



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

HIGH COURT CRIMINAL CASE NO. 5 OF 2016

(FORMERLY KERICHO HC.CR.C. NO. 4 OF 2016)

REPUBLICPROSECUTION

VS

ERICK MAKAU MUSILA.....ACCUSED PERSON

JUDGMENT

Background

1. The accused Erick Makau Musila was charged on 23rd January, 2013, with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that on the 7th day of January, 2016, at Kapkwen within Bomet County, the accused murdered Diana Chemutai Musila, alias Chelele.

2. This case commenced before Meoli, J, who heard all the prosecution witnesses, and found that the accused had a case to answer. I heard the defendant's evidence upon the defence affirming that they did not wish to start the hearing de novo.

Prosecution case

3. The prosecution called thirteen witnesses in this case. In the absence of substantive and direct eyewitness testimony of the murder, the prosecution has sought to rely largely on evidence of the records of the telephone communications between the deceased and the accused and other key witnesses. It is not in dispute that the accused and the deceased were husband and wife. Due to disagreements they became estranged and subsequently separated in 2015. They had started living together in 2007 had twin daughters in 2009. They lived in Nairobi in Utawala area and also at Kapkwen.

4. From all accounts, the deceased was a popular musician. After her separation, from the accused, the deceased relocated from Nairobi to Bomet County, where she befriended PW1, Ronald Cheruiyot, also a singer. He became her boyfriend and they began living together.

5. PW1 Ronald, testified that he was a close friend of the deceased for six months before she died. On 5th January, 2016, he was with the deceased at his home in Kapsoit when he noted she had a small WICO phone. On asking her she explained that she had bought another phone on her husband's advice so that they could communicate concerning his return of her goods. He testified that the deceased and her husband spoke frequently, as the accused had retained custody of their twins.

6. He stated that the deceased had a techno phone before buying the WICO phone and had acquired a new line. He identified the WICO phone as MF1 as MFI 3 a Safaricom line No 0791 509182 by its plate (MFI 2) and its receipt for Shs 1,100/-. He further testified that she was in contact with the accused that day as the accused had told her he would be returning her goods when he arrived that evening. He said he warned the deceased not to visit with the accused in the night but she said she did not want to be seen by many people in Bomet.

7. According to PW1, the deceased called him at about 9.00pm on 6/1/2016 to say she would be waiting for the accused at Club City. He spoke with her again at 11.00pm when she told him that the accused had arrived and she was going to meet him. After that her phones went off at about midnight. He was unable to reach her again all night, and the next day at about noon he travelled to Bomet to the house of a mutual friend, PW2 Damaris Chepkemoi. Damaris told him that she had also lost contact with the deceased at night. PW1 returned to Kericho on 7/1/2016 and continued to make efforts to trace deceased's whereabouts.

8. Eventually, on advice, he went to Kericho police station to report the deceased as missing but whilst there, a friend called him to tell him that the deceased had been killed. PW1 therefore went back to deceased's house at Kapkwen in Bomet, and found the deceased's body had

already been removed. There were many people there and he saw blood stains on the veranda, but did not go into the house.

9. In cross examination, PW1, confirmed that the deceased had two phones before buying the third one, a WICO. He gave the other phone number as 0700 028 182. He denied that the deceased had attempted suicide in the past; he denied knowledge of the rendezvous of the meeting between the deceased and her husband; he said her night movements were not strange given her occupation as a singer. In re-examination, he admitted that he had bailed her out in a lower court case; and that he called her on the fateful night several times on her number 0700 028 182.

10. PW2 Damaris Chepkemoi testified that she was a long-term good friend of the deceased, and that the deceased often stayed in her house in Bomet. She stated that she had tried to assist resolve one of the disagreements between the deceased and the accused concerning some 20,000/= the accused had taken from the deceased. On the night of 6th January 2016, PW2 had gone out for supper and had met the deceased at the house of Faith Marende, her sister in law, where deceased was having supper. The house is a rental just next door to PW2's. She noticed that the deceased was constantly on her phone, and would go out to receive calls.

11. At about 10.00pm PW2 made a bed for deceased to sleep in as she was to sleep in PW2's house. However, the deceased said she had to go out to meet someone. The deceased left on a boda boda having been escorted out by PW2 and others in the house. PW2 gave the deceased the gate key to let herself in when she returned, but she never returned.

12. In cross examination, PW2 confirmed that the deceased and accused had separated, and she co-habited with PW1. At one point, when the deceased said that she would have to leave PW1 because PW1's family was not in favour of the relationship, PW1 was shocked and said "you will not see me again". PW2 did not know whether that was a threat to commit suicide; she did not know the identity of the man who carried deceased on the boda boda; She, PW2, assisted in posting bail for deceased in an assault case in Bomet; and confirmed that deceased was a famous singer.

