



**Republic v Chepkwony (Criminal Case 18 of 2018)
[2023] KEHC 17312 (KLR) (24 April 2023) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL CASE 18 OF 2018**

**RL KORIR, J
APRIL 24, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

WILITHA CHEPNG'ETICH CHEPKWONY ACCUSED

JUDGMENT

1. The Accused was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the Information were that on the 20th day of September 2018, at Olingwoswet village in Longisa location within Bomet county jointly with others not before the court, murdered Bernard Kipng'etich Yegon.
2. The Accused was arraigned before Muya, J on October 2, 2018 where she took plea and denied the charge of murder. A plea of not guilty was subsequently entered and the case proceeded to full trial with the Prosecution calling eleven (11) witnesses and producing 2 exhibits.

The Prosecution's Case

3. The Prosecution called PW1 Leonard Kimutai Cheruiyot, the Accused's brother who testified that on the material night, he escorted his sister to meet with the deceased whom he knew as a boda boda rider. That he requested the deceased to allow him to hire the motorbike to use the following day and thereafter left him in the company of the Accused. He further testified that the Accused called him after 40 minutes and informed him that the deceased had been electrocuted. That on going to see found the body lying beside the road and there was an electric post nearby. He also touched the body of the deceased and confirmed that he was dead.
4. PW2 Emmanuel Rono testified that he dropped Leonard (PW1) on the material night and handed the motorbike to Bernard (the deceased). That at around 8.30 p.m. he heard screams and when he went



- to check, he saw a body lying near a Kenya Power & Lighting pole. He also identified the motorbike as the one he had earlier on used with Leonard.
5. PW3 Timothy Kirui was the Assistant Chief who testified that he had tried to resolve a quarrel between the Accused and the deceased's wife relating to an affair between the Accused and the deceased. PW4 Debra Yegon the deceased's wife also testified that she knew of an affair between the Accused and her husband (deceased) and that she had reported the same to the chief. She testified that the Accused had threatened to kill her or her husband and that she reported this to her mother-in-law. PW6 Lina Towet was the deceased's mother and PW4's mother-in-law. She corroborated PW4's evidence that the Accused had befriended the deceased and threatened to kill either the deceased or his wife.
 6. PW5 Bernard Kamuren Tomno was a maintenance engineer employed by Kenya Power. He testified that on September 21, 2018, he proceeded to Olgoswet to check on a transformer that had blown off. He found that the lines and conductions were dead and the fuses blown but could not estimate how long the lines had been dead. He also stated that he did not see any dead body on the said date. He produced the Electrical Report dated September 21, 2018 (P.Exh1).
 7. PW7 Sharon Kipkemoi was the sister-in-law of the deceased and testified that she heard screams and when she ran to the scene, she met with the Accused who also inquired about the screams. She testified that at that point, the Accused inquired of Debra's (PW4) whereabouts and that she (PW7) came to later learn of the deceased's death. It was her testimony also that the Accused and PW4 had gone to the Chief's office before because the Accused abused Debra.
 8. PW9 Dr. Kibet conducted a post-mortem on the deceased's body on 26th September 2018 and found the cause of death to be a closed head injury secondary to head trauma. He produced the Report (P.Exh 2). PW10 Nicholas Lang'at who was the deceased's brother testified that he attended the port-mortem with their father Samuel.
 9. PW11 was No 73347 Cpl. Joseph Ngumi the Investigating Officer in the case. He testified that he visited the scene on the material day at 9 p.m. and found the deceased's body lying in a bush next to a fallen electric pole which had loose wires. PW11 noticed that there were no physical injuries on the body of the deceased and that from the witnesses, the Accused person was the one last seen with the deceased. He further testified that he received a report from the Kenya Power and Lighting Company which indicated that the deceased could not have been electrocuted with the wires as a result of low voltage. That this evidence informed his decision to charge the Accused.

The Defence Case

10. At the close of the prosecution's case, the court vide its ruling dated April 28, 2022 found a prima facie case established against the accused. She was consequently placed on her defence under section 211 of the *Criminal Procedure Code*. The Accused elected to tender sworn evidence under section 306 of the Criminal Procedure Code and called no witnesses.
11. At the defence hearing on July 13, 2022, the Accused testified that on September 20, 2018, she attended a fundraising for her grandmother's funeral, after which she left for her home with her brother Cheruiyot (PW1). She said that they met the deceased on the way to Kapkimoowa who at the time was buying something from a canteen with his motorbike parked by the roadside. The Accused testified that her brother requested the deceased for his motorbike and when he accepted, he (PW1) took it up the road for a test ride. That at that point, she started walking with the deceased and after they had walked about 50 metres, her phone battery dropped and she stopped to pick it up, while the deceased walked ahead of her.



