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THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO.69 OF 2014

LESIT, J

REPUBLIC.....PROSECUTOR

VERSUS

ANDREW NJENDU GIKERA.....ACCUSED

JUDGEMENT

1. The accused **Andrew Njendu Gikera** is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are:

“On the night of 18th day of July, 2014 at Kamandura Village within Limuru location in Kiambu County, murdered ANN NYAGACHO WANYOIKE.”

2. The prosecution called a total of 12 witnesses.

3. In brief, the prosecution case was that on the 18th of July, 2014 the accused and the deceased Anne Nyagacho Wanyoike were together. The deceased made the final call to her brother PW3 at 6:50 pm informing him that they were headed to the hospital before coming home as the accused was in pain. That was the last time her phone was on. The body of the deceased was found next morning along the road near Kamandura in Limuru. On the other hand, the accused checked into Macki’s Hotel and Restaurant on the same night of the incident. The cause of death of the deceased was exsanguination due to a severe neck and chest injury caused by a sharp force trauma.

4. In summary, the prosecution witnesses gave the following evidence. PW 3, James Njoroge, the deceased only sibling was living with the deceased and her son in their parental home in Mutaratara, Limuru at the time of the incident. PW3 stated on 18th of July, 2014 at 7:45 am the deceased left their home for work. He further stated that the deceased was always expected home at 6:30 pm or latest at 7:00pm. PW 3 stated that he spoke with the deceased thrice that evening. The last call was at 6:50 pm when the deceased told him that she was at Rironi not far from Limuru and that she was in a vehicle with the deceased. She further told him that the accused had stomach cramps and that they stopped on the way and bought some water which he drunk but he did not feel any better. PW3 testified that the deceased told him that she and the deceased were on their way to the hospital but did not say which hospital they were headed to.

5. It is PW3’s testimony that the deceased did not show up back home and that at around 8:00 pm he started calling her and the accused repeatedly but the calls went unanswered. He continued calling till 12am when both phone numbers were ‘Mteja’ that is switched off.

6. At 8:00 am on 19th July 2014, PW3 said that he spoke to Mrs. Ikonywa who told him that there was an accident at Kamandura near Limuru and that she suggested that he should go there. Mrs. Ikonywa was not called as a witness and therefore the source of her information remained unknown. PW3 said that he proceeded to Kamandura where he arrived at around 8:30 am. That is where he found and identified the body of his sister lying dead in a bush next to the road.

7. PW3 described the body of the deceased as having a gapping open cut on the forehead and at the base of the neck. After the police officers had completed taking photos of the scene, they took the deceased body to Uplands Funeral Home.

8. PW 3 stated that the accused did not own a vehicle however on 15th July, 2014 the accused arrived at their home driving a Nissan

Sunny Registration number KBH 678S. PW3 said that he continued to see the accused with the same vehicle on Tuesday, Wednesday and Thursday evenings when the accused dropped his sister home. PW3 testified that on the three days the accused dropped the deceased home after picking her from work and after going for the burial meetings of their cousin in Limuru. PW3 later on identified the vehicle KBH 678S at the Central Police Station.

9. PW 6, CIP Frank Anunda who is a gazetted Crime Scene Officer took photographs of the scene of murder at Tigoni area. He prepared a report marked **P. Exh7A** on the photographs dated 16th August 2014. PW3 identified the scene where the deceased body was found in the photos which he produced as **P. Exh7**.

10. The Nissan motor vehicle reg. no. KBH 678S, hereinafter referred to as the subject vehicle was hired out to the accused by PW2. The photograph of the vehicle was produced in court as **P. Exh 1(a)**. PW2 testified that on the 15th of July 2014, at 3 pm, he signed an agreement, **PExh3** with the accused for the hire of a Nissan motor vehicle reg. no. KBH 678S. The accused was supposed to return the vehicle on the 17th July, 2014 at 3pm. He however passed a message to PW2 through his friend who had introduced him to PW2 saying that he would delay with it until 7pm. The accused returned the vehicle at 7pm. He re-hired it again on 18th July, saying he needed to take his son to hospital. PW2 and accused signed a new contract, **P. Exh.6** He did not return it. PW2 testified that he could not reach the accused on 18th night and by morning his phone was off. The subject vehicle was found by PW 4, PC Humphrey Kitio on the 19th of July 2014 at the junction of Kirinyaga / Kilome road in Nairobi.

11. PW 9 was Chief Inspector and Crime Scene Officer. He said that he took 40 photos of the vehicle and prepared a booklet of photographs and a signed report marked **P.Exh.17** and **P.Exh.18** respectively. It is his testimony that he opened the vehicle assisted by two other police officers at Tigoni Police Station. He took various photographs of various exhibits and blood stains inside the vehicle. PW9 also took a photograph of a bloody finger print on the knife, **P. Exh.13** which he submitted to the CID Fingerprint Comparison Unit. The blood stains in the car were also documented.

12. The properties belonging to the deceased that were found in the vehicle were identified by PW3. He identified some items which included a Kikoi **P. Exh 8**, a brown handbag **P.Exh 9**, a shoe **P.Exh 15**, an umbrella **P.Exh 10**, several personal items in the handbag which were marked **P.Exh12** which included a job card, Naivas supermarket card, N.H.I.F card, Gertrude's Medical Centre card all in her names, the deceased house keys, papers, money, pictures of her son, a small booklet, a diary, her silver wrist watch, a sim card, white colored medicine, Vaseline, lotion tube, nail file, a nail cutter and a Safaricom kit with a Green card all belonging to the deceased.

13. PW 7, Simon Ng'anga Wanyoike, a Senior Clinical Officer at Tigoni Hospital examined the accused for injuries on the 23rd July, 2014 at Tigoni Hospital where he had been admitted. He noted that the accused had changed his original clothing as he alleged to have found himself at a different hospital -Thika Level 5 Hospital. He stated that the accused claimed that he could not recall what had happened.

