



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 60 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PAUL ODHIAMBO OGUNDE.....ACCUSED**

**JUDGMENT**

**The Charge**

Paul Odhiambo Ogunde, the accused in this case, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the night of 8<sup>th</sup> and 9<sup>th</sup> June 2015 at Buruburu Phase V Estate within Nairobi County he murdered Agnes Mwikali Mutua. The accused has denied committing this offence. He is represented by Mr. Nyaberi instructed by Omwoyo, Momanyi Gichuki & Co. Advocates.

**Prosecution Case**

Ten (10) witnesses have testified for the prosecution. The evidence from these witnesses is clear in respect of the circumstances leading to the death of Agnes Mwikali Mutua, hereinafter referred to as 'the deceased'. The evidence shows that Paul Odhiambo Ogunde, the accused, and the deceased lived together in Buruburu Phase V. There is evidence from Mary Makau (PW1) sister to the deceased showing that the relationship between the accused and the deceased was an "on-and-off" affair. The accused has referred to the deceased in these proceedings as his wife. However, Mary Makau told the court that the accused was a boyfriend to her late sister. The accused and the deceased had a baby girl, C. S. O, aged at about 9 months at the time. They also lived with a house help/nanny Carol Mueni Musembi (PW4). Evidence on record discloses that their relationship had its fair share of challenges. The accused had another family that lived in another part of Nairobi. On the night of 7<sup>th</sup>/8<sup>th</sup> June 2015, the accused spent the night at Buruburu Phase V with the deceased. In the morning of 8<sup>th</sup> June 2015 the accused left for work in the morning before 7.00am leaving the deceased at home. At about 11.00am the same morning the deceased also left home. She told Carol that she was going to her sister's (Mary) place but evidence shows that the deceased did not go to her sister's home. She went to visit Nicholas Odati (PW2) at his home in Kahawa Sukari.

Nicholas Odati had met the deceased in February 2014 at a Hospitality College run by the accused. At the time the deceased was working at that college. By March 2014 Nicholas and the deceased started dating. Their relationship progressed and in the words of Nicholas "The relationship became serious headed to marriage." After re-assurance that the deceased was single and was not dating anyone, Nicholas settled into the relationship. When the deceased told him that she was pregnant, Nicholas automatically thought the deceased was expecting his baby. At first Nicholas thought that the deceased was joking about her pregnancy but then pregnancy started showing and became obvious that was expecting a baby. She delivered the baby in August 2014 and Nicholas was there for her, assisting her by giving her some money, which he said in cross-examination that it was Kshs 20,000, to pay the hospital bill. The deceased was discharged from hospital and went home. Nicholas thought that all this time, from the time he met the deceased to the time she went home from hospital, the deceased was living with her sister Mary.

In October 2014, the deceased went to Nicholas' home. She lived with him and the baby for two weeks. She left when Nicholas was on duty. Nicholas thought she had gone back to Mary's home. Nicholas could not reach her on phone. On a date not disclosed, the deceased in company of the accused and two police officers went to the home of Nicholas to pick deceased's personal belongings and the baby's items. After it became apparent that the deceased had been lying to him all along, and that she lived a double life, Nicholas distanced himself from her. Unconfirmed evidence from Nicholas shows that the parents of the deceased intervened by persuading him to pick calls from the deceased. In December 2014 the deceased moved with the baby to Kahawa to the home of Nicholas. They lived together un-interrupted up to March 2015 according to Nicholas. This relationship was not getting any better and the two parted ways. It seems to me that the deceased was a troubled and restless soul!

