem on the body of the deceased on 19.5.2016 at Kenyatta University Funeral Home and his opinion as to the cause of death was that the deceased died as a result of possible neck compression due to hanging. He extracted samples of blood, kidney, a portion of the liver, stomach and its contents for purposes of toxicology.
44. The samples were taken to the government laboratory and on examination, PW8, Stephen Mutinda in a report dated 15.1.2018 established cyhalothrine, a highly toxic synthetic pyrethroid pesticide was detected in the stomach and liver samples of the deceased, an indication that the deceased had ingested the pesticide which might have contributed to the death of the deceased.
45. Dr. Abdul Aziz Mohamed, PW16, produced postmortem report conducted by Dr. Mwachiti at Coast General Hospital Mortuary and the opinion of Dr. Mwachiti was that the deceased died due to asphyxia secondary to hanging.



46. The presence of poisonous substances in the samples analysed by the Government Analyst and the position of the deceased person at the scene of the crime makes this court believe that death was caused by an unlawful act by a 3<sup>rd</sup> party. Although pathologies PW15 and PW16 were of the opinion that the deceased died of possible neck compression due to hanging and asphyxia secondary to hanging, this court has had the opportunity to look at the photographs showing the deceased person tied to the lowest grill on the window in their bedroom while leaning on the bed with the legs stretched out on the floor, and find that it is not practically possible that one can die by hanging from a height that is much less than their own body height. It does not make sense that the deceased could not have ingested pesticide then hanged herself.

#### **Participation of the accused in the commission of the alleged offence**

47. There was no eye witness to the death of the deceased. PW1 and PW2, the children to the Accused and the deceased said that their parents used to quarrel and that the Accused used to beat the deceased frequently. PW3, the brother to the deceased testified that both the Accused and the deceased would call him whenever they fought. That in 2015, he went there four times. That one time, the deceased was unwell and that she went to PW3's place and said she was very sick and that the Accused had not taken her to hospital. That the deceased went to her aunt in Kiembeni and stayed there because PW3 had a small house. That PW3's parents were called and they did a case and the deceased went home. That again in 2015, the Accused beat the deceased and told her to go to the police, and that she was injured on the head. That at the police station the deceased said they would solve the problem.
48. That on 13.5.2016 when the Accused called PW3 and told him his sister was not there as a result of an alleged suicide by hanging, he got suspicious and arranged for a second postmortem examination out of which specimens taken were analysed and it was established that there was a highly toxic synthetic pyrethroid pesticide detected in the stomach and liver.
49. According to PW5 and PW6, when the deceased closed the Mpesa and barber shop the previous evening at 9.00 pm, they were not aware of any issue that could have caused the Deceased to commit suicide.
50. PW4, the niece to the Accused, passed by her uncle's residence as usual so as to accompany the deceased to a Chama but she did not see her and there was no response from her house. A Somali neighbor who was outside the house told PW4 that she had not seen the deceased. PW4 second visit to the deceased's house did not yield any result and it is on the 3<sup>rd</sup> visit that she entered the house and in the bedroom she saw her near the window, the body lying down but the neck was raised. On a closer look, she saw a wire on the neck.
51. The Accused said that he had left the deceased in the house on the material day on 13.5.2016 where he received a call from PW4 and PW6 and also spoke to PW11, and learnt that his wife had committed suicide. He brought a witness, Alfred Nyamai Mutinda, DW2, whom he said was his immediate boss and that the said witness took him home. When he was cross examined to confirm that he was indeed at work, he produced a register which showed that the date against his name was 12.5.2016 but the same had been altered to show 13.5.2016. DW2 who said that he had retired in 2021 did not have evidence that he worked with the Accused and did not have authority to come to court and produce the attendance register which the Accused allegedly worked for. The original attendance register was therefore not in court and the same was not authenticated.
52. Although nobody saw the deceased being killed, the Accused was the last person with the deceased and his whereabouts on that material morning prior to PW4 coming to the house is not accounted for. The



only inference that can be made from the circumstances is that he was involved in the murder of the deceased and made the scene look like she had committed suicide.

### **Malice aforethought**

53. Section 206 of the Penal Code defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

54. On the element of malice aforethought in respect to Section 206 of the Penal Code, the court held as follows in the case of Isaac Kimathi Kanuachobi -vs- R (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

55. The elements to prove malice aforethought were settled in the case of Ernest Asami Bwire Abanga alias Onyango v R (CACRA No. 32 of 1990) where the Court held:

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

56. The administration of a pesticide and use of a cable to tie the deceased person on the window grill to make it look like she committed suicide by hanging is evidence of extreme malice aforethought on the part of the Accused Person.

57. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused person is found guilty of the offence of murder and convicted accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 31<sup>ST</sup> DAY OF MAY 2024**

**HON. LADY JUSTICE A. ONG'INJO**  
**JUDGE**



In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for the State

Mr. Amadi Advocate for the Accused

Accused person present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

Mr. Ngiri : I don't have previous records.

Mr. Amadi : I pray for certified copies of proceedings and judgments for purposes of appeal.

Order : Mention 17/06/2014 for Victim Impact Statement, Pre-sentence Report Mitigation and Sentence.

Certified Copies of Proceedings to be supplied.

Accused remain in custody at Shimo La Tewa.