14. PW7 stated that in his opinion the accused was fully conscious and well oriented in time, place and person. The accused had no injuries on the head, face and neck. Upon further examination of the accused thorax and abdomen PW7 found that there was bilateral tenderness of the chest cage. PW7 said that the accused had a 1 cm deep cut wound on the right hand between his thumb and the index finger. He also had a linear scratch wound on the left palm and a deep ulceration from the middle knuckle and the fourth finger consistent with boxers' injuries and a human bite on the dorsal aspect of the right hand.

15. According to PW7, the probable weapon which caused the injuries between the thumb and the index finger was a sharp object, the injuries on the knuckles a blunt object and the injury on the dorsal aspect of the right hand was a human bite. PW7 testified that the injuries were consistent with a fight and struggle. He classified the degree of injuries as harm. PW7 filled and signed a P3 form on the 28TH July 2014 and produced in court as **P. Exh3**.

16. Mr. Elias Thuo Gachuna PW 8, was a hotel manager at Macki's Hotel and restaurant. He testified that on the 19th of July 2014, he was called by an employee at Macki's Hotel and restaurant because there was a client who had requested to be woken up at midday but who was not responding to calls. After several attempts to wake him up, PW8 reported the matter at Thika Police Station. He then went back to the hotel and together with other employees broke down the door to gain access to the client.

17. PW8 testified that they found the accused inside the room but unconscious. He said that he also noted a quarter bottle of Furaha Gin in the room but the room was undisturbed. PW 8 said that he noticed a wound between the thumb and the index finger. PW8 identified property he found in the room as shoes marked **P.Exh 10** and a jacket **P.Exh 16** belonging to the accused. There was also

a wallet with several sim cards and an ID card of the accused.

18. PW8 said that he called in a taxi and took the accused to hospital at Thika Level 5 Hospital. He handed over the wallet with several sim cards to the doctor to aid in getting accused next of kin. PW8 said that he saw the accused the following two days and found him still unconscious. On the third day, he found him awake but confused. He did not go to see him again after that.

19. PW8 also spoke of two men who went to the hotel to enquire about the accused. The two declined to carry his shoes and jacket, **P. Exh10** and **16** respectively. They promised to go back but did not. PW8 handed the two items to PW12, the investigating Officer of this case.

20. The Government Chemist PW10, Elizabeth Waithera Onyiego testified that they received blood swabs from P.C Ezekiel Siambo of Tigoni Police Station on the 22nd of July 2014, 24th July 2014 and 28th July, 2014. (Exhibit Memo forms **P. Exhs. 20 (a), (b) and (c)**). She later carried out the analysis and compiled a detailed report which she produced as **P. Exh19**.

21. PW10 came to three conclusions as a result of the analysis. In her first conclusion, the effect of her findings was that the blood stains on swabs collected from the subject vehicle's driver's door, co-driver's seat ad gear box; the stains from the knife **P. Exh 13**, the shoes of the deceased **P. Exh15** and the kikoi indicated to be of the deceased **P. Exh. 8** all matched the DNA profile generated from the blood sample of the deceased.

22. The second conclusion was that the DNA profile generated from two swabs from the co-driver's door and the steering wheel respectively of the subject vehicle, swabs from a towel, (not produced as exhibit) and shoes said to be for the accused **P. Exh10** all matched the DNA profile from the accused blood sample.

23. The third conclusion was that the DNA profile generated from the blood stains of a shirt said to be of the accused, **P. Exh. 14** had mixed DNA profile generated from the blood samples of the accused and the deceased.

24. The blood swabs delivered to the Govt Chemist for analysis were lifted by the Crime Scene Officer, PW9. This officer testified that he lifted the swabs from various parts of the vehicle. The details of where the swabs were lifted is set out in the evidence of PW10 herein above.

25. PW 11 Dr. Peter Muriuki Ndegwa performed the post mortem on the body of the deceased on 21st July 2014, at Uplands Funeral Home, Limuru. He testified that upon examination of the body he found an incision wound running from the frontal face to nasal bridge, 13cm long vertically. He also found a penetrating stab wound on arterial neck, 3cm long by 2.5cm wide and 2cm deep. There was a stab wound on left hand. Internally there was left sided haemothorax with severed left blood vessels of the heart. The doctor formed the opinion that the deceased cause of death was exsanguination due to head and chest injuries due to a stab.

26. The post mortem report is dated and signed on 21st July 2014 and was produced by PW11 in court as **P. Exh.19**. PW11 stated that he also gave a blood sample of the deceased to the police.

27. PW 12 CIP Felix Kugun, the investigation officer testified that he was called to the scene on 19th July 2014 and examined the body of the deceased. He saw a stab wound on the head and neck of the deceased. He further described the scene as he found it stating that there was a shoe on the left side of the road, tire tracks of a vehicle and blood across the road to where the body was lying.

28. On 20th July 2014, PW12 received information about the vehicle that the accused was driving at the time of the incident. The vehicle KBH 678S was at Central Police station. It is PW12's testimony that on 22nd July, 2014 the accused was traced through the uncle of the accused who called PW12 and informed him that the accused had been traced through the facebook, and that he was at Thika Level Five Hospital. PW12 stated that he confirmed that the accused was at Thika Level 5 hospital on 23rd July, 2014. PW12 testified that he was informed at the hospital that the accused had been taken there by employees of Macki's Hotel after finding him unconscious in his room at the hotel. PW12 later transferred the accused to Tigoni Hospital.

29. On the 24th July 2014 PW 12 recorded the statements of the hotel manager and the day shift worker at Macki's Hotel. He said that from his investigations he found out that the accused checked into the hotel on the 18th of July 2014 at 11pm. PW12 said that from the room booked by the accused at the hotel, he recovered the identification card of the accused, which was handed over to the

defence counsel in court before the trial begun, a small black book and blood stained shoes **P.Exh.10**.