On 8<sup>th</sup> June 2015 the deceased visited Nicholas at Kahawa Sukari. She arrived at about 11.00am and stayed with him up to 4.00pm. This evidence is confirmed by Carol. On the same day, the accused left work early. He arrived home, according to Carol, at 4.00pm. He found the deceased was not at home and sought to know from Carol where she had gone. As far as Carol knew, the deceased had gone to Mary's home. Carol told the court that the accused left shortly thereafter after picking a telephone set belonging to Carol and going with it. He returned

home at about 8.30pm accompanied by the deceased. According to Carol, the deceased and the accused were not talking to each other when they returned home. Carol served them dinner which they took without speaking to each other. Carol cleared the table and washed the utensils after which she asked for her phone from the accused. He declined. Carol started crying prompting the deceased to intervene and tell the accused to give Carol her phone. The accused gave Carol her phone and she retired to bed at about midnight. Shortly thereafter, at about 1.00am Carol was woken up by 4 police officers who asked her about the whereabouts of the baby. Carol told the police that she had left the baby with the deceased and the accused. She was told to go to look for the baby. She found the baby sleeping on the parent's bed and picked her. She returned to the sitting room. The accused took the baby from Carol. She was told to go back to her bedroom which she did. She slept until about 5.00am when she was told to pick some clothes. Both Carol and the baby were taken to the home of Mary. All this time Carol had not seen the deceased.

Evidence shows that the deceased was found lying in a small room used as a store in the home they shared. There was an iron box cord that was still attached to the iron box around her neck. She had injuries on her face and neck. She was dead. Evidence further shows that the accused reported at Buruburu Police Station that he had killed his wife. Scenes of crime personnel visited the scene and took photographs of the scene. The body was removed from the scene and taken to Kenyatta University Funeral Home. After the investigations were completed the accused was charged with the murder of the deceased.

### **Defence Case**

The accused testified under oath. He was the only witness for the defence. It was an emotional journey for him and this court had to take breaks in between his testimony to allow him time to calm down when emotions got the better of him. This was done repeatedly. This show of emotions was picked by the defence in submissions as a demonstration of the love the accused had for the deceased and the unbearable pain of seeing photographs of her lying dead. His counsel took time to encourage him to hold himself together and present his case to court.

The accused painted a very loving relationship between him and the deceased in which he pampered the deceased whom he referred to as his wife although he told the court that he had not formalized the relationship. He admitted that he had another family and told the court that he loved the deceased and provided her a good life. He admitted he knew that the deceased cheated on him on several occasions and that she had infected him with sexually transmitted diseases on various occasions. He also hinted that the deceased may have infected him with HIV AIDS and that both were HIV positive but that they had accepted the condition and their circumstances. It is the word of the accused alone on the allegations that the deceased was HIV positive since this court was not given medical proof of this.

The accused confirmed the evidence that the deceased worked at his Hospitality College. It is not clear for how long the deceased worked in this college. The accused testified that he has had confrontations with the deceased over her behavior that led to his contracting sexually transmitted diseases. He confirmed evidence by Carol that he left the deceased at home on 8<sup>th</sup> June 2015 when he went to work. He said he did not feel well that day and at about 1.00pm he left work at Stake Out in Lavington where he worked as a Consultant General Manager. He testified that when he arrived home, he did not find the deceased and that on asking Carol about the whereabouts of the deceased he was informed that the deceased had gone to Mary's home. He testified that he waited for her but she did go home. He said he called the deceased and they agreed to meet at a Kenol Petrol Station in Buruburu Phase V. He said that he walked to the petrol station from home after picking the phone said to belong to Carol. He said the phone was used at home and did not belong to Carol and that he had picked it because he was expecting a call on either his personal phone or that house phone from a friend from Las Vegas. He testified that he met the deceased at Kenol Petrol Station and that they talked and resolved their issues and returned home at peace and harmony.

