CASE NO.: CC 12/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

KENNETH BUNGE ORINA

CORAM: LIEBENBERG, J.

Heard on: 21-23, 27-30 September, 2010; 01, 04-06, 11-13, 18-19, 21 October, 2010; 18-19, 21, 26 January, 2011; 18 March, 2011; 04-06, 18,19, 21 April, 2011.

Delivered on: 28 April 2011

JUDGMENT

LIEBENBERG, J.: [1] The accused, a Kenyan national, was arraigned to appear before this Court on charges of murder, read with the provisions of the Combating of

Domestic Violence Act, 4 of 2003 (count 1); and defeating or obstructing or attempting to defeat or obstruct the course of justice (count 2); alternatively, violating a dead human body. He pleaded not guilty on all charges.

[2] Ms. *Mainga*, appearing on behalf of the accused on the instructions of the Directorate: Legal Aid, informed the Court from the outset that the accused elected not to disclose the basis of his defence; thus, putting the State to prove its case against him. He merely denied the allegation that he had killed Rose Chepkemoi Kiplangat (hereinafter referred to as his 'wife') and persisted therein up to the end of the trial.

[3] The State's case against the accused was summarised in its Summary of Substantial Facts in the following terms:

> *"The accused and the deceased, both Kenyan nationals, were involved in a domestic relationship as they were married and resided together at flat number 2 situated at the Nurses Home at the Grootfontein State Hospital where the accused was employed as a nurse.*
>
> *During the period 14 to 17 September 2007 and at flat number 2 the accused killed the deceased by stabbing her in the chest and/or slitting her throat with a knife or other unknown object. The deceased died on the scene due to respiratory obstruction or severe haemorrhage due to the incision wound on the throat. With the intention to defeat or obstruct the course of justice as set out in count 2 of the indictment the accused dismembered the following parts of the deceased body: The head, two forearms, two upper arms, two thighs and two lower legs. He dumped these parts and the torso at various places in Grootfontein after having inserted a panty and a*

face cloth into the vagina and the chest area of the deceased's torso. The accused also cleaned the flat where the killing and dismembering of the deceased took place."

[4] The State, represented by Mr. *Wamambo*, called no less than 64 witnesses during the trial, whilst the defence called only the accused and one more witness. The testimony given by some of the State witnesses was to some extent immaterial to the issues in dispute and as such, unnecessary to prove the charges against the accused; hence, it was left unchallenged by the defence. This unfortunate state of affairs was brought about by the accused exercising his Constitutional right not to disclose the basis of his defence at the commencement of the trial; thereby forcing the State to cover all bases. In addition, the admissibility of five documents was contested and after a trial-within-a-trial, three of these documents were ruled to be admissible in evidence. These are: a statement made to magistrate Nicolaidis on 14 November 2007; and two photo plans and annexures thereto relating to two incidents of pointing out made by the accused to Chief Inspector Kurz and Inspector Marais, respectively. The documents found to be inadmissible are: the proceedings held in terms of section 119 of Act 51 of 1977 on 20 November 2007 in the Magistrate's Court Grootfontein; and a document titled "Identification of Body" dated 22 November 2007. Reasons on the admissibility or otherwise of these documents, were given in a separate judgment. I shall return to the content of the admitted statements later herein.

BACKGROUND

[5] For a better comprehension of the evidence adduced during the trial, it seems necessary to briefly state the circumstances which brought the accused and his wife to

Namibia; and secondly, the situation that prevailed when the first three black plastic bags containing dismembered body parts were found on the streets of Grootfontein on 17 September 2007. As for the latter, by that time a special unit within the Criminal Investigation Department of the Namibian Police, called the "B-1 Butcher Unit", had been established and specifically tasked to investigate the 'serial' killing and dismembering of female persons in and around Windhoek. The body parts were thereafter dumped at various places along the B-1 main road; hence the name "B-1 Butcher" given to the unit investigating those cases. This team of investigators did not only consist of police officers but also included local and foreign forensic experts. Because of the similar *modus operandi* (the dismembering of the bodies) between the findings at Grootfontein and the cases registered in Windhoek, the B-1 Unit conducted the initial investigation which expanded across the borders of Namibia. This case, understandably, was given high priority within the police force in an attempt to trace the unknown 'serial killer' responsible for these deaths. Through their investigations the police later concluded that there was no connection between the accused and those cases registered in Windhoek.