30. After the close of the prosecution case the court placed the accused on his defence. The defence called two witnesses. DW1 was the accused. He denied the charge. The accused stated that on 18th July 2014 at 2 pm he indeed went to collect the subject vehicle KBH 678S which he had hired at Westlands. He stated that he carried the deceased in the vehicle at 5:10 pm and that they both proceeded to Limuru to pick up their son. He confirmed that they were only two in the vehicle.

31. The accused continued to state that the two were attacked by two men when they got off the highway headed towards Limuru town. It is the accused defense that the two men entered the car via the back door. The accused described the men as being in their mid-30's, one dressed in brown khaki trousers and a trench coat while the other person had a shirt. He said that the two were armed with a knife and a pistol and demanded valuables.

32. It is the accused defence that one of the attackers grabbed the deceased by her hair and that is when an altercation ensued between the accused and the attackers. The accused stated that one of the robbers seated behind him was strangling him. He stated that he was pierced on the neck with an object which he could not identify. The accused stated that he saw the deceased ran out of the car screaming. He said that he became dizzy and passed out. Accused stated that he woke up in a hospital in Thika.

33. In his testimony, the accused denied knowing or ever visiting Macki's Pub. He stated that there are people with motives of fixing him. He further stated that at the time of the deceased death they did not have any disagreements, and that the reason she moved back to her home was because her mother needed her care. He said she went back to her home to care for her mother as PW3 was a drunkard and irresponsible.

34. It is the accused testimony that the assailants also took away their mobile phones and other valuables. The accused stated that he does not know how the vehicle KBH 678S got to Kirinyaga Road

35. On cross examination by learned prosecution counsel Ms. Onunga, the accused stated that the deceased did not leave his home because she was being beaten. The accused further stated that the assailants had a pistol and a knife and that he tried to punch them while defending the deceased. The accused stated that he did not have bite marks as stated by PW 7 and neither did he have scratch marks on his neck. He continued to state that the story he gave was true and believable.

36. DW2, Sophie Hannah Mukwana is a Forensic Scientist and a Consultant. She produced what the defence counsel referred to as a DNA Profile Review after a critique of the Government Chemist's Report **P. Exh.19**. Her Report is dated 21st September, 2018 and was produced as **D. Exh. 1**. The witness stated that upon studying the Government Chemists report, she noted inconsistencies in the report. She highlighted them in her testimony. a repeat analysis was recommended. The witness highlighted other areas of the report which she said had raised a red and green colour, and stated that the colour red meant there was an issue which needed to be addressed. Overall she stated it is recommended that where inconsistency was noted there was a need for re-analysis.

37. The learned prosecution counsel Ms. Onunga cross examined DW2 as to her registration as an Analyst and she stated that she was not gazetted. DW2 stated that she had been an Analyst for 8 years. She said that she was only drawing a conclusion based on the findings in the Government Chemist' Report.

38. After the close of the case both counsels for the prosecution and the defence made submissions. Mr. Kariuki, learned defence counsel relied on the written and filed submissions and highlighted them in court. Just to point out that I did consider the filed as well as the oral submissions by both counsels.

39. The accused faces an information with one count of the charge of Murder contrary to **section 203** as read with **section 204** of the **Penal Code. Section 203** which creates the offence of murder provides as follows:

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

40. It is important to note that the burden of proof lies with the prosecution to prove the charge against the accused beyond any reasonable doubt. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. In **Anthony Ndegwa Ngari Vs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows:

a) Proof of the fact and the cause of death of the deceased.

b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the `actus reus' of the offence;

c) Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the `mens rea' of the offence.

41. Malice aforethought is an essential element of the offence of murder under **section 203** of the **Penal Code**. What constitutes malice aforethought is set out 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.”

42. Having carefully considered the evidence adduced by the prosecution, the accused defence and submissions by the counsels for the accused and the prosecution, I find the following are the issues that are not in dispute:

I. That the deceased and the accused at one time lived as husband and wife and had a son out of that relationship.

II. That the deceased died as a result of being murdered.

III. That the accused and the deceased had been together in the subject vehicle just before the attack leading to deceased death.

IV. That the accused was hospitalized after the incident.

V. That the accused entered into car hire agreements with PW 2 for the hire of vehicle KBH 678S.

VI. That the accused did not return the subject motor vehicle to PW2 as agreed.

43. The issues that are in dispute:

I. That the accused and the deceased had an acrimonious and violent relationship.

II. That the reason deceased parted ways with the accused in 2011 never to return to him again was the battering she suffered at accused hands.

III. That the deceased death was as a result of an act or omission by the accused.

IV. That the accused checked himself into Macki Hotel before being taken while unconscious to Thika Level Five Hospital for treatment by the Manager of the said hotel.

V. That the accused had a human bite on his right hand.

44. The issues which are for determination in this case are as follows:

- a. Whether the charge against the accused was fatally defective.**
- b. Whether the circumstantial evidence in this case is sufficient to establish the charge against the accused and whether the facts justify the drawing of an inference of guilt for offence charged.**
- c. Whether malice aforethought as defined under section 206 of the Penal Code has been established by the prosecution beyond reasonable doubt.**
- d. Whether there was material inconsistencies and contradictions in the prosecution case.**
- e. Whether the prosecution has proved motive for the commission of this crime.**
- f. Whether the prosecution failed to call material witnesses in this case and whether that can justify the court to make an adverse inference.**
- g. Whether the accused defence is plausible and tenable.**

45. **As to whether the charge against the accused was fatally defective.** It was the submission of Mr. Kariuki that the charge against the accused was defective for the reason the names of the accused stated therein were **ANDREW NJENDU WANYOIKE** which were not the names of the accused. The basis of that submission was a charge sheet filed before the Magistrates Court which the defence counsel displayed before the court. That was not an information, and definitely not the one charging the accused before this court. The information gives the accused correct names of **ANDREW NJENDU GIKERA**. Nothing turns on that point.