He further testified that after dinner Carol went to sleep leaving them in the living room. He said they showered together and went to bed. He said that he asked for conjugal rights but the deceased refused and became wild. He said that the deceased told him that she had had good sex the whole day with a young man who knew how to perform better in bed and that she had made up her mind not to allow the accused to have sex with her again. He said that this shocked him and led to an argument that took a period of time. He said that he decided to take the deceased back to her parents and he told her so. He said that the deceased could not take this in because it would paint her in bad light to her parents and she started crying pleading with him not to take her home to her parents. He said he slept after this and when he woke up he did not find the deceased in bed. He went around looking for her in the other parts of the house. He said he found her lying on the ground in the room used as a store with an iron box cord round her neck. He said that he called her but she did not answer. He said the room was disturbed with crates of soda in disarray and drinking glasses broken and stools lying on the side. He said he also saw broken pieces of concrete on the floor. He could not figure out what had happened and in that confused state he went to the police station at Buruburu and reported.

### **Submissions**

The summary of the submissions by the prosecution is that it has, through circumstantial evidence, proved beyond reasonable doubt the case of murder against the accused person. It was submitted that the accused, the deceased, Carol, the house girl, and the baby were the only people in the house. It was submitted that Carol had gone to sleep leaving the accused and the deceased together. It was submitted that circumstantial evidence points to the accused to the exclusion of all others as the person who had murdered the deceased by strangulation. It was submitted that the deceased had defensive injuries pointing to an attack before he was strangled. It was submitted that through circumstantial evidence the prosecution has proved that unlawful death of the deceased occurred through actions of the accused and that the accused possessed malice aforethought as defined under Section 206 of the Penal Code. The prosecution urged that this court finds the accused guilty of murder and convict him accordingly.

On his part the accused through Mr. Nyaberi for the accused urged the court to consider:

- (i) That the accused has rendered a plausible and truthful defence.***
- (ii) That the case for the prosecution is based on circumstantial evidence.***
- (iii) That the deceased was suffering from post-partum depression.***

**(iv) The applicable case law.**

**(v) The motive.**

**(vi) The demeanour of the accused.**

It was submitted that the accused loved his wife as evidenced by his constant emotional breakdown in the course of his testimony especially after viewing the photographs of the deceased. It was submitted that the investigations by the police did not carefully consider the scene where the body of the deceased lay. It was submitted that the iron box was not exhibited in court and that the photographs and the certificate presented in court did not meet the requirements of the Evidence Act and therefore this part of evidence is prejudicial to the accused person.

On the issue of circumstantial evidence it was submitted that the evidence on record pointed to a suicide other than strangulation; that there were concrete pebbles in the store the scene where the body of the deceased was found and the stool was pushed aside; it was submitted that the doctor's opinion will remain just that: an opinion. It was submitted that the deceased suffered from postpartum depression and this may have led her to end her life given the decision by the accused to take her home to her parent.

Several cases have been cited to support the defence case. These are:

**(i) Abanga alias Onyango v. Republic Criminal Appeal No. 32 of 19190 (UR).**

**(ii) Uganda v. Sebyala & others [1969] EA 204.**

**(iii) Katende Samakula v. Uganda (Supreme Court Criminal Appeal No. 11 of 1994.**

**(iv) Sawe v. Republic (2003) KLR 364.**

It was submitted that the prosecution has failed to prove to the required standard all the ingredients of murder and that *mens rea* has not been proved. Mr. Nyaberi urged that this court makes a finding that the accused is not guilty and acquit him.

### **Determination**

The offence of murder is created by Section 203 of the Penal Code which provides that ***any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*** The penalty for murder is death as provided under Section 204 of the Penal Code. Before the court can pronounce death sentence on an accused person charged with murder the prosecution must discharge its heavy duty of proving beyond reasonable doubt the charge of murder. The prosecution must prove that the death of the victim in question has occurred; that the death was caused by the accused person before the court by an unlawful means and that the accused, in causing that death, had malice aforethought. To become a crime of murder the accused must have acted with a guilty mind commonly referred to as *mens rea*. This is the malice aforethought as defined under Section 206 of the Penal Code. If the element of malice aforethought is missing, then a killing becomes manslaughter and not murder.