12. It was the Accused's testimony that as she was fixing her battery back into her mobile phone, the deceased decided to walk ahead about 20 metres and went to the side of the road where she thought he had gone to relieve himself. That shortly, she heard a 'grrrhh' sound and when she turned, she saw a spark from an electricity post with exposed wires and the deceased pressed on one of them. She testified that at that point, she began screaming prompting her brother Leonard (PW1) to rush back to where she was. She stated that he gave her the motorcycle keys and she placed them on top of the motorcycle.
13. The Accused further testified that her screams attracted people and that when they came, she left the scene, went home, had supper and slept. That she told her husband of the incident that night and went to report to the chief the next morning but was almost attacked by the family members of the deceased. She stated that the chief called the police who came and arrested her and PW1. It was her testimony that they found crowds blocking the road at Longisa and their houses burned by the family of the deceased. She stated that she had no grudge with the deceased or his family.

The Law

14. The Accused is charged with the offence of murder. Section 203 of the [Penal Code](#) provides as follows:-
 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
15. In the case of [Republic v Mohammed Dadi Kokane & 7 others](#) [2014] eKLR, Odero, J outlined the ingredients of the offence of murder as follows:-
 1. The fact of the death of the deceased.
 2. The cause of such death.
 3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly
 4. Proof that said unlawful act or omission was committed with malice aforethought.
16. For the charge of murder to be sustained, it is imperative for the Prosecution to establish these four ingredients. The Court of Appeal in the case of [John Mutua Munyoki v Republic](#) [2017] eKLR stated in this regard thus:-

“...in all criminal cases, the prosecution has the task of proving its case against an accused person beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged.”
17. It cannot be gainsaid that in every criminal trial, the standard of proof is beyond reasonable doubt. This was the determination of the Supreme Court of Canada in [R v Lifchus](#) (1997) 3 SCR 320 when it stated thus:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not



imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt." (Underline mine)

(See also Brennan J.'s decision (United States Supreme Court) in *Re Winship* 397 US 358 [1970], at pages 361-64).

18. From the above law and principles, it follows that the issues for determination must fall within the ingredients of the offence. These are:
 - i. The fact of death and the cause thereof
 - ii. That such unlawful death was caused by the acts or omissions of the accused.
 - iii. That the accused acted with malice aforethought in committing the crime of murder.

The Death of the deceased and the cause thereof.

19. The Prosecution in this case called on the evidence of PW1 and PW2 who stated that when they arrived at the scene, they saw the deceased lying on the ground. PW1 specifically stated that he touched the deceased's body and confirmed what his sister the Accused meant when she told him the deceased was no more.
20. The deceased's death was further proven by the evidence of Dr. Kibet, (PW9) who conducted the post-mortem. The fact of death was therefore proven.
21. In the present case, the cause of death was contested. The Prosecution case was that the Accused led the deceased off the road and murdered him. The Prosecution submitted that the insinuation that the deceased was electrocuted was quashed by the testimony of PW5 and that the medical evidence adduced by PW9 indicated that the deceased had open wounds, swellings and blood stains which were a testament of the heinous acts of the Accused.
22. The defence on the other hand maintained that the deceased died from electrocution occasioned by faulty loose electric wires that hung from a pole nearby. Counsel submitted that it was not in doubt that the deceased had died as a result of head injury. Secondly, Counsel submitted that it was the burden of the Prosecution to prove that the Accused had caused the said death.
23. To prove the cause of death, the Prosecution called PW9 Dr. Kibet who testified that he conducted a post-mortem on the deceased and made the following observations: There were swellings and bloodstains in the parietal skull, the head was moving freely with cracking sound, bruises measuring 3 by 4 centimeters on the neck, no fractures or open wounds, stomach was empty, whitish stains on the perennial area and a fracture on the cervical spine. PW9 concluded that the cause of death was head injury secondary to head trauma. He produced the Post-Mortem Report (P.Exh 2) which I have also examined.
24. From the Post-Mortem Report (P. Exh2) the cause of death was closed head injury secondary to blunt head trauma and not electrocution as claimed by the Accused. This evidence as adduced by PW9



amounts to expert evidence. Section 48 of the *Evidence Act*, Cap 80 contemplates expert opinion in criminal trials and provides as follows: -

48. Opinions of experts

1. When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.
2. Such persons are called experts.

25. Potter, JA in giving guidance of who an expert was and how the Court should deal with expert evidence held in the Court of Appeal case of *Mutonyi v Republic* (1982) KLR 203 at 210 thus: -

“Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.