46. **On the issue whether the circumstantial facts in this case are sufficient to establish the charge against the accused and whether the facts justify the drawing of an inference of guilt for offence charged.** It is clear that there was no eye witness of the murder of the deceased. The prosecution is relying on circumstantial evidence to prove the charge against the accused in this case. In regards to circumstantial evidence, Ms. Onunga for the prosecution urged that the prosecution had adduced sufficient circumstantial evidence against the accused to justify the court drawing an inference of guilt. The prosecution urged that the circumstantial evidence adduced pointed to the accused as the perpetrator of the murder to the exclusion of any other. The prosecution further stated that the accused denial that he was involved in the deceased murder was not worthy of belief.

47. Regarding circumstantial evidence Mr. Kariuki submitted that since the case against the accused was circumstantial, then it should have pointed irresistibly to accused guilt. Counsel urged that the evidence before court exonerated the accused. He urged that a single circumstantial evidence raising doubt in the prosecution case was sufficient to acquit the accused. For that proposition counsel relied on the case of **PHILIP MUIRURI VS REP [2016]eKLR** where the court held that:

“To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating doubt(s), a single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.”

48. The Court of Appeal set out the test of determining whether the prosecution has established its case against an accused based on circumstantial evidence in the case of **Abanga alias Onyango vs. Republic CR A NO.32 of 1990(UR)** in the following terms:

- a) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.**
- b) The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused person.**
- c) 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.”

49. Seven years later the Court of Appeal while considering a case in which the prosecution was relying on chain of circumstantial evidence in the case of **CHARLES MATHENGE MWANGI & ANOTHER –V- REP CA NO. 72 OF 1997 (unreported)**, (OMOLO, TUNOI JJA and RINGERA Ag. JA) held as follows:

“The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example REX vs. KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135.

With profound respect to the learned Judge, it was his duty to himself and to the assessors to specify which circumstances he was relying on and what inference(s) he was drawing from those circumstances. We have ourselves set out what we think were the circumstances the prosecution was relying on and we have come to the conclusion that those circumstances are not necessarily incompatible with the innocence of the appellant. We do not know if the Judge would have come to the same conclusions had he set out each individual circumstance and analyzed it as we have done. Nor was it fair to the assessors to be given directions on the general principles applicable to circumstantial evidence without explaining to them the individual circumstance and asking them what inference they thought could be drawn from the circumstance.”

50. I am well guided by these cases. The prosecution is relying on several circumstances. The prosecution relies on the fact the accused hired a vehicle from PW2 in order to create an opportunity to be with the deceased during the time deceased and PW3's cousin had died and funeral night meetings were taking place at the cousin's home.

51. The prosecution has adduced evidence to show that the accused picked the deceased from her work place every evening from 15th to 18th July, 2014. The accused has not denied he hired the vehicle from PW2 and that he used it to pick the deceased for those days. He denies any involvement in the deceased death. The prosecution submitted that the accused admitted that he was with the deceased on the evening of the 18th of July 2014, the same night that she died. Counsel urged the court to find that the act causing the death of the deceased was caused by the accused.

52. The prosecution relies on the fact that the deceased was murdered and left dumped next to the road while the vehicle she had been riding in with the accused was left dumped many kilometers away with the deceased properties intact inside the vehicle. The accused was found in Thika where he checked himself into Macki's Hotel on the same night of the incident. The following day the Hotel staff found him unconscious inside his room. After reporting to the police who seem to have ignored them, the hotel staff broke into his room and took the accused to Thika Level Five Hospital where he was admitted and remained unconscious for three days.

53. As stated earlier the accused disputes having checked himself into Macki's Hotel, or ever going there. The evidence that the accused was at the Hotel on the same night the deceased was murdered is contained in the evidence of PW8. PW8 was the Manager at the Hotel. He did not check the accused into the Hotel. The staff who did so was not availed by the prosecution. PW8 saw the accused the following day, lying unconscious and with a gin bottle next to him.

54. The question is whether PW8 was lying. No such question was put to this witness by the defence. The only issue the defence took with PW8 was the fact in his statement he did not say the kind of drink he found next to the accused in the hotel room. Mr. Kariuki asked him how come he could not recall that at the time he wrote the statement when the issues were fresh. He admitted he had forgotten until the day of his testimony in court.

55. The issue of PW8's testimony being a lie has arisen during the defence case. I heard his testimony and observed his demeanour. PW8 impressed the court as an honest and credible witness. His demeanour was good throughout his testimony. I have considered that PW8 was a total stranger to the accused. He had no reason to lie against him. Further more PW8 was so humane. Even when the police did not want to be involved, PW8 took upon himself to take the accused to hospital. He then checked on him at the hospital for three days, even taking him milk to refresh him on the third day after he regained consciousness. He went beyond his call of duty, even his duty of care as a hotelier to his customer to ensure that the accused was safe and on his way to recovery. I find he was telling the truth.

56. There was other circumstantial evidence relied upon by the prosecution. This was in the evidence of PW8 and 12. PW8 testified that the accused had his identity card, his shoes, **P. Exh 10** and his jacket **P. Exh.16** in the room he rented from the hotel and that when they took him to hospital the three items were left behind. PW8 handed over to PW12, the I. O. in this case. PW12 produced them in evidence except the ID card of the accused which this court ordered released to Mr. Kariuki the defence counsel on his application on the 20th November, 2014 before the case begun.