In determining this case, I will be looking at whether the death of Agnes Mwikali Mutua occurred; if so, whether that death resulted from an unlawful act perpetrated by the accused person before this court and whether in so acting the accused possessed malice aforethought. These issues will be intertwined with the issues being raised by the defence. In resolving the issues I have identified, this court will also be considering whether the accused has tendered a plausible and truthful defence. The court will be considering the evidence tendered in court, which is circumstantial in nature, and the applicable case law in respect of circumstantial evidence; the issue of post-partum depression; the motive of this crime and the demeanour of the accused.

The death of Agnes Mwikali Mutua has been confirmed by Dr. Oduor Johansen (PW9). He examined the body of the deceased on 10<sup>th</sup> June 2015 at Kenyatta University Funeral Home. The body was identified to the doctor as the correct body of Agnes Mwikali Mutua by Michael Mutua and Immaculate Nduku Mutua. The doctor documented the following injuries:

**(i) Multiple bruises with swelling around the eyes.**

**(ii) Ligature contusion around the neck.**

**(iii) Bruises on right shoulder and right side of the neck.**

**(iv) Sub-cutaneous bruises on both upper arms on the lateral aspect (defence injuries).**

**(v) Central cyanosis (depicting someone whose blood lacked oxygen at the time of death).**

**(vi) Multiples areas of bleeding on the neck muscles and hyoid bone.**

**(vii) Bruises on omentum.**

**(viii) Temporal hematoma.**

### (ix) Occipital hematoma

After the examination of the body the doctor formed the opinion that the cause of death of the deceased was ligature strangulation. It is worth mentioning at this stage that the defence has put up a theory that the deceased committed suicide. While this theory will be examined carefully in this judgment it is worth noting that the defence counsel cross-examined Dr. Oduor on this theory. The doctor clarified that self-induced suicide is hanging while strangulation is different. The doctor stated that the injuries he noted on the body of the deceased were consistent with assault and that all the injuries were inflicted on the deceased before she died. This evidence has satisfied me that the death of the deceased occurred. That death was caused by ligature strangulation. This is not a natural death. It is a death by an unlawful act – strangulation. I find the fact of death of Agnes Mwikali Mutua proved beyond reasonable doubt.

Did the deceased commit suicide or was she strangled to death and if strangled to death, who did it? Evidence is clear that the accused, the deceased, Carol the house girl and the little baby C. S. O were the only people at home that night. The accused in his defence and in submissions put in a theory that the deceased killed herself. This is the word of the accused alone. The reason advanced by the accused as to why the deceased killed herself is that the deceased could not accept that the accused was planning to take her home to her parents. This was explained to mean that the deceased could not live with the knowledge that her parents would be told about her conduct of having two men in her life. It was said that the deceased practiced polyandry. Simply defined, polyandry is a form of polygamy in which a woman takes two or more husbands at the same time. Strictly speaking, the deceased was not married to either the accused or Nicholas. Both were however her boyfriends. Evidence shows that none of the two had paid dowry to make the deceased a customary wife. To refer to her as having practiced polyandry is to use that term in a loose way. The relationship between the deceased and the accused was described by Mary as an on-and-off affair. The accused has another family and from the evidence of Mary and Nicholas, his relationship with the deceased may not have been the happiest. The accused has however portrayed their relationship as a very loving one where the deceased was spoilt for choice in the lifestyle she led. Be that as it may, the deceased met Nicholas and concealed from him that she had another relationship. It seems that Nicholas believed her fully and actually thought that the deceased was pregnant with his baby. He must have had his doubts because at one time he told the court that the baby came abruptly about six months of his knowing the deceased.