Section 48 of the *Evidence Act* (Cap 80) provides that where, inter alia, the court has to form an opinion upon a point “of science, art, or as to identity or genuineness of handwriting or finger or other impressions”, opinions on that point are admissible if made by persons “specialist skilled” in such matters.

In Cross on Evidence 5th Edition at page 446, the following passage from the judgement of President Cooper in *Davie versus Edinburgh magistrates* (1933) SC 34,40, as scenting the functions of expert witnesses:

“Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence.”

So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:

1. Establish by evidence that he is especially skilled in his science or art.
2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.”

26. It is thus clear that in accepting expert evidence, the Court must consider with keen scrutiny such expert evidence alongside other evidence and make up its own mind whether to accept it or not. In *Silvanus Njuki Nguku v Republic* [2015] eKLR, Tunoi, O’Kubasu JJ A & Onyango Otieno, Ag JA held that:-

“An expert witness should come to court prepared to justify his opinion by argument and demonstration, but he need not necessarily be called upon to do so. In many cases it is sufficient if the witness gives his opinion and the more eminent the expert the less the need for demonstration. A doctor may give his bare opinion as to the cause of death, and



government analyst even in the rare cases where he is called as witness, may state without argument his conclusion (for example) that seminal stains were found on the clothing.

In every case the Court is entitled to accept or reject the opinion of the expert, and in that sense it must make up its own mind.” (Emphasis)

27. I have considered the findings of Dr. Kibet as recorded on P.Exh2. He found that the cause of death was closed head injury secondary to trauma. Further, PW9’s stated during cross-examination that the deceased’s body had bruises which could have been occasioned by dragging. The pathologist made no observation on any evidence of electrocution.
28. Alongside this evidence is that of PW5 Bernard Tomno, the electrical engineer who inspected the blown transformer who stated that he was unable to ascertain when the electric lines went dead. It was also his expert evidence that the faulty electric wires were not capable of causing electrocution because the current was too weak. PW1 also stated on cross-examination that by the time he arrived, though there were electric wires nearby, the deceased’s body was not in contact with them.
29. From PW9’s testimony, it is clear that the deceased did not die where the electric post lay. It is evident that he was dragged to the point where he was found, which was near the electric post. From this evidence, this Court draws the conclusion that the person who killed him wanted to make it look like his death had been caused by electrocution from the electric post.
30. Both the Post-Mortem Report (P.Exh2) and the Electric Engineer’s Report (P.Exh1) negate the Accused’s testimony that the deceased was electrocuted in her presence and thus died.
31. I am satisfied that the cause of death was closed head injury secondary to trauma as per the findings of PW9 Dr. Kibet. It is my finding that the Prosecution established the death of the deceased and the cause thereof to the required legal standard.

That the unlawful death was caused by the acts of the Accused.

32. The Prosecution submitted that proof in criminal cases was vested on the Prosecution and never shifts to an accused person unless the prosecution raised certain presumptions which would call for rebuttal by the Accused. They submitted that the evidence on Record indicated that the deceased was last seen with the Accused when they went together to the forest-like environment. The Prosecution also submitted that from the evidence of PW5, there was no chance that the deceased could have been electrocuted as claimed by the Accused.
33. The Prosecution further submitted that sections 203 and 206 of the Penal Code outlined the ingredients of the offence of murder and that the facts in this case were not in dispute. It was their submission that a careful examination of the evidence unerringly pointed to the Accused as the perpetrator of the offence and that there were no other co-existing circumstances to weaken or negate the inference that the Accused was the one who committed the offence.
34. The Accused’s submissions are dated November 18, 2022 and filed on November 28, 2022 by defence Counsel Brandy Koskey. Counsel submitted that none of the Prosecution witnesses was an eye witness to the murder and that none of them linked the Accused to the murder. Counsel submitted on three issues being: the death and cause of death of the deceased; whether the death of the deceased was caused by an unlawful act or omission on the part of the accused; and whether there was malice aforethought.
35. It is trite that a charge of murder can be proven either by direct or circumstantial evidence. In defining circumstantial evidence, this Court in the case of *Republic v Sagaray & 4 others* (Criminal Case 61



of 2012) [2023] KEHC 246 (KLR) (Crim) at paras 159-160 cited which defined circumstantial evidence as follows: -