57. **Section 111(1) and 119** of the **Evidence Act** places an evidential burden on the accused of a rebuttable presumption to give explanation, in this case regarding how his ID card, shoes and jacket found their way to Macki's Hotel room. The accused offered no explanation. All he said is that he was never in that hotel. That explanation is a bare denial. The items were in the hotel. PW12 got them there during the course of investigations he conducted in this case. The only conclusion which can be made that the accused was at the hotel and booked himself in. The reason they were left is because he was in no position to wear them or take care for them while at the hospital because he was unconscious when he left that room.

58. The other circumstantial evidence relied upon by the prosecution was the presence of deceased blood in accused properties, namely his shirt P. Exh 14 found by police inside the subject vehicle. The prosecution also relies on the presence of blood on the driver's door to the outside and the gear box. They rely on the presence of accused blood on the co-driver's door.

59. The accused explanation was that when they were attacked, the deceased managed to get out of the vehicle and run. He was unable to leave and instead lost consciousness until he woke up at Thika Hospital. If deceased ran out of the vehicle, how did her blood get to the driver's door. Also, if the accused lost consciousness inside the subject vehicle, how did his blood get to the co-driver's door.

60. The only conclusion that can be made over this issue is that the deceased must have come into contact with the driver's door, and the accused the co-driver's door after both got injured for their blood to be found in both places. There could be an innocent explanation for the blood in question being in the wrong places, given the fact that the two were injured while inside the vehicle. Since this evidence has to be considered alongside other evidence, it does serve as corroborative evidence to other evidence, if found.

61. Regarding the knife an issue was raised that if it is the accused who attacked the deceased, why was his blood not found on the knife now that he too had injuries that bled" PW10 was questioned about whether if a knife stabs two people both DNAs can be found on it and her response was in the positive. Clearly then the accused DNA was expected to have been present on the knife, but it was not. The court has the duty to consider the entire evidence and find whether from the totality of the evidence the accused is exonerated from this offence.

62. The other piece of evidence relied upon is the human bite and other injuries on the accused, which the medical personnel who examined him, PW7 found on his hands. The accused has denied having any human bite and said the clinical officer who said he saw it made a mistake. I noted that during cross examination of PW7, no question or suggestion was put to him that he may have been mistaken in his findings. Clearly this allegation against PW7 is unfounded and an afterthought. PW7 was a total stranger to the accused, he had no reason to lie against him. PW7 had good demeanour as he testified and impressed the court as a truthful witness. I find the accused denial was an afterthought. I am satisfied that the accused had a human bite on the right dorsal aspect of his hand. He also had boxers injury on his knuckles and a single deep cut between the thumb and index finger. These were found to be consistent with a struggle and a fight. They were suffered at the time the deceased was fatally injured.

63. The prosecution urged the court to find that the accused could not have been under attack as a victim when he received the injuries. A parallel was drawn between the injuries on the deceased and those on the accused. The ones on the accused have been mentioned herein above.

64. The injuries suffered by the deceased were an incision wound on frontal face to nasal bridge 13 cm long vertically, penetrating wound on the neck 3cm long, 2.5 cm wide and 2.5 cm deep, severed vessels of the heart to the left side and stab wound on the left hand. These were all very severe injuries to the extend of severing her blood vessels to the heart. The concern is that while accused had minor injuries, the deceased was severely and fatally wounded. Could the injuries the accused had which were classified as harm, cause the accused unconsciousness at the scene of attack, was the question the prosecution asked. I will get back to this later.

65. I have carefully considered the circumstantial evidence adduced and find that there was not a single circumstance which created reasonable doubt about the guilt of the accused in my mind.

66. I am satisfied that the prosecution has cogently and firmly established the circumstances from which the inference of guilt was sought to be drawn against the accused. I find that the circumstances are of a definite tendency unerringly pointing towards the guilt of the accused person. I find 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.

67. **As to whether malice aforethought as defined under section 206 of the Penal Code has been established by the prosecution beyond reasonable doubt.** The court must determine whether the accused with malice inflicted the injuries that resulted in the death of the deceased.

68. The prosecution urged in their submissions that the fatal injuries inflicted on the deceased were caused by a knife and that the events prior to the incident points to well planned and executed plot by the accused to murder the deceased.

69. **On the question of malice aforethought**, there is sufficient evidence that whoever executed the murder of the deceased had formed the necessary intention to cause death or grievous harm. He armed himself. He dug deep into the deceased body to the extent of severing blood vessels in the heart. Looking at the manner in which the offence was committed, the nature of injuries inflicted and the type of weapon used there is no doubt that the one who attacked the deceased had formed the necessary malice aforethought to commit this offence. I am satisfied malice in this case has been proved by the prosecution beyond reasonable doubt.

70. **Regarding the issue whether there was material inconsistencies and contradictions in the prosecution case. Mr. Kariuki challenged the quality of P. Exh 14 the P3 report completed by the Senior Clinical Officer, PW7 after examining the accused. Counsel took issue with the fact PW7 had said that he had not renewed his practicing certificate since Registration in 2002, because being a public servant, he was not required to renew it; and that he could not remember his admission number. Public servants who do not perform private work, whether advocates, doctors and clinical officers, among others need not take out practicing certificates as they do not need them for the purposes of their work. PW7's explanation to that effect was correct. Nothing turns on this point.**

71. Mr. Kariuki urged that PW7 was inconsistent in his evidence regarding the date he examined the accused between 23rd and 24th. I have examined the evidence of this witness. His evidence was that the accused was taken to Tigoni Hospital where PW7 works, on the 23rd July, 2014. PW7 said that it was on 23rd that he treated him as an in-patient, and that he was discharged the same day as the discharge summary by Dr. Brenda of Tigoni Hospital clearly indicated. For purposes of the P3 form, PW7 testified that Police Officer Syengo took the accused to PW7 on the 24th and requested for the examination for purposes of filling the P3 form. PW7 later on changed and said that the date he examined the accused was 28th July, which was also the date indicated in the P3 form P. Exh, 14. I find nothing turns on this.