13. PW3, Faith Chepkirui, a musician who was a friend to the deceased, comes from the same rural area as the deceased and considered the deceased her mentor. She testified that on the night of 6th January 2016, she was at her house when the deceased arrived at about 8.00pm. They had supper in the company of others including her boyfriend and an in-law, when PW2 arrived. She also stated that she escorted the deceased to PW2's house at 11.00pm. In her testimony, she corroborated the evidence of PW2 who said the deceased spent a lot of time on the phone that night; that the deceased left her Samsung phone and took her other phones when she later left on a boda boda; that the deceased said she would be going out just for an hour then return: PW3 also stated that she gave the deceased her boots and a Maasai shuka to wear as she went out. The deceased did not return that night.

14. The following day PW3 went to inquire with PW2 as to the whereabouts of the deceased because deceased had her phone. She also stated that PW1 came to her house at 11.00am the following day to look for the deceased, saying she had been out of reach. In cross examination, PW3 confirmed that the deceased stayed on until 11.00pm when she escorted her to PW2's house; she said she knew that the deceased drunk but was sober when she arrived; and finally that she learned of the deceased's death the following day.

15. PW5 Gladys Chepkemoi, was a neighbor of the deceased in Bomet, Kakweny. She testified that she was headed home aboard a motorbike on the night of 6/1/2016 when she saw the deceased running towards Kapkweny. She asked the boda boda rider to stop and shine his light towards the deceased. As they stopped, they saw the accused cross the road in front of them, and he hugged the deceased. She said he was wearing a V-shaped sweater which had white stripes. The deceased was wearing a maasai shuka. They had stopped about 100 metres from the deceased, she said, and was curious to see what was happening. According to her, another man joined the deceased and the accused. The accused flashed his phone torch to signal the boda boda to stop illuminating the three of them across the road. She then saw the three – meaning the deceased the accused and the man who joined them – walk towards a place called Annexe. The next morning, PW5 learned that the deceased had been murdered

16. In cross examination, PW5 stated that the deceased was running in the direction to which they were headed, so that they were behind her, but they stopped ahead of her. The accused, and also the third man, came from the roadside near Itembe Secondary School but there was no light there. She saw no weapons and the other man wore a creamy yellow shirt. The accused wore a sweater and the deceased wore a maasai shuka. PW5 knew the deceased's house which was about 200-300 metres away. As far as she was concerned, security in the area is not very good. She also stated that one could hear if a person screamed.

17. PW5 was later recalled to identify and produce a sweater as an exhibit. It was meant to be a grey sweater with white stripes which she said she saw the accused wearing on the material night. The sweater was long sleeved and she saw it by the light shining from the boda boda. However, the sweater actually sought to be produced by the prosecution was, instead, white, not grey and white. She confirmed that it was not the sweater she saw the accused wearing on the material night.

18. PW 6 Rita Chemng'eno, had known the deceased for about twenty years, and the accused for about seven years. She is a cousin to the deceased's mother, and the deceased called her "mother" in a customary way. On 7th January 2016, at about 3.00am she was travelling from Kericho to Bomet in a car belonging to one Wesley. She said she saw the accused standing by the roadside at a place called Chebole stopping a vehicle. She asked the driver to stop as she knew the accused who was visible in the lights. The driver however, refused to stop because it was late at night. Later she tried to call the deceased as she wanted to let her know she had seen the accused. She was aware the two had had marital disagreements. The next morning, she went to the deceased's sister's (Faith Chepkoech's) home and both then went to PW8's home. She learnt of the deceased's death on Saturday 9th January, 2016.

19. In cross examination, PW6 asserted that she "met" the accused at a place called Chebole at 3.00am which is about 150 kilometres from Kapkwen. She stated that the accused wore a black trouser and a short sleeved white shirt with black stripes but no sweater. She also stated that despite calling the deceased several times neither she nor the deceased's sisters were able to get the deceased on phone.

20. PW8 Beatrice Chebet, the deceased's sister, testified that on 6/1/2016 she was home and rang the deceased concerning some property

they had purchased together. The deceased said she would come to PW8's home but later rang to say she would instead come on 8th January, a Thursday. On the evening of 7th January, PW8 spoke to deceased and she confirmed she would come the next day. On 8th January, PW8 could not get the deceased on phone, as it went unanswered. Her number was 0710 419 247. That was on Thursday. Then on Friday the accused rang PW8 at about 10.00am asking why the deceased's phone was off yet they had agreed to take children to a certain place. PW8 did not answer.