The deceased spent the better part of 8<sup>th</sup> June 2015 with Nicholas. Evidence shows that the accused knew of Nicholas because at one time, in the presence of police officers, he had accompanied the deceased to the home of Nicholas to pick personal items belonging to the deceased and the baby. This was after the deceased had left the home of Nicholas where she had lived with him and the baby for some weeks before returning to the accused. This was the day the deceased was to die. She left home at about 11.00am and spent the day with Nicholas. She left him about 5.00pm and the last time he spoke with her was about 6.00pm on the same day. She informed him that she was about to reach home, meaning the home she lived with the accused. By this date, the deceased and Nicholas had not reconciled their differences. Nicholas was hurting after it dawned on him that the deceased had been lying to him all this time. The deceased wanted to live with Nicholas if only he would accept the baby. Nicholas told the court that on 8<sup>th</sup> June 2015 they discussed and agreed that the deceased would go to pick the baby then both of them would talk to both deceased's and Nicholas' parents about their relationship.

On the other hand the accused was not happy. He had left home very early that day, 8<sup>th</sup> June 2015, to work. He left work before time because he was unwell as testified. He went home. During that day he could not reach the deceased when he called her. He found that she was not at home. He asked Carol who told him that the deceased had gone to her sister Mary's place. This was a lie and the accused knew it. The accused left the house after taking the phone belonging to Carol but which the accused said was a house phone. When the accused returned to the house he was with the deceased. They were not talking. They had their dinner without speaking to each other. This is how Carol left them after she was given her phone back and went to bed. Even if this court were to doubt Carol on this evidence, the accused has told the court that they argued that night after the deceased denied him sex. He said that they had resolved the problems caused by deceased's absence. This is doubtful because they were not on talking terms when they reached home. Denial of conjugal rights was not the only problem according to the defence. In addition to that issue, the deceased is said to have taunted the accused by telling him that she did not want to sleep with him because she had spent the day having good sex with a younger man who knew how to perform better in bed than him. It is on record that after this the two argued for some time. This is when the accused claimed that he told the deceased he would take her home to her parents. He claimed he went to sleep and when he woke up he could not find the deceased. A search for her in the house led him to her lifeless body lying in the room used as a store.

It is the view of this court that a normal human being and especially a man is expected to be enraged by the behavior and utterances like those attributed to the deceased. The words allegedly uttered by the deceased, if true, were provocative, more so when directed to a man as was the case here. This is because the words and taunts touched on his ego as a man and in a way challenged his manhood. It is noteworthy that the defence did not invoke provocation as a defence. The absence of the deceased and her having been off-air most of the day on 8<sup>th</sup> June 2015, coupled with her lies that she had been at her sisters which later changed to window shopping in Eastleigh, compounded by her entertaining another affair with Nicholas were enough factors to offer the accused motive to attack her.

The law under Section 9 (3) of the Penal Code states that motive to do or to omit to do an act or to form an intention is immaterial so far as regards criminal responsibility. In **Choge v. Republic (1985) KLR 1** the Court of Appeal held as follows in regard to motive:

***“Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1<sup>st</sup>appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.”***

Further in **Libambula v. Republic [2003] KLR 683**, motive is defined in the following terms:

***“Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. (See section 8 of the Evidence Act Cap. 80 Laws of Kenya). Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be***

*drawn from the facts, though proof of it is not essential to prove a crime.”*

It is in the context provided by the above authorities that I find the relevance of motive in this case. The behavior of the deceased provided motive for the accused to act as he did.

On the issue of the suicide theory, I have examined all the evidence by the prosecution and that of the defence. Firstly, the relationship of Nicholas and the deceased was known by her sister Mary and her parents. Nicholas told the court that she was in communication with her parents and that he had visited them at their rural home. From the evidence of Mary and Nicholas it seems that the parents of the deceased preferred Nicholas to the accused. Although the accused told the court that he had visited the parents of the deceased at their rural home, this was denied by Mary who said she was not aware of such a visit. It would be expected that Mary, being sister to the deceased, would have known if such a visit had taken place. Whatever the case, it is my view that it would not have been a threat to the deceased to be told that she would be taken home to her parents because of entertaining two relationships with two men. In fact if the evidence of Mary and Nicholas is to be believed, the deceased wanted to move in with Nicholas. This can be discerned from their relationship. They had been discussing the issue that the deceased leaves the accused and moves in with the Nicholas if Nicholas would accept the baby. The threat to take her home to her parents would not, in my view, have caused her to end her life if this court were to believe the accused that she committed suicide.