159. Circumstantial Evidence entails that evidence which is deduced or inferred from a set of facts. It is openly distinct from direct evidence in that, whereas direct evidence draws from credible testimonies which result in creating some sort of belief, circumstantial evidence on the other hand entails a process of inference and deduction.....
 160. Circumstantial Evidence will be construed as sufficient where it enables the court to make reasonable inferences about the ultimate facts in issue; it must be more than mere conjecture, speculation or guess. The court must closely scrutinize the circumstantial evidence at hand and conduct an assessment of probabilities of guilt. (Emphasis added)
36. It follows then that circumstantial evidence are pieces of information or evidence which when placed closely together or considered holistically can enable a court to draw an inference consistent with guilt. This was the decision of *R v Hillier* {2007} 233 ALR 63, where it was held thus: -
- “The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant’s guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant’s guilt is proved beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence.”
- (see also Dawson J. in *Shepherd v The Queen* [1990] 170 CLR 573 at 579).
37. In the present case, there was no single prosecution witness who witnessed the death of the deceased. The evidence adduced was purely circumstantial in nature as rightfully submitted by the defence counsel.
 38. PW1 Leonard Cheruiyot testified that he was with the Accused and the deceased on the material night. He stated that he requested the deceased to allow him to take the motorbike for a test ride since he intended to hire it for their grandmother’s funeral the following day. It was his testimony that he left the two (deceased and Accused) together as he went ahead, hoping to meet them about a kilometer ahead. He also testified that the Accused called him about 40 minutes later and told him that the deceased Bernard was no more. He stated that the Accused informed him that the deceased had been electrocuted.
 39. In his further testimony, PW1 stated that when he arrived at the scene, he saw the deceased lying beside the road, about 100 metres from the nearby house and that there was also an electric post nearby.
 40. The evidence of PW1 was corroborated by that of PW2 who also stated that he saw the deceased’s body lying near the Kenya Power post. In line with this evidence is that of PW7 who testified that she heard screams from her home and ran to the scene where she found the Accused who then asked her about the screams and the whereabouts of Debra (PW4) the deceased’s wife.
 41. I have considered the above testimonies and it is evident that the Accused was the one who was last seen with the deceased, more particularly from the testimony of her own brother. Further, the Accused admitted in her defence that she was with the deceased when he branched off the road as she walked behind him Courts are replete with decisions in respect of ‘the doctrine of last seen’.



42. In the case of *Moses Jua v The State* (2007) LPELR-CA/IL/42/2006, the Nigerian Court of Appeal held thus: -

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

43. Similarly, in *Stephen Haruna v The Attorney-General of the Federation* (2010) 1iLAW/CA/A/86/C/2009, the Nigerian court in considering the same doctrine opined thus: -

“The doctrine of ‘last seen’ means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

44. In the present case, it was an established fact that the Accused and the deceased had met on the material night and were left talking by PW1 as he rode the deceased’s motorbike. Shortly after, the Accused called PW1 to inform him of the demise of the deceased.

45. The Accused stated on her defence that the deceased walked a head of her and went to the shrubs away from the road. That she thought that he was on a mission to relieve himself. That shortly she heard a scream and saw sparks and on checking found that the deceased already electrocuted.

46. I have considered the explanation offered by the Accused that the deceased was electrocuted. This explanation was not plausible owing to the cause of death as already established by the Post-mortem Report (P.Exh2). I dismiss the Accused’s explanation as it does not displace the Prosecution evidence on the cause of death. Indeed it does not cast doubt at all as PW 5 testified that the electric pole could not have electrocuted the deceased due to its low voltage. This court finds in the absence of a plausible explanation by the Accused, that she was culpable of the death of the deceased. The cause of death was closed head injury secondary to blunt trauma with spine and cervical fracture having a contributory role.