21. PW8 further testified that after Rita Chemweno and Beatrice Chepkoech left she went to the deceased's home on Saturday, which was just about two kilometres away. When she entered the compound, she met the body of the deceased lying down with the face towards the gate. The body was on the corridor in front of the house facing up, and there were flies on it. The door was slightly ajar, but the rear door was open and all the stuff had been removed. She called the next door neighbor of the deceased and then ran to Bomet police station. This was about 8.00am. The deceased's body was then moved to Longisa District mortuary.

22. In cross examination, PW8 confirmed that the accused called her on Friday 8/1/2016. That on 6/1/2016 she rang deceased on the 0710 number. That the deceased's sister also had telephone lines 0700 028 182 and 0710 419 247.. That prior to 6/1/2016 deceased visited PW8 but she had not seen a new phone in deceased's possession. That on 8/1/2016 she could not get through any of the deceased's lines. That when the accused called her on Friday 8/1/2016, he said that he had not agreed with deceased to sell the house to take their children to a certain school; and that he could not get her on phone. PW8 testified that she did not sense alarm in accused's voice.

23. PW9, Felix Mwaura Kamau, worked for the accused, and run a movie shop at Utawala in Nairobi. He had little to say about the material night. However, he stated that he was interviewed by the police who wanted to know where his phone was. He said it had been taken for fixing. He sent for it and it was brought and taken by the police. He stated that prior to that the accused had used the phone.

24. PW4, Paul Rono gave evidence that he identified the body of the deceased at Longisa hospital mortuary on 20th January, 2016, prior to the post mortem.

25. PW7 Dr Titus Ngulungu, was the Government pathologist from Provincial General Hospital, Nakuru, who did the post mortem of the deceased. He said the body was identified by PW8 and PW4. In his report, he stated that the body had started peeling due to putrefaction, meaning that four days had elapsed since death. He noted blood loss before death; Neck had multiple stab wounds. On dissection he noted cuts involved the jugular and carotid. Right hand side had cuts on the dorsum – defence injuries – measuring up to 5mm. There was a lesion wound on the palm which appeared to be from a person holding onto a knife that was pulled forcefully. On the gluteal there were cuts and slash wounds on abdomen and incisors with the intestines protruding from the cut. Internally, the chest had through incision from larynx and there was blood in trachea. Lungs were collapsed due to bleeding

26. Internally, the heart was normal but vessels were transected. Intestine was eviscerated and had slash injuries. Other systems were normal. In his opinion death was due to massive blood loss leading to shock due to major neck injuries inflicted by sharp force trauma on the body. This was an over-kill and was in keeping with homicide. Some blood was given to an officer attending post mortem for analysis, but he did not receive the results. He produced the post mortem report as Exhibit 4.

27. In cross examination, he reiterated that excessive blood loss led to the death. The cuts were inflicted by a sharp object. He could not say if more than one person had attacked the deceased.

28. PW10 was Martin Wekesa a Safaricom Law enforcement officer. He produced data records for the following number 0791 509182 as requested by the investigating officer. The data required was for the period between 1st January 2015 and 10th January 2016. He produced Exhibit 5-8 being a letter received from Safaricom and Call Data for the number which was registered in the name of Kipng'eno Langat ID No. 25887174. The data showed movement from Kibiyet, Orange (Kitui), Kapsoit where he remained until 1838 hours. At 1904 hours (6th January) he was at Kericho Majengo, then Cheplinet, Chebilet, Yakanak orange Karumeti, Chebulet, Mutarakea, Silibwet and Bomet (later at 2059 hours of 6th January remaining there until 7th January 0022 hours. Then signal went off completely. He stated that the signal goes when phone not active from lack of network or if the simcard is removed.

29. PW11 was Vincent Mabu, an Airtel security officer responsible for law enforcement. He produced data call records for the number 0786427449 following a request from Bomet CID (Chief inspector Oguta). He availed the following: IMEI Number and history; Incoming and outgoing data for the number; and the subscriber details of the registered owner. He stated that the registered owner was Antony Ngare from 15/12/2015 to 15th February 2016 ID Number 29423909; that the IMEI number was 353600068018080; and the call data record for 15th December 2015 to 15th February 2016, details (MFI 9B) Exhibit 9A and 9B.

30. PW12 was Richard Kimutai Langat is the Government Analyst. He testified that on 11/2/2016 he received police exhibit memo form from Bomet police in respect of deceased Dian Chemutei. The Memo forwarded the following:- Blood stained jumper white marked A (MFI 10 in dock); Blood stained soil samples and partially burnt papers marked B (MFI 11); Deceased's blood sample marked C. He availed his report containing DNA profiles tabulated therein.