Secondly, Dr. Oduor discounted this theory. According to his opinion the deceased was strangled. I have examined with great care the evidence of the doctor. It is true that his conclusion on the cause of death is based on his opinion. But there is evidence to back up that conclusion. There is photographic evidence showing bruises on the body of the deceased. The external bruises are visible on the face. There were internal bruises too including injuries to the omentum (this is a layer of peritoneum, thin membrane, that surrounds abdominal organs). There were bruises in the abdomen and under the skin of the head both on the temporal and occipital areas. The accused in his defence and also in his submissions attempted to draw the attention of the court to concrete debris on the floor and also a hook on the ceiling as well as a stool pushed to the side. Much as I closely scrutinize the photographs I am not able to see any hook or concrete debris on the floor. I have noted that the defence counsel did not cross examine IP Isaac Thiaka (PW7) who took photographs at the scene and produced them in court on the issue of a hook on the ceiling, the displaced stool and the debris on the floor. The only issue the defence raised in respect of IP Thiaka's evidence was in connection with compliance with Section 78 of the Evidence Act and whether he was the officer who took the photographs produced in court. These issues were handled during the proceedings and a ruling made. Even if this court were to find that the requirements of the law were not followed, which is not the case, there is evidence of Mary and the police officers who visited the scene. Their evidence was very clear on what they noted at the scene where the body of the deceased was found. The injuries on the body of the deceased have been described by other witnesses including Mary. Thirdly, a suicide theory does not explain how the deceased sustained other injuries on her body which the doctor described as consistent with assault. This theory would not explain how deceased sustained those injuries. It was also noted that the defence relied on those photographs (Ex. 2(a) to 2(j)).

My careful analysis of all the evidence on both sides leads me to the conclusion that the deceased did not commit suicide. It was said that she was suffering from post-partum depression. This allegation was coming from the bar through submissions. This type of evidence required a professional opinion like that of a psychiatrist. This court did not benefit from such evidence and therefore this evidence cannot be relied on at all. It has no basis and given the finding of the court that evidence on record does not point to a suicide this evidence does not add value to the defence case.

There is the issue of failure to produce as exhibit the iron box. I am aware that the iron box cord that was found around the neck of the deceased and that it has not been produced in court. The iron box is said to have been in the exhibit store. I pose the following question: Is failure to produce the iron box cord as evidence of the murder weapon detrimental to the prosecution case? To answer to that question, I have looked at case law. In **Ekai v. Republic (1981) KLR 569** it was held that:

***“That failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the post mortem report had established beyond reasonable doubt that the injury from which the deceased died had been caused by a sharp bladed weapon.”***

Similarly in **Karani v. Republic (2010) 1 KLR 73** the Court of Appeal stated thus:

***“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit”.***

In **Ramadhan Kombe v. Republic Mombasa C.A. NO. 168 OF 2002** – the Court was of similar view:

***“In the matter before the trial court and before us, the cause of death of the deceased is patently obvious. The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the doctor who prepared the post mortem report was cross-examined. The failure by the prosecution witness to produce the murder weapon was not fatal to the case of the prosecution nor did it prejudice the appellant's defence. We have no hesitation in rejecting this submission”***

The above authorities provide adequate support and binding value to this court to lead me to make a finding that failure by the prosecution in this case to produce the iron box whose cord was found around the neck of the deceased and which is said to have been the murder weapon is not fatal to the prosecution or prejudicial to the defence case. There is ample evidence from Dr. Oduor and other witnesses, both in chief and in cross-examination that the cord was found around the neck of the deceased and that her death was caused by ligature strangulation. There were injuries found around the neck of the deceased that were consistent with the findings of the doctor. This evidence satisfies me that the iron box cord is the murder weapon and even though it was not produced in court, this court harbors no doubts that it is the murder weapon.