72. Mr. Kariuki took issue with the fact PW7 did not indicate the state of the clothing the accused had when he examined him and filled the P3 form. Counsel urged that omission was against the rules governing filling of the P3 forms. PW7 saw the accused on 23rd July when PW12 transferred him there from Thika Level 5 Hospital. He examined him and filled the P3 form on the 28th July. The brief background of the case on page 1 of the form was clear that the incident under investigation had taken place on 18th July. Having known the date of incident, and having received him from another hospital, it would have served no purpose to indicate the state of accused clothing on the 28th several days after the date in question. I find nothing wrong with PW7's decision not to complete that bit of information.

73. The defence took issue with fact the original P3 form produced in court had additional information that was not there in the copy supplied to the defence. The additional information was about the probable weapon that caused the injury noted between the thumb and the index finger. PW7 admitted that the probable weapon that caused the said injury was not indicated in the photocopy shown to him, which is the copy that was supplied to the defense. PW7 admitted adding that information while in court. There is nothing wrong with doing that however the prosecution should have brought that to the attention of the court, which if the court allowed, the amendment should have been made and countersigned in open court. It was irregular how the change was done. However, the change was duly countersigned. I am satisfied that the error has not occasioned any prejudice to the accused.

74. The other issue taken by the defence was the fact PW7 indicated that he did not write any statement except the report, and the fact he disowned a statement included in the Witness Statements supplied to the defence by the prosecution. The issue of extra or disowned statement of PW7 was taken up with the investigating officer who said he did not write any statement from PW7 and said that there was another I.O. who should explain. For purposes of evidence PW7 was a formal witness and all he did in this case was reduced into a report. The report is sufficient evidence for the role he played. The

presence of a statement alleged to be his is neither here nor there as it was not shown to have compromised the prosecution case, nor prejudiced the defence. I find nothing turns on this issue.

75. Mr. Kariuki took issue with the manner in which injuries found on the accused were described. He took issue with the use of the term two deep ‘*ulcerations*’ and called PW7 a joker for using that term as according to Online Wikipedia that word is associated to ulcers which, counsel urged can only form in the stomach or duodenum. He took issue with use of word ‘*nickles*’. In court PW7 used same word ulcerations to describe the injuries from the middle knuckle to the 4th finger, and he explained that the term was both a medical term and an English word. PW7 testified that an ulceration is an injury to the skin which does not go beyond the skin. His evidence was the ulceration was an injury also known as boxers’ injury and was caused by a blunt object.

76. The witness pointed to knuckles in court as the area where he saw the injury. That is what he spelt as nickles in his report. That was clearly a topographical error. What PW7 meant was clearly knuckles as pointed out in court.

77. I will quote a persuasive case to demonstrate that medical evidence should not be disregarded without good cause. In the case of the REPUBLIC Vs. LANFEAR 1968 1 ALL ER 683 where DIPLOCK, L. J. gives the correct English position in regard to doctors’ evidence thus:

‘... Our view is that the evidence of a doctor, whether he be a police surgeon or anyone else, should be accepted, unless the doctor himself shows that it ought not to be, as the evidence of a professional man giving independent expert evidence with the sole desire of assisting the court.’

78. I will quote from a text, Sarkar’s Law on Evidence 15th Edition Vol. 1, the opening remarks under the title “*Medical opinion and its value*” thus:

“The opinion of physicians and surgeons may be admitted to show the physical condition of a person, the nature of a disease, whether temporary or permanent the effect of the disease or of physical injuries upon the mind or body as well as in what manner or by what kind of instruments they were made, or at what time wounds or injuries of a given character might have been inflicted, whether they would probably be fatal, or actually did produce death.’

79. Mr. Kariuki urged the court to reject the P3 form P. Exh. 14 on the basis of the issues raised on the evidence of PW7 as dealt with herein above. I find that PW7 gave his opinion as to injuries he found on the accused, which was within his training and knowledge, and that his intention was to assist the court.

80. Mr. Kariuki was suggesting that the word which PW7 may have meant was a laceration. A laceration is a deep cut or tear to the skin or flesh synonymous to slashing, tearing or ripping according to Wikipedia. That was not the same as the injury PW7 intended to describe. He was very clear in his mind what he meant, and having used it in the medical meaning of it, neither counsel nor court have the power to suggest to PW7 that he chose the wrong word. I have found the challenges to PW7’s report inconsequential and I have given my reasons. I find no reason to reject his opinion as contained in the P3 from, P. Exh. 14.

81. The defence challenged the evidence of PW9 for disowning a statement attributed to him. Regarding that statement Counsel urged that it indicated that a blood stain was taken from the driver’s seat and finger prints on the knife lifted. There was a swab taken of blood on the driver’s seat and that same was sent to PW10 for analysis. As for the knife PW9 was clear that he photographed the bloody finger print on the knife as lifting it any other way would have destroyed it. I fail to see where the problem raised on the two item lies, as truly there is no inconsistency in that evidence. As for the disowned statement, as nothing was shown to have been included in it which affects the prosecution case or prejudices the defence, I find nothing turns on this point.

82. I wish to deal with the mix up markings of exhibits sent to the Govt. Chemist for analysis. PW10. Dr. Onyiego admitted in cross examination that there were two sets of samples of exhibits sent to them which bore same markings. When asked whether there was any confusion caused, she stated that the double markings were noted by her and that they did not cause any confusion.

83. I examined the markings of the said exhibits in the exhibit memo forms and in the evidence of PW10. These were sent to the

Govt Chemist on different days. There were two items marked J by the police. These were a kikoï of the deceased and shoes of the accused. The other set of items given same markings were a pair of deceased shoes and a blood sample. I am satisfied that there is no way labelling these four items could have caused confusion to PW10 as they are distinctly different.