31. He showed a photo of jumper and where stain was on left hand sleeve and on the hood; he extracted the stains from the jumper to analyse them and made a tabulation. The profile generated indicated that the burned paper and the jumper had mixed blood samples of the deceased and unknown male DNA profile. He prepared and signed his report on 26/6/2016 and produced it as Exhibit 13.

32. PW13 was DCIO Corporal Stephen George Mutunga the Investigating Officer. He testified that on 9/1/2016 he was called by DCIO, Bomet Chacha Okwach to join him at a scene of murder in Bomet. The scene had been earlier visited by the OCS. They revisited it with a view to interview witnesses. Beatrice Chepkemoi an aunt of deceased and deceased's boyfriend Ronald were interviewed. Beatrice Chepkemoi told them she was to meet her sister on the day she went missing but she did not show up. That deceased's phone was off. On 9th

January 2016 Beatrice Chepkemoi went to her sister's previous home and found the body of the deceased.

33. During investigations he identified the primary scene at Bomet town. He drew a sketch map of the scene. The primary scene was 200 metres from Itembwa Secondary School and Cattle Dip Primary School. He produced it as Exhibit 17. The scene was some metres from deceased's house.

34. At the primary scene he found strips of blood stained khaki papers which appeared burnt. He took sample and took them to Government analyst in Kisumu. He produced a jumper found at accused's house in Utawala Nairobi (MFI 10). They took blood samples of the deceased for a comparison. PW1 identified the new handset which deceased had bought and availed the receipt dated 4th January 2016 in name of Kipngeno Langat (MFI 3); the sim card for 0791509182 (MFI 2); and the carton for the WICO Lubi 4 phone. He noted that the line (MFI 2) was used severally by the deceased to communicate with accused on several occasions. The accused was using a phone set and line of his servant called Terry Wanga who could not be traced.

35. PW12 produced the accused's handset when he was arrested, namely, a Pantech (MFI 14). He noted that there was a suspect, Anthony Ngari, who procured a line in his name for use by the accused. He pointed to the Call Data from Safaricom for the phone number 0786427499 which is registered in name of Anthony Ngari. He said Ngari sold miraa at the accused's premises where he sold wines and spirit. He said he believed Anthony Ngari was the person who wore the jumper MFI 10 on the night of murder. Information regarding Ngari came only after the arrest the accused. He said they zeroed in on phone lines which the accused used. Other numbers which the deceased had were never used in material period.

36. Finally, PW12 took burnt soil samples (MFI 1) prepared an exhibit memo and dispatched them to the Government Chemist for comparison with blood samples of the deceased. The results showed that the two matched. He said he believed the blood samples MFI 10 belonged to the suspect Anthony Ngari. He produced MFI 1, 2, 3, 10, 11, Exhibit memo MFI 12, phones MFI 14 and 15 and inventory MFI 16 duly signed by accused, sketch plan, MF17. All the items were marked as exhibits, respectively.

Defence Case

37. The Accused testified under oath, and availed two witnesses. He stated that the deceased was his wife and that they had lived together since 2007; that she had become a drugs and alcohol addict; that they separated in October 2015 after he sacked PW1 from his employment at Kaitui, but PW1 returned to work immediately thereafter as he was a boyfriend to the deceased; that he took custody of the children in January 2016. He produced DExhibit 2 showing pleadings in SRMCC 59 of 2015 Tasha Mwendu Musila, Sasha Mumbe Musila, suing through Eric Musila, being a case he filed for custody of the children.

38. He stated that on 9th January 2016, he learned of his wife's death from a traffic policeman who said they were at his house in Bomet. He then left the children with his uncle Tom Onyango and went to Bomet.

39. Reacting to the evidence of the Investigating Officer, the accused stated that the deceased had no such secret phone as had been alleged by PW1 and in the call data evidence produced by prosecution. He said he did not know Ngari who was the most frequent caller to that number; that his phone number was 0704 022 969. That is the number I used to use even to communicate to Beatrice Chebt PW8 on her number 0710 577 211 on 8th January 2016; that on 7th and 9th January 2018, this data shows he was in Ruai and Embakasi. In that data he noted that he had made calls to Diana for example on 4th January 2016.

40. Accused produced call data as D. Exhibit 1 (DMFI 1) which document was provided to the defence by the prosecution. He said the relationship with Diana was not bad, and that they had not had disagreements except as to her addictions. When shown the call data produced by the Investigating Officer, he said he did not know Kipng'eno Langat

41. In cross examination he admitted that he did not ask any questions regarding the issue of sacking of PW1. In re-examination, he stated that PW5 and PW6 were wrong in stating that he was in Bomet.