Having settled this issue, it is my view that the deceased did not commit suicide. She was assaulted as a result of which she sustained fatal injuries. She died of ligature strangulation. This was as a result of another person attacking her and strangling her. Evidence shows that she was left with the accused after Carol went to bed. This fact is admitted by the accused. They were not in good terms following what had happened during the day. It could be true or not that they also disagreed over sex as stated in the defence of the accused. Even if this court were to doubt this part of the evidence by the accused, all the time bearing in mind he has no duty under the law to prove his innocence, there is evidence that they were not in good terms that day. I have also considered the evidence of the accused that the telephone set he picked from the house did not belong to Carol. I do not believe this evidence. Carol was on the witness stand and she was not cross examined on this issue to clear the air that the phone did not actually belong to her. Carol was crying over that phone after the accused refused to release it to her. It beats logic that someone employed could cry over a phone belonging to her employer. Even if she used that phone it does not make sense that she should cry over it.

After careful consideration of all the evidence, my conclusion is that based on circumstantial evidence, the accused is implicated in the assault on the deceased that led to her death. He may have become emotional during his evidence but to me this does not mean he was crying because of the love he had for the deceased. Human nature is complex to fathom. In my view the accused may have broken down emotionally during his testimony due a number of factors that are not within this court's knowledge. He also painted the deceased as promiscuous and hinted that she had infected him with sexually transmitted diseases and HIV AIDs. There was no medical evidence to show that the deceased was HIV positive. The saying "Dead men tell no tales" comes to mind. The deceased cannot speak for herself and this court will never know the truth about some of the allegations leveled towards her although the central issue for determination is her murder.

I now turn to circumstantial evidence. I pose the question: What is circumstantial evidence? Simply put, circumstantial evidence is all the evidence that is not given by eyewitness testimony. It is evidence based on inference and not on personal knowledge or observation (see Black's Law Dictionary, Tenth Edition).

I have carefully read and considered the relevant authorities including those cited by the defence on the issue of circumstantial evidence. These authorities include **Abanga alias Onyango v Republic Criminal Appeal No. 32 of 1990 (UR)**, **R. v. Kipkering Arap Koske & Another (1949) 16 EACA 135**, **Simoni Musoke v. Republic [1958] EA 715**, **Sawe v. Republic (2003) KLR 364** and **Katende Samakula v. Uganda (Supreme Court Criminal Appeal No. 11 of 1994)**. All these authorities refer to the requirements regarding circumstantial evidence. At the centre of basing a conviction on circumstantial evidence are the following requirements:

***(a) 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.***

***(b) 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.***

***(c) It is a burden which never shifts to the party accused.***

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

My careful reading, analysis, and consideration of all the evidence, both from the prosecution and the defence, satisfies me that the evidence upon which this court can draw an inference of accused's guilt is firmly established; that the circumstances in this case are of a definite tendency to unerringly point towards the guilt of the accused and that the circumstances taken cumulatively 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. I have also satisfied myself that there are no other co-existing circumstances which would weaken or destroy the inference of guilt in respect of the accused.