84. Having considered all the evidence challenged by the defence as being inconsistent and contradictory, I find that inconsistency if any was not material as to affect the case, neither were they fundamental as to go to the core of the case or to cause prejudice to the accused. Inconsistencies as observed by the courts are bound to be present in a case. In **Joseph Maina Mwangi -vs- Republic Criminal Appeal No. 73 of 1993** this Court held:

“In any trial, there are bound to be discrepancies. An appellate Court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code vis whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences”

85. **I now wish to consider the evidence of DW2.** DW2, Sophie Hannah Mukwana is a Forensic Scientist and a Consultant. She produced what the defence counsel referred to as a DNA Profile Review after a critique of the Government Chemist’s Report **P. Exh.19**. Her Report is dated 21st September, 2018 and was produced as **D. Exh. 1**. The witness stated that upon studying the Government Chemists report, she noted inconsistencies in the report. She highlighted them in her testimony. She identified item C a blood swab from the driver’s seat of the subject vehicle which was at pages 33 to 36 of the photolog, and stated that the same was not captured. She stated that from the samples she had indicated in her report, the peaks in E-grams did not meet the threshold. She raised issue with the heights in the peaks of the tables provided saying they were too short, and stated that if that was the case, a repeat analysis was recommended. The witness highlighted other areas of the report which she said on each of the E-grams where there was a red and green colour, it meant there was an issue which needed to be addressed.

86. The learned prosecution counsel Ms. Onunga cross examined DW2 as to her registration as an Analyst and she stated that she was not gazetted. DW2 stated that she had been an Analyst for 8 years. She said that she was only drawing a conclusion based on the findings in the Government Chemist’ Report.

87. Mr. Kariuki submitted that D. Exh. 1 was a critique of the governments analyst’s report produced by the prosecution. He urged that DW2 revealed and clearly demonstrated that the government analysts report was not in accordance to the standard laboratory practice.

88. Regarding expert witnesses the Court of Appeal in **DHALAY vs. REPUBLIC {1997} KLR 514** held:

“It is now trite law that while the courts must give proper respect to the opinion of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.”

89. This court has been urged to disregard the evidence and report of PW 10, the Govt Chemist on the basis of a report by DW2, also an Analyst. I am guided by the case I have quoted of **Dhalay**, supra. From that authority, the court is entitled to to examine all other evidence alongside the expert evidence and if there is proper and cogent basis it can reject the expert opinion. The basis the defence has provided for rejecting PW10’s evidence and report is the evidence of DW2. The defence is not raising issue with reliability of the report on account of misinformation, or consideration of irrelevant facts or omission of relevant facts. What the defence is challenging in the report of PW10 is the fact the in carrying out the analysis standard laboratory practice was not followed.

90. The so-called Standard Laboratory Practice was not exhibited in court to enable the court examine it and form an opinion on the facts argued by DW2 and the defence counsel. What that practice is was not presented to the court.

91. I noted that PW10 was not cross examined on the Standard Lab Practice talked about by DW2. It would have been prudent to put the questions to PW10 on areas of concern before calling another expert to testify on those areas. And there was nothing wrong with the defence applying to cross examine PW10 further after the close of the prosecution case for that purpose. This was not done. That means the court was denied an opportunity to test the response of PW10 against that of DW2 and against the rest of the evidence in order to draw a cogent and firm conclusion.

92. I also considered the person that was challenging the expert report in issue, and the person who was being challenged. DW2 stated that she was not registered as an Analyst. I do not know what that means. Could be qualified in that field. Could it mean she has some training remaining before she can be considered for registration" The court was not enlightened on that. DW2 said that she had 8 years' experience in the relevant field.

93. PW10 on the other hand has 25 years of experience in Analysis to her credit, and has Masters Degree in the same field. Whether an unlicensed expert with less than half the years of experience, and with less qualification can critique the work of the more educated and the one who has more than double the years of experience remains to be seen. It is definitely ludicrous. I say no more.

94. **As to whether the prosecution has proved motive** for the commission of this crime. It is not necessary to prove motive in any charge unless the law requires it. **Section 9(3)** of the **Penal Code** stipulates thus:

'(3) 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.'

95. That provision was the subject of interpretation in the case of **Chogo Vs Republic (1985) KLR1**, where the Court of Appeal held as follows:-

"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 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not."

96. In the case of **Libambula -Vs- Republic (2003) KLR 683 the Court of Appeal** stated:

"We may pose, what is the relevance of motive here" 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 Evidence Act Cap 80 Laws of Kenya.

Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof if it is not essential to prove a crime."

97. The motive for the attack on the deceased can be seen from their history. The two had co-habited together but in 2011 when the deceased left the accused she had no intentions of going back. That was the evidence of PW3. The accused contested it saying deceased left because PW3 was irresponsible and a drunkard; and that their mother needed help as she was senile, which PW3 could not provide.

98. I noted that PW3 was not asked about being irresponsible or a drunkard during cross examination. He was not questioned about the deceased mother being senile or needing help at any time before she died. That leaves only one conclusion, it was an afterthought.

99. Even if we are to accept that the deceased mother needed help and that it was the reason the deceased left her matrimonial home with the accused, one other point begs an answer. The undisputed fact that the mother of the deceased died three months after the deceased returned to her home in 2011 and she made no attempts to return to the accused, three years down the line. That is clear evidence that the mother's sickness was not the reason she left.