47. It is however insufficient to convict solely from the doctrine of last seen. The court must consider all other evidence that can establish a connection between an accused and the crime of murder. This principle was aptly espoused by the Indian case of *Ramreddy Rajeshkhanna Reddy & Anr. v State of Andhra Pradesh*, JT 2006 (4) SC 16 where the Supreme court held thus: -

“That even in the cases where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small, that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”



48. Similarly, in *Republic v Elizabeth Anyango Ojwang* [2018] eKLR, the court relied on the principles outlined in the Indian case of *Anjan Kumar Sarma v State of Assam*, Criminal Appeal No 560 of 2014 and stated as follows:-

“ 18. The circumstances of last seen cannot by itself form the basis of holding the accused guilty of the offence...There must be something more establishing connectivity between the accused and the crime...It is clear from the above that in a case where the other links have been satisfactorily made out and circumstances point to the guilt of the accused, the circumstances of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstances of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.”

49. Based on the foregoing, this Court is called upon to consider whether there was other evidence that would circumstantially point to the guilt of the Accused. A closer look at the evidence of PW3 Timothy Kirui the Assistant Chief, PW4 Debra Yegon the deceased's wife, PW6 Lina Towet the deceased's mother and PW7 Sharon Kipkemoi the deceased's in-law will shed light as to whether or not the Accused was culpable.

50. It was the testimony of PW3 that he had intervened in a quarrel between the Accused and PW4 the deceased's wife, which quarrel related to a friendship that had developed between the deceased and the Accused. PW3 testified that PW4 claimed that the Accused had insulted her in this regard. PW6 and PW7 corroborated this when they also testified that they were aware that PW4 had gone to the chief because of insults by the Accused relating to the friendship that had developed between her and the deceased. In addition, it was the testimony of PW4 and PW6 that the Accused had threatened to kill either the deceased or the deceased's wife PW4. These testimonies demonstrate that the Accused had formed the necessary motive to kill the deceased. She had expressly stated so.

51. Section 9(3) of the *Penal Code* states that: -

Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

52. I have also considered the conduct of the Accused before, during and after the fact of death of the deceased. PW7 Sharon Kipkemoi testified that she heard screams on the material night and left her house to find out what was happening. She said that she met the Accused on the way and the Accused inquired from her about the screams and asked her the whereabouts of the deceased's wife.

53. In analyzing this evidence, I find these inquiries by the Accused extremely peculiar. Her questions implied that she was unaware of the origin of the screams yet she was the one who by her own admission had witnessed the alleged electrocution of the deceased then called her brother PW1 to inform him that the deceased was no more. According to PW1, there was no other person at the scene by the time he arrived. This therefore means that by the time other people were discovering the body, the Accused who was the only witness to the alleged electrocution was already aware of the death of the deceased. Therefore, the fact that she chose to act ignorant to PW7 about the death of the deceased and painted a picture of concern about the screams demonstrates that she was trying to deceitfully distance herself from a murder that she was already too aware of.

54. This Court concludes that the Accused was the person responsible for the death of the deceased because she knew what had happened to him and opted to concoct the narrative of electrocution. It



is also the view of this Court that the Accused must have dragged the deceased's body nearer to the Kenya Power and Lighting poles and disturbed the scene of crime to conveniently to fit her narrative of electrocution as demonstrated by the fact that the deceased's body had bruises that seemed as if he had been dragged on the ground. But as the evidence has already established, the electric wires were not in contact with the body and the cause of death was not electrocution. Evidently, the Accused deceived her own brother PW1 when she stated that the deceased had been electrocuted. The reasons for this deceit infer guilt on her part.

55. When a case is pegged on circumstantial evidence, the court is also required to consider whether there may be other possible scenarios to explain the commission of the crime, in this case, the death of the deceased. In *Sawe v Republic* [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.”

56. Similarly in *Simon Musoke v Republic* [1958] EA 715 it was held as follows:-

“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.”

57. The Defence Counsel's submission that the evidence produced was purely circumstantial in nature and referred to the case of *Abanga alias Onyango v R* Criminal App No 32 of 1990. She further submitted that the chain of evidence from the Prosecution was incomplete and could not sustain a conviction. To this end, Counsel cited the case of *Sawe v R* [2003] KLR 364.