The remaining issue is the element of malice aforethought. Section 206 of the Penal Code defines malice aforethought to include intention to cause the death of or to do grievous harm to any person and 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. The element of malice aforethought was discussed by the Court of Appeal in **Nzuki v. Republic (1993) KLR 171** where the court stated that:

***"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:- (i) The intention to cause death; (ii) The intention to cause grievous bodily harm; (iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.***

Malice aforethought has been defined to include express, implied and constructive malice. In **Isaack Kimanthi Kanuachobi v. R [2013] eKLR** the court expressed itself in the following terms:

***"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 person killed in furtherance of a felony (for example, rape, or 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 (See Republic -v- Stephen Kiprotich Leting & 3 Others (2009) e KLR HCCC No. 34 of 2008).***

The accused testified that after the events of the day and after they had had their dinner, the accused and the deceased showered together and

retired to bed. He wanted to have sex but the deceased did not and an exchange ensued in which the deceased told him the reasons she did not want to have sex with him. This is captured elsewhere in this judgment. This led to an argument that took some time and the threat by the accused that he would take the deceased back to her parents. He said he slept and woke up later to find deceased missing. It is recalled that Carol went to bed at about midnight. She was woken up later shortly at about 1.00am. By this time the deceased was already dead. The body of the deceased was dressed in blue jeans and a multi-coloured sleeveless top commonly referred to as spaghetti top. These are the same clothes the deceased wore that day when she visited Nicholas. This was confirmed by Nicholas who told the court that:

***“At Kenyatta University I observed that the body had a black eye and blood clot on the nostrils. She was still in the same clothes she wore when she left my home. There were injuries on the neck. She had coloured and striped top and blue jeans. She still wore the same clothes when I saw her body.”***

It cannot therefore be true that the accused and the deceased had showered together and retired to bed unless the deceased dressed in the same clothes after they had showered and gone to bed. There is no such evidence. It is my thinking therefore, based on circumstantial evidence that the argument may have continued after Carol left them and that the accused must have attacked the deceased, assaulted her and strangled her using the iron box cord. This is the only inference this court can make given the circumstances surrounding this case.

In my view and given the arguments between the accused and the deceased and given that they were not talking to each other when they returned home together and during their dinner, it seems that the accused did not act in the heat of passion so as to amount to provocation even though he did not raise provocation as a defence. He must have been enraged about the behavior of the deceased and perhaps harboring evil thoughts towards the deceased. Whatever happened after Carol left is not known. What is known is that an hour or so after Carol went to bed the deceased was lying dead inside a store with an iron box cord around her neck and bruises on her body. She could not have inflicted those injuries on her body. Some of the injuries were internal, in the stomach and the head. It is my view that anyone placing a rope or in this case an iron box cord around another person's neck and squeezing it to cause ligature strangulation as in this case must have one intent in mind, to cause the death of or to do grievous harm to the victim. It is therefore my finding that the accused possessed malice aforethought, either the express malice or at the very least the implied malice.

Before concluding this matter I wish to comment on *Uganda v. Sebyala & others [1969] EA 204*. This case was cited by the defence to support submissions on alibi. I wish to state that I am not aware the defence raised by the accused included alibi. Nothing much was said in submissions on alibi and in any case where alibi is raised as a defence the defence has to notify the prosecution in time in order to enable the prosecution rebut the same. It is my view therefore that this citation does not assist the defence in any way.

### **Conclusion**

Having applied my mind to the evidence before the court and the applicable law and having examined the circumstantial evidence as required of me, I come to a conclusion that the prosecution has proved all the ingredients of murder against the accused. His defence cannot therefore be plausible or truthful. His defence has not created any doubts in my mind in regard to the evidence tendered by the prosecution. I am aware he reported to the police that he had killed his wife. I am also aware that the accused explained in his defence that he was confused after the death of the deceased and thought that he had caused her death by threatening to take her back to her parents. While I find that no confession to that effect was made in the manner prescribed by the law and therefore this report cannot be taken against the accused, there is sufficient circumstantial evidence proving this case to the required legal standard. This court rejects the defence of the accused and finds that the offence of murder against the accused has been proved beyond reasonable doubt. Consequently, I find Paul Odhiambo Ogunde guilty of the murder of Agnes Mwikali Mutua and convict him accordingly. Orders shall issue accordingly.

**Delivered, dated and signed this 7<sup>th</sup> day of March 2019.**

**S. N. Mutuku**

**Judge**