100. PW3 testified that the accused was violent and that the deceased returned home twice before 2011 with 'black eyes'. The has contested that bit of evidence. The defence maintained that the bare fact that PW3 never witnessed the fights, and the fact the deceased never made any such report to the police, there was no proof of violence. I accept the defence argument that the prosecution has not proved the fact that the accused was ever violent to the deceased before. I find however that the deceased by her conduct t return home and remain there the four or so years before she met her death is a clear indication, she had no intention to

return to the accused. That she left the accused; and the accused conduct to hire a vehicle in order to ride with her for three days before he struck her, is sufficient proof of the existence of motive on the part of the accused to harm the deceased. The attack on the deceased was clearly a revenge mission for leaving the accused. The accused planned it well. He hired a vehicle and drove the deceased for three days in it for her to gain confidence in him before he attacked her.

101. Regarding the issue whether the prosecution failed to call material witnesses in this case and whether that can justify the court to make an adverse inference.

102. There were two material witnesses not called. The worker who processed the accused at Macki Hotel and the doctor who treated the accused at Thika Level Five. Their evidence was crucial. Regarding the receptionist who booked in the accused to Macki Hotel, no record was adduced or evidence given regarding his admission on the night of 18th. There was only the evidence of PW8 that the accused was found unconscious inside the room he had hired on the following day. Even though there was no record of booking the room, having adduced evidence that he was in the room he hired the night before compliments the evidence of the witness not called as a witness. The fact his properties were found in that room including his ID card, and the same handed over to the I.O. PW12 removes any doubt regarding the booking in of the accused the night before.

103. PW7 stated that he interviewed the accused and saw the treatment notes from Thika Level Five and saw that the accused had alleged he had been drugged, and that is what he was being treated for at Thika Level Five Hospital.

104. The doctor who treated the accused at Thika Level Five could have shed light on what the accused was being treated for and what may have caused him to lose consciousness. From the evidence of PW7, I find some light was shed, that the accused was being treated for a case of drugging. As to whether it was self-inflicted or administered by another, even the doctor from Thika could not have answered that. I find that even though the doctor was not called, the same was complimented in the evidence of PW7.

105. Mr. Kariuki raised issue with failure by the prosecution to call Mrs. Ikonywa who first told PW3 about an accident, only for it to turn out to be deceased body on alleged accident scene. Counsel urged that the prosecution did not call helpful evidence and he invited the court to make an adverse inference. I do not find Mrs. Ikonywa a helpful or useful witness. From the evidence before the court the source of her information about the alleged accident which led PW3 to find his sister's body is unknown.

106. In conclusion on this point I find the evidence of the doctor from Thika and the receptionist at Macki Hotel were important witnesses. However, failure to adduce their evidence did not materially affect the prosecution case as there was other complimentary evidence adduced in the form of PW7 and 8 respectively as explained herein above.

107. The other evidence left out was the findings on the finger print on the knife taken by PW9. It was important to find out whether the photograph of the finger print yielded any results. Even without that evidence there was sufficient evidence upon which to reach a just conclusion of the matter.

108. As to whether the accused defence is plausible and tenable. According to the accused defense, he claims that he and the deceased were attacked by robbers on somewhere along Limuru Highway. The accused said he sustained a pierce on the neck and that he was strangled. PW7 who saw the accused and examined him thoroughly five days after the incident did not find any strangulation marks or any piercings on his neck. The injuries noted were on the hands, which even PW8 testified seeing as he took the accused to hospital. I have already found that the accused claims that he passed out immediately after being attacked by robbers was not truthful. I have also found that his defence that he woke up at Thika Level 5 Hospital from the time of falling unconscious at Limuru was not true. The accused denied he had human bites on his hand and challenged PW7's evidence in that regard in the final submissions. As I have already stated I found no reason to discard the findings of PW7. I found he acted in good faith and did his best according to his level of training. PW8 saw the same injuries and stated so in evidence even though not using the same terms as PW7 did. The conclusion is that the accused had human bite and the only way they came to be on him as the person he was attacking was trying to defend herself. I find that the accused was not a victim during the attack in question, but that he was the attacker.

109. The accused wants the court to believe it is not him who attacked the deceased. The concern is that while accused had minor injuries, the deceased was severely and fatally wounded. Could the injuries the accused had cause unconsciousness at the scene of attack, was the question the prosecution asked. They were classified as harm. There is no way these injuries could have caused the accused to lose consciousness. He was not telling the truth.

110. The other issue was the abandoned subject vehicle. The accused claims he has no idea how the vehicle left Limuru for Kirinyaga road in Nairobi. He claims from date of attack he woke up in hospital. The issue of waking up in hospital has been dealt with to the effect the accused took himself to Macki's Hotel, and that it is the Manager there who took him to hospital on the second day.

111. I find from all circumstances of the case that it was the accused who abandoned the subject vehicle at Kirinyaga Road. Incident at Limuru was around 8pm or so. The accused booked himself at Macki's hotel at 11pm. He had ample time to commit the offence, drive the vehicle to Nairobi, abandon it and travel by other means to Thika. The reason for doing all that he did was simple. The deceased blood was all over the vehicle and so were her properties. There is no way he could have returned the vehicle to PW2. He was trying to exonerate himself from the vehicle's contents. That is why he could not return it back to the one who gave it to him as agreed.

112. Finally, as stated earlier, the accused took himself to Macki's Hotel in Thika the same night after attacking the deceased and causing her death. The ID card and jacket and shoes he left behind are proof he slept in that Hotel on the night of the incident. He was found unconscious the following day at that Hotel. He cannot successfully deny stepping into the Macki's Hotel.

113. Having considered the accused defence I find it unreasonable, implausible and unbelievable. I reject it in total.

114. Having carefully considered the entire evidence adduced in this case, I am satisfied that the prosecution has proved its case against the accused beyond any reasonable doubt. I find the accused guilty for murder contrary to **section 203** of the **Penal Code** and convict him under **section 322** of the **Criminal Procedure Code**.

DATED AT NAIROBI THIS 13TH DAY OF DECEMBER, 2018

LESIT, J.

JUDGE



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