58. I have considered the entire Prosecution evidence and the Accused's defence in this regard. This Court noted that the Accused's version of the events did not displace the Prosecution evidence and in particular PW1's testimony. While the accused stated that the deceased's body was pressed on one of the wires, her own brother PW1 testified that the body was not in contact with the electric pole. Further, PW5 the KPLC Engineer stated in his Report (P.Exh1) that the voltage on the wires was too weak to cause death by electrocution. Thus, the deceased could not have died from the electrocution as she alleged. Further it has already been established that the deceased was last seen alive with the Accused who was found alone with the deceased's body at the scene of the crime by PW1.

59. The Accused stated in her defence that she could not have killed the deceased because he was bigger than her in stature. This raises the possibility that the Accused may have acted in concert with others to kill the deceased, and explains why she was charged with others not before court. The entire Prosecution evidence pointed towards her as the person responsible for the said offence. In any case even if she acted in concert with others, that would not absolve her of her own guilt.

60. Having considered the entire evidence, I am satisfied that there were no other co-existing circumstances that could weaken the strength of the circumstantial evidence adduced by the Prosecution.

61. From the totality of the Prosecution evidence, this Court finds that the Accused was the one responsible for the death of the deceased owing to the doctrine of last seen and coupled with other



circumstantial evidence adduced by the Prosecution. It is my firm finding that she caused the death of the deceased by inflicting head injury.

Whether the Accused acted with Malice Aforethought

62. The last ingredient in establishing a charge of murder is malice aforethought which is defined under section 206 of the [Penal Code](#) as follows: -

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

- a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not,
- b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- c. an intent to commit a felony;
- d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

63. In the case of [Roba Galma Wario v Republic](#) [2015] eKLR the court held as follows:-

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

64. Thus, malice aforethought must be proven to the required standard as the other ingredients. It does not necessarily connote feelings of ill-will on the part of an accused person against the deceased. Bayley J. in [Bromage & another v Prosser](#), 107 Eng Rep 1051, 1055 (KB 1825) as:-

“Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse.”

65. The Prosecution’s case was that the Accused killed the deceased because of differences that arose between them regarding their affair. This was demonstrated from the evidence of PW3, PW4, PW6 and PW11 who all testified that the Accused and the deceased had an affair and that the Accused had threatened to kill either the deceased or the deceased’s wife.

66. On mensrea Defence Counsel submitted that section 206 of the [Penal Code](#) outlined the circumstances under which malice aforethought could be inferred. She submitted that no Prosecution witness gave evidence to demonstrate that she had any malice or motive to kill the deceased, that the person who last saw them together confirmed that they were engaging in an amicable manner. Counsel cited the case of [R v Silas Magongo Onzere alias Fredrick Nemema](#) (2017) eKLR, [Tubere vs/o Ochen](#) (1945). Republic and [Ernest Asami Bwire Abanga alias Onyango v R](#) (CARCA No 32 of 1990).



67. In considering whether the Accused was possessed of the necessary malice aforethought in committing the murder of the deceased, I find guidance from the case of Nzuki v Republic [1973] KLR 171 where the Court of Appeal held that:-

“.....If, on a review of the whole evidence, it either thinks that that intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt. Thus, where on a charge of murder the evidence does not exclude the reasonable possibility that an accused person killed the deceased by an unlawful act but without the intent necessary to constitute legal malice requisite to the proof of that offence, that killing would only amount to manslaughter”.

68. In the present case the Prosecution established that the Accused and the deceased went into the thicket from where the Accused later screamed that the deceased had been electrocuted. I have already found that the deceased was killed by the Accused. The prosecution evidence however does not prove beyond reasonable doubt that the deceased possessed the necessary mensrea to take the life of the deceased.

69. The evidence established that they were lovers and it is not known whether there arose disagreement between them in the bush or whether the Accused lured the deceased into the bush with the intention to murder him.

70. In this case I have found the accused guilty of causing the unlawful death of the deceased. As the element of mens rea is not proved to the required legal standard, I apply the provision of Section 179(2) and substitute the offence of murder with that of manslaughter.

71. I find the accused guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. She is accordingly convicted.

Orders Accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 24TH DAY OF APRIL, 2023.

.....

R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of the Accused, Ms Kosgei for the Accused, Mr. Njeru for the State and Siele (Court Assistant).