42. DW2 Moses Ogalo Digolo is a businessman who lives in Utawala and has known the accused as his customer since November, 2015. He stated that from 5th January, 2016 the accused took the children to school; and that he saw the accused on 5th, 6th, 7th, 8th, and 9th January, 2016. The accused could thus not have killed his wife on 7th January, 2016 as he saw the accused with his children on that date. In cross examination he stated that his shop is situated opposite Imani Flats where the accused lived.

43. DW3 Tom Onyango Ayuoyo, a serviceman with the Kenya Defence Forces, stated that he was an in-law of the accused as he is married to accused's aunt. He testified that on 7th January, 2016, he was with accused in Utawala. On 8th January 2016 he was with the accused in Nairobi; on Saturday 9th January, he was on duty and accused told him he wanted to leave his children with him. DW3 asked that he should be booked in. He recalled that the accused went in his car with the lawyer. He left his children with DW3. In cross examination, he stated that he was not aware that the accused did not state his, DW3's, name in his statement; he was aware the accused and the deceased had differences in their marital life.

Analysis and determination

44. The offence of murder is defined in **section 203** of the **Penal Code**, as follows:

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

Thus, to successfully obtain a guilty verdict in a murder charge, the prosecution, is required to tender proof beyond reasonable doubt of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

45. On the other hand, malice aforethought is established, under **section 206** of the **Penal Code**, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not; or
- 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; or
- c. Intent to commit a felony; or
- d. Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

46. That the deceased died is not in dispute. The death occurred very likely around midnight on 6th January, 2016 or the early morning of 7th January, 2016. The post mortem report showed that death was caused by multiple stab wounds leading to loss of blood. No witness was called who saw how the death occurred. The evidence given is therefore circumstantial. The pending issues are whether the death was caused by the accused and whether, if the answer is in the affirmative, he had the requisite mens rea or malice aforethought.

47. As stated, the evidence here is circumstantial. In dealing with circumstantial evidence the courts have stated essentially that: the burden of proof remains on the prosecution and never shifts to the accused; that the inculpatory facts must be incompatible with the innocence of the accused; and that the chain of facts or events must lead to the guilt of the accused and to no one else. The following authorities give exposition to those principles:

48. In **Sawe –vs- Rep [2003] KLR 364** the Court of Appeal held:

“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 hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

In **R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135**, in the Court of Appeal for Eastern Africa had this to say:

“In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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.”

In **Mwangi v Republic [1983] KLR 327 Madan, Potter JJA and Chesoni Ag. J. A.** held:-

“In order to draw the inference of the accused’s guilt from circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused.”

49. In light of these legal guidelines, I now assess the facts.

A mix of Telephones and Telephone Activity

50. From the evidence of PW1, the deceased who was his girlfriend had, at around the material time, bought or acquired a new WICO telephone and a safaricom line. PW1 produced the receipt, a box for the phone and a safaricom plate for the new line which was number 0791 509182 (Exhibits 1, 2 and 3). PW1 questioned the deceased on the need for a new telephone and she responded that her husband (accused) advised her to get the new phone to communicate with him over the return of her goods. This witness was not shaken on cross examination.

51. I have no reason to doubt the evidence of PW1 – supported by a receipt of the phone and a sim card plate – that the deceased was using this new telephone and number.

52. When the investigating officer checked the data and details for this line with Safaricom, it turned out that the number was registered in the name of Kipng'eno Langat. The Investigating officer produced Exhibits 5, 6, 7 and 8 from Safaricom through PW10 Martin Wekesa. The said Kipng'eno Langat did not give evidence nor was he traced. I will revert to this telephone number shortly.

53. The accused in his evidence denied knowledge of Kipng'eno Langat in whose name the phone line had allegedly been registered. When shown investigating officer's evidence PW10, he said:

“I do not know Kipng'eno Langat in whose name Diana had allegedly taken a phone.”

Despite this denial by the accused, the call data evidence which he (the accused) produced as DMFI 1 shows that on 5th January, 2016 between 8.44am and 9.27am, a total of six (6) incoming sms texts and two outgoing texts were exchanged between accused's number and number 0791 509182 which the deceased was allegedly using. Thus he had direct contact with that number which was with the deceased. The prosecution did not, however, follow any line of inquiry regarding what this connection meant or could have meant, and thus availed no evidence on it. The court is none the wiser concerning this aspect.