[6] As regards the personal background of the accused and Rose Chepkemoi Kiplangat it is common cause that they were not legally married but resided together in the nature of a marital relationship according to the accused's custom. The relationship therefore falls within the ambit of s 3 (a) or (b) of the Combating of Domestic Violence Act 4 of 2003. Both were qualified nurses in Kenya when recruited for employment in Namibia; and whereas the accused had already taken up employment with the Ministry of Health and Social Services and deployed at Grootfontein in 2006, he was joined by his wife during the same year. She thereafter

also applied for a post within the same Ministry. Although informed by the Ministry in writing that she had been appointed, she had to date not yet taken up employment with the Ministry of Health and Social Services. It is common ground that the accused at the time of his arrest in 2007 was working at Grootfontein State Hospital as a theatre nurse where his duties, *inter alia*, were to co-ordinate activities in theatre and generally to assist surgeons during operations.

[7] From the evidence of Catherine Bonaya, a Kenyan colleague and friend of the accused; and reports made to the Grootfontein police in July 2007, it would appear that the relationship between the accused and Rose was troubled and showed signs of a break-up. Ms. Bonaya said that despite her friendship with the accused and Rose during their stay in Grootfontein in 2007, their relationship broke down when Rose accused her of seducing the accused. Inspector Ndilula testified about an incident on the 9th of July 2007 when he interviewed the accused who complained about his wife acting violently against him and that he sought assistance from the police to detain her until such time that he could secure her return to Kenya. It turned out that Rose at the same time arrived at the police station bare feet, dirty and disorientated; wanting to lay charges against the accused. A complaint under the Domestic Violence Act was registered that would have been heard by the local magistrate the following day. According to the accused the case was removed from the roll instead.

[8] During his testimony the accused denied that he told Inspector Ndilula that he wanted his wife to be detained by the police. According to him he reported her missing and that he feared she might have committed suicide as she was suffering from depression. He was unable to tell for how long she had gone missing as the

insident happened some time back. His evidence was supported by Inspector Garises, the Operational Officer, who heard the accused say to Inspector Ndilula that the deceased tried to commit suicide; something Ndilula denied during his testimony. Although nothing further relevant to this case came from that incident, it tends to show that there was a history of domestic violence between the accused and Rose.

[9] This conclusion is fortified by the evidence of Gloria Nomizamo, a senior colleague of the accused, who testified that between June – July 2007 the accused phoned her, saying that he was experiencing problems with his wife as she went berserk and started breaking the furniture and he wanted her to return to Kenya. During cross-examination the accused could not recall having told Ms. Nomizamo about his wife breaking furniture, but denied saying to the witness that he wanted Rose to return to Kenya. She said the accused later phoned towards the end of July, saying that he and his wife have sorted out their differences and there was no need for her to return to Kenya anymore. This the accused confirmed when testifying, but according to him, he referred to financial problems – an aspect not taken up with the witness Nomizamo during cross-examination.

It is also relevant to note that when Rose (again) disappeared, the accused, unlike the first time, did not deem it necessary to make a report to the police. He denied the reason why she had left him from time to time being because of his violent behaviour.

DISMEMBERED BODY PARTS

[10] Between 17 and 25 September 2007 dismembered human body parts were discovered at different sites in and around Grootfontein. In total there were ten body

parts namely, a head; 2 forearms; 2 upper arms; 2 lower legs; 2 upper legs; and one torso. Forensic evidence adduced during the trial would show that some of the limbs and body parts belonged to the same human body.

[11] On the morning of 17 September 2007 Grootfontein municipal workers discovered three black plastic (refuse) bags close to the gate and just inside the hospital grounds behind the mortuary. They used garden tools to open the bags and respectively discovered the head and two forearms of a human body in two of the bags. According to one worker, Fillemon Shikongo, they also found two surgical gloves (Latex gloves) and a brassier in the third bag. As regards the third bag, another worker, Teofelus Kawana, said that a night dress was also found in the bag; whilst the surgical gloves were lying next to the bags and not inside as testified by Fillemon. Despite the difference pertaining to the exact position of the gloves when discovered, they corroborate one another in material respects namely, that the gloves were found on the scene and in close proximity of the bags in which the body parts were discovered.

[12] Detective Sergeant Lungameni from the Namibian Police attended the scene soon thereafter and photographed the scene as shown in Exh. 'H'. He confirmed the evidence that two surgical gloves were found at the spot where the bags had been lying on the hospital premises. Detective Sergeant Apollos' evidence – except for the number of gloves found – corroborates that of the other witnesses in material respects and according to him, the third plastic bag contained a brassier and something like a seat cover. However, his evidence differs as regards the number of gloves found at the scene. Where the others testified about two cloves he claimed that there were *two*

pairs – one pair inside the other. They removed the bags with its contents from the scene and took it first to the offices of the Criminal Investigation Department of Grootfontein; and from there to the police mortuary, Tsumeb. As for the gloves, these he placed in a "sealed" envelope and later on handed it over to a Scene of Crime Officer, Constable Shikongo, in Tsumeb. He was adamant that nobody had tampered with any of the exhibits whilst under his control. The evidence of Sergeant Gomeb on this point is that he was responsible for taking photos of the scene and the body parts after it was taken to Tsumeb police mortuary.