54. The accused also asserted that from the call data (Exb 6) the most frequent caller to that number was Anthony Ngari of telephone number 0786 427449 which was not his number. He was categorical about his own number and calls when he stated:

“I do not know Ngari who was the most frequent caller. My phone was 0704 022969. This is the number I used to use even to communicate to Diana (deceased)”

55. I have already accepted the evidence of PW1 that the deceased was using this new telephone and number. Further, the call data in Exhibit 5 shows that the accused's acknowledged number 0704 022969 did in fact communicate with the number the deceased was stated to be using, namely, 0791 509182. These communications occurred thrice on 5th January, 2016, just over a day before she was murdered. This direct connection between the accused and the deceased's new number is of great interest as is shown later.

56. What is even more curious and disconcerting is that, despite the accused unequivocally denying knowledge of Ngari of telephone number 0786 427449, the call data in Exhibit 9B produced by PW11 – Vincent Mabu of Airtel – shows that the accused's number 0704 022969 communicated numerous times over a span of ten days with Anthony Ngari's aforesaid number. The communications were as follows: on 24th December, 2015, six (6) times; on 25th December, 2015 six (6) times; on 26th December, 2015, three (3) times; on 27th and 29th December, 2015, one time (1) on each day; on 30th December, 2015, twelve (12) times; on 31st December, 2015, seven (7) times; on 1st January, 2016 three (3) times; on 2nd and 3rd January, 2016 one time each day. These are forty one (41) communications between the accused and Ngari.

57. These communications with Ngari instead prove the accused to be a liar, because, in fact, he must have had knowledge of Ngari. Why did the accused seek to distance himself from Ngari? What were the accused and Ngari discussing in all those calls? These are all very suspicious coincidences. However, the prosecution again did not follow this line of inquiry, and no serious effort seems to have been made to apprehend Ngari or any of the persons he was most frequently in contact with.

58. PW8 Beatrice Chebet testified that her deceased sister had other telephones and identified numbers 0700 028182 and 0710 419247. Exhibit DMFI1 produced by the accused – which shows call data with his telephone number 0704 022969 – discloses some incoming and outgoing calls between accused's number and deceased's number 0700 028182 on 4th and 5th January 2016. It also shows one sms outgoing from his phone to hers on 8th January 2016 at 8.03 pm. Whilst the details of the communications are unknown, there is no doubt that the accused was engaging regularly with both the deceased and with Ngari.

59. Back to call data in Exhibit 9B; it also shows that there were communications between Ngari and the number the deceased (Diana) was using – belonging to Kipngeno Langat. The said Ngari (0786 427449) – Diana (0791 509182) communications begun on 5th January, 2016. This was the day after the accused contacted the number Diana was using, and three days after the accused's last contact with Ngari prior to deceased's murder.

60. These communications between Ngari and the deceased are even more alarming. Starting on 5th January, 2016, Ngari communicated with the number held by Diana seventy three (73 times) over the next two days to just past midnight on 6th January, 2016. On the night of her presumed murder, just between 11.30pm and 12.22 am, the two spoke six (6) times to one another. No other calls were made after the 12.22 am call on 7th January, 2016.

61. What is to be made of all the call data evidence? First, the call data corroborates the evidence of PW2 and PW3 regarding the fact that the deceased was engrossed with and distracted by telephone conversations on the fateful evening and night when they were together. Secondly, the call data also shows the accused to be an untruthful and unreliable witness. It shows that the accused was calling Ngari on the number which he says he had been using and admits was his. This is confirmation that the accused had secretly been in constant touch with Ngari for ten days from 24th December, 2015, despite denying knowledge of Ngari. What were they discussing or planning?

62. I am of the view that the accused had arranged with Ngari for Ngari to keep in close contact with the deceased on the fateful night. This plan was to ensure that whatever arrangements Ngari or the accused had in relation to the deceased, were accomplished. Having regard to the fact that the deceased's last communications were between Ngari and herself, that would be a reasonable deduction to make in the circumstances. Yet when the prosecution charged the accused, he was charged not as an accomplice or conspirator with other(s) not before

the court, but alone as the person who committed the murder. This is somewhat baffling.

The Blood stained sweater

63. This deduction I have made concerning the plan between accused and Ngari is all the more likely when account is taken of the following facts: that there was a blood stained sweater which was found in the accused's house on 13th January, 2016. That the accused did not, either in his evidence or during cross examination of the Investigating officer, deny or raise any issue concerning the blood stained sweater; that he did not deny or challenge the fact that it was found in his house; or that it had bloodstains which, when analysed by the Government analyst, showed that the blood stains were found to contain a mixed DNA profile matching that of the deceased and an unknown male.