[13] The second find of body parts was on the 22nd of September 2007 when school children made a report about a foul smell coming from a black bag lying a distance from the road leading into Grootfontein. Inside this bag Sergeant Hoa-Khaob discovered two lower legs and two upper arms wrapped in a grey and white striped blanket. After the scene was secured Commissioner Visser and Dr. Ludik, Director of the National Forensic Science Institute of Namibia (NFSI), took charge of the investigation conducted at the scene.

[14] Three days later, on 25 September 2007, residents of Grootfontein led the police to a spot where rubbish was dumped in an open area and where a dog was earlier seen eating on a human leg. A partly eaten upper leg (thigh) was found on the ground, with a second thigh inside a black plastic refuse bag, right next to it. Inspector Ndilula, who attended the scene, then ordered a search of the area and about 500 m from where the thighs were found, a human torso also wrapped in a grey blanket and black plastic bag, was found lying in the veld. Both scenes were photographed by Sergeant Gomeb that same day, from which he compiled a photo plan (Exh. 'J'). The body

parts were also transported to Tsumeb police mortuary. From there it was transferred to Windhoek police mortuary and handed over to Sergeant Haraseb. The defence formally admitted that the body parts did not sustain any further injuries during transportation between the different scenes and the respective mortuaries transported to i.e. Tsumeb and Windhoek. Sergeant Haraseb was responsible for taking two sets of fingerprints (Exhibits 'M' and 'N') from the body parts handed over to him, which he in turn, handed over to Warrant Officer Seraun.

FORENSIC INVESTIGATION

[15] I have already alluded to the fact that Dr. Ludik from the NFSI, on the instructions of the Namibian Police, became involved in the investigation. He directed an investigation team of forensic analysts consisting of Mrs. Swart and Messrs. Kongeli and Robberts, all attached to the NFSI; and directed the compilation of a compendium of forensic reports handed into evidence (Exh. 'V'). The team of analysts attended two scenes of crime situated in Grootfontein; also the police mortuary in Tsumeb where they examined the exhibits collected by the police from the different scenes. The photos, forming part of the compendium of reports, were either photographed by Dr. Ludik himself or were taken on his instruction by Mr. Robberts; whilst the points depicted therein were pointed out to them at the different scenes by members of the police. The exhibits were subsequently transported to Windhoek and booked in at the NFSI where Mrs. Swart subjected it to scientific examination and on each exhibit detected blood of human origin. These exhibits were: a seat cover; a face cloth; a second face cloth; a brassier; a bloodstained T-shirt; bloodstained toilet papers; and thirteen black plastic bags. She furthermore harvested

samples and swabs of the respective exhibits for DNA analysis. This included swabs taken from the inner palms of the gloves. On 5 October 2007 Mrs. Swart handed over to Capt. Labuschagne from the South African Police Service – who was also part of the B-1 investigating team under command of Dr. Ludik – the gloves; 13 black plastic bags; and other exhibits. I shall return to the evidence of Capt. Labuschagne later herein.

[16] On 01 November 2007 (after the arrest of the accused on the 30th of October), the team of forensic scientists entered the accused's residence at the nurses' home in Grootfontein to determine, by scientific means, whether there was any human blood present. The scene was subjected to chemical testing for the presence of blood and they specifically focussed on zincs and down pipes. No blood traces were observed or chemically detected; neither in the residence itself, nor inside a nearby store room on the premises. According to the evidence, depending on the detergent used, traces of blood could be erased completely, making it virtually impossible to detect the presence of blood by means of chemical testing.

[17] Mrs. Swart was responsible for the compendium of reports (Exh. 'V') comprising of Report 848-2007-BO1 (exhibits submitted to the NFSI); Photoplan 848-2007-BO1-PO1 (exhibits received; swabs and tissue specimen); Report 848-2007-R1 (scientific examination of the accused's residence on 01.11.2007); Photoplans and keys 848-2007-P1 and P2 (two crime scenes visited in Grootfontein; the visit to the police mortuary in Tsumeb; and during the autopsy performed in Windhoek). Dr. Ludik adhered to the reports submitted in evidence by Mrs. Swart in every respect.

[18] In his testimony Dr. Ludik also elaborated on the manner in which the cuts were made on the limbs. He explained that when dismembering the limbs of the human body, there are certain impediments when cutting. In support of this contention he referred to photo 48 (Photoplan 848-2007-P1) where several attempts (cuts) to dismember the head are visible on one side of the neck. From photos 37 and 38 he pointed out that fairly straight (symmetrical) cuts are visible on the limbs from which he deducts that a fairly sharp object was used; with a sure hand, and by a person having a fair idea of the human anatomy.