64. The prosecution did not seem to make efforts to ensure that Ngari was arrested despite the many calls he made to frequent numbers shown on the call data availed. Further, the accused's blood samples were not taken for analysis to link them to the fateful event, or to the sweater. The Investigating officer in fact was of the view that the sweater belonged to Anthony Ngari and not to the accused. This raises more questions than answers: How did the sweater get into the accused's house? How did blood matching that of the deceased happen to be on the sweater? Whose sweater was it? What was the true relationship between Ngari and the accused? These are the questions which the prosecution was required to assist the court determine through evidence and submissions. The prosecution failed in that aspect

65. The only thing that is certain is the fact that although the accused denied knowing Ngari, it turned out that the two had in fact been in close communication. Does this mean that the benchmark was met for inferring from this circumstantial evidence that the accused was guilty of murder as charged? I do not think so. Such an inference may be drawn only when the evidence discloses irrefutably that the crime was committed by the accused and no one else. This was well put in the case of **Abanga Alias Onyango v Rep CR. A No.32 of 1990(UR)** where the Court of Appeal set out the principles applicable in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“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.”

66. What I find in the present case is that the accused likely co-ordinated with Ngari who then maintained close contact with the deceased until her last moments. Whether the accused met the deceased on the fateful night or not, is not known; whether Ngari was with the deceased on the fateful night or not is not known; whether Ngari and the accused were together with the deceased on the fateful night is not known. This however leads me to the next issue.

The alleged sighting of the accused on the fateful night

67. Two prosecution witnesses stated that they saw the accused on the night of 6th January, 2016. PW5, Gladys Chepkemoi, a neighbor of the deceased stated that at around midnight on 6th January, 2016 she was being driven home on a boda boda. Suddenly she saw the deceased running ahead of them towards Kapkweny. She says she stopped the boda boda and asked him to shine his light on the deceased. They stopped about 100 metres away from the deceased. As they stopped, she says she saw the accused in a v-neck striped sweater run across the road towards the deceased. When he got to her, he hugged her and spoke to her. Then another man followed and joined the pair. The three then walked towards a place called Annexe. In cross examination, she said the other man wore a long cream shirt. She saw the deceased in a maasai shuka. The deceased was running with her back towards them, but they stopped ahead of her and shone the motorbike lights on the couple.

68. I have great difficulty in accepting the evidence of identification of the accused by PW5. She says they stopped about 100 metres away from the deceased. It was midnight. 100 metres is about the full length of a football field. There was no evidence of good lighting other than the motorbike lights. It seems to me improbable, if not impossible, for a person to clearly see and recognise another from that distance at night. To be able to recognize the attire worn – a v-neck sweater, a striped sweater and maasai shuka – from such a distance at night without floodlights appears to me to be suggested evidence.

69. The prosecution sought to produce a white sweater through PW5. She however denied that it was the grey and white striped sweater that she had seen the accused wearing. Nevertheless, the sweater was the blood stained one which the investigating officer had found in the accused's house (MFI 10). PW12, the Government Analyst had analysed the blood stains and concluded that the DNA matched the blood sample of the deceased and also had a mixed DNA male and female profile, meaning that the deceased's blood sample matched it but it also matched an unknown male's DNA. The investigating officer thought it belonged to Ngari.

70. PW6 Rita Chemng'eno, the deceased's mother's cousin, testified that on 7th January 2016 at 3.00am, she was travelling with a business colleague from Kericho to Bomet. At a place called Chebole, she saw the accused stopping a vehicle on the roadside. She asked the driver to stop so that they could carry the man, but he declined, as it was late. She said she saw the accused from the light beaming from the car. In cross examination, she said the accused wore a black trouser and a short sleeved black and white striped shirt, with no sweater.

71. This evidence is again shaky. PW6 was travelling in a vehicle at night. It was 3.00am and dark. She was in a moving vehicle and, unless she was on a lookout, it would be unlikely to be able to clearly recognize a person on the roadside to the point where you could identify his attire so clearly. She did not say how far away he was from the vehicle, or how fast they were driving. Finally, there was no corroboration of either her evidence or that of PW5.

72. I have however carefully evaluated the evidence of PW5 and PW6. I am not satisfied that the circumstances for proper identification were favourable. In the Court of Appeal case of **Wamunga v Republic (1989) KLR 426** the court warned against relying on evidence of

identification where the circumstances were not favourable when it stated as follows:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

The Accused’s Alibi

73. The accused in his defence pleaded alibi, namely, that he was in Nairobi on the day – namely 7th January, 2015 – when the murder occurred.

74. In **R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145**, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.

75. The first thing I noted is that during the hearing of the prosecution’s case, the accused did not raise the issue of alibi at an early stage or in cross examination. The issue arose during the defence hearing, so that the prosecution had no opportunity to deal with the same. This failure only goes to credibility of the defence as already pointed out. In the Ugandan case of **Festo Androa Senua v. Uganda, Cr. App. No. 1 of 1998** the following apposite remarks were made:

“We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence.”

76. DW2 Moses Digolo, in corroborating the alibi of the accused, stated that he saw the accused on each of 5th, 6th, 7th, 8th and 9th January, 2016. DW3 Tom Onyango also testified that he was with the accused on 7th, 8th and 9th January 2016.

77. None of the defence witnesses categorically stated in their testimony that the accused was in Nairobi on the night of 6th - 7th January 2016. They merely implied it. The accused said he had custody of the children on 7th January, and learned of his wife’s death on 9th January, 2016. That when he learned of her death he decided to go to Bomet and left the children at Utawala Barracks with his uncle, Tom Onyango. To back up his alibi, he stated that his phone shows that he was in Ruai and Embakasi on 7th and 9th January, 2016.

78. Looking at the call data (DMFI 1) for the accused’s telephone (0704 022969) one sees a communication pattern as follows: On 4th January, his phone was active starting at 6.14 am to the following night at 1.27 am; On 5th January his phone was active from 9.02 am to 21.54 at night; on 7th January, it was active from 9.56 am to 19.49 in the night; on 8th January it was active from 10.02 am to 22.41 in the night; on 9th January it was active from 8.43am to 23.27 at night; on 10th January it was active from midnight to 23.09 in the night; on 11th January it was active from 1.01am to 23.58 in the night; and on 12th January it was active from 0.26am to 22.22 at night. It was a pattern of early mornings to late night communications.

79. However on 6th January 2016, the accused’s telephone broke the pattern; it was active from 9.56am to only 16.38 in the afternoon. All communications shown on the call data for the short duration of 6th January, show that he was communicating from various parts of Nairobi. The question that arises then, is: Why did his phone communications suddenly cease from 4.38pm in the afternoon of 6th January 2016? Why did he not communicate as avidly as he usually did everyday into the deep night? Could he have travelled? Was this the opportunity needed to do the deed? The alibi he has provided does not deal with this period of time after 4.38pm on 6th January, 2016.

80. If one accepts the evidence of DW2 and DW3, it would be an acceptable alibi for the accused’s daytime appearances in Nairobi. There is no explanation for his sudden communications silence after 4.30pm on 6th January, 2016 and his whereabouts throughout that night. What happened that evening? What was happening throughout the night that made him go dumb on phone? Where was he? In other words, it was possible for the accused to be in Nairobi as was explained by DW2 and DW3 at daytime, and be elsewhere on the night of 6th January, 2016. The accused relied on evidence of his phone call data to show he was in Nairobi. However, that data does not show his whereabouts from 4.38 pm on 6th January to 9.02 am on 7th January, 2016.

81. As earlier seen, the deceased’s telephone communications with Ngari, whom the accused had also long been in close communication with, ended on the night of 6th January to early morning on 7th January, 2016. No alibi has been provided for that period.

82. Now, I must say that the prosecution did not assess and analyse the evidence of the telephone calls and submit thereon as demonstrated above. For example, it is not the prosecution that pointed out that the accused had in fact been in close telephone contact with Ngari; Nor is it the prosecution that shone the spotlight on the change in the accused’s call data pattern that provided the accused an opportunity to travel

from 4.30 pm on 6th January, 2016. It is the court that has noted these glaring facts.

83. In **Charles Anjare Mwamusi v R CRA No. 226 of 2002** the Court of Appeal stated:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25.”

84. Whilst the accused may have had a motive for murder premised on the differences with the deceased which has not been demonstrated, and may have had opportunity to execute such a plan with Ngari, there is no evidence that it was they who did execute it. The question would have been answered if the DNA of the accused had been taken or if Ngari or his close acquaintances had been arrested and had given evidence.

85. As was stated in the landmark case of **R.T. Bhatt v Republic [1957] EA 332 – 335** it is not for the **“court [to] fill the gaps in the prosecution case”**. It is also true that **“suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”** See *Sawe v R [2003]*

86. Taking all the foregoing matters into account, and despite the court’s own suspicions as to the possible co-ordinating role played by the accused in the murder of his wife Diana Chemutai Musila, alias Chelele, I find that it would be unsafe to convict the accused for murder on the evidence availed by the prosecution.

87. In light of the foregoing, I find that the accused is not guilty of said murder. The accused is hereby acquitted, and shall be released forthwith unless otherwise lawfully held.

88. Orders accordingly.

Dated and Delivered at Naivasha this 3rd Day of May, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Koima for the State
2. Ms Waluma holding brief for Simiyu for Accused
3. Accused - Erick Makau Musila - present

4. Court Clerk – Quinter Ogutu