[19] I pause here to observe that during the testimony of Dr. Vasin, a Chief Forensic Officer and full time forensic pathologist, the same observation was made. This witness was called to explain and comment on the post mortem report (Exh. 'W'), compiled by Dr. Shangula, who had performed an autopsy on the body parts discovered in Grootfontein. The reason for this was because Dr. Shangula had in the meantime passed away.

After viewing the relevant photographs he, like Dr. Ludik, also opined that a sharp object was used by a person familiar with the anatomy of the human body when making the cuts; as one would expect to have found more (ragged) cuts on the body parts when the cutting was done by a person unfamiliar with the anatomy of the human body. In my view, there is merit in the inferences drawn by both witnesses.

[20] Dr. Ludik, with regard to photo 63, pointed out that it depicts a piece of garment (panty) lodged in the vagina of the corpse. Although Dr. Vasin testified that he had never before come across something similar to this, he was of the view that, according

to “references” (text books), this would be indicative of a pervert mind. However, no evidence was presented explaining this phenomenon. Dr. Ludik made some general observations pertaining to DNA evidence; the contamination thereof; and the preservation of blood samples for purposes of DNA testing. I shall return to this aspect of his testimony later herein.

POST MORTEM REPORT

[21] The chief post mortem findings reported on by Dr. Shangula in her report are:

- The whole body dismembered in ten pieces namely, head, two upper arms, two lower arms together with hands, two thighs, two lower legs together with the feet and the two forearms;
- A slit throat;
- An incision wound at the back on the left side;
- An incision wound on the left gluteus maxim (a large muscle in the buttock); and
- A perforated lower lobe of the left lung.

It was concluded that the cause of death was:

- Incision wound of the throat
- Dismembered, decomposed body parts.

TRIAL-WITHIN-A-TRIAL

[22] I have earlier hereinbefore mentioned that the Court, during a trial-within-a-trial found the statement made by the accused to magistrate Nicolaidis; and two photo plans, compiled by Chief Inspector Kurz and Inspector Marais, respectively, to be admissible in evidence (Exh's 'EE'; 'FF'; 'GG').

[23] The content of the statement made to magistrate Nicolaidis (covering seven pages) , can be summarised as follows: That the accused had remorse ("felt bad") for what he has done "as it was nor fair"; but failed to report the incident to the police as his mind "was not free". He described an incident which was recorded *verbatim*, that happened on 14 September 2007 in the nurses' home where he and his wife resided, and during which she uttered "bitter words and unusual questions" to him whilst saying that he on that day would die. Despite all his attempts to calm her down and his pleading with her, she continued acting strangely, whilst throwing documents and household items out of their flat. He took her threats serious and begged her to let him live; but when she started looking for a knife, he made a dash for the bedroom in order to find a spare key to the flat as she had locked him in. She followed him into the bedroom carrying a knife and when he tried to wrestle it away from her; she was accidentally cut on the neck. Despite her bleeding and being fatally injured, she continued saying that she had to kill the accused that day. He was overwhelmed for what he has done to his wife and begged her forgiveness. Her condition deteriorated to the point that she died whilst he sat with her, holding her for some hours. He realised that he had killed her "innocently" and did not know what to do. He went up to the police twice, but courage failed him every time to report the incident. He returned home and held the body until the morning, not knowing what to do. He later that morning attended a funeral and upon his return did not know how he would

manage to carry the body to the mortuary. It was then that he decided to cut it into pieces. On his way to the mortuary he realised he could not manage, and decided to leave it at the mortuary gate. The rest of the body he took to different places in the nearest field where he dumped it.

[25] The two photo plans admitted into evidence depict two separate incidents of pointing out: The first pertaining to the incident in the flat when the deceased was killed and the respective places where the body parts were discovered. The second relates to a follow-up pointing out in the flat of knives, a mobile phone, a passport, and letter of appointment. In respect of photo no's xxxii and xxxiv of Exhibit 'FF' the accused is depicted where he is wiping his face with a white cloth; and again where he is seated on the bed with his one hand on his face. This, according to Chief Inspector Kurz, was when the accused explained what had happened that day and then broke down in tears. However, during his testimony the accused denied these allegations and was adamant that, what he had narrated to magistrate Nicolaidis and the police during the pointing out, is merely what was dictated to him by three unidentified police officers who threatened him with his life.

[26] The Court, at the end of a trial-within-a-trial, delivered its reasons for rejecting the accused's evidence that he had acted under duress when giving his statement to magistrate Nicolaidis; and when making the pointing out to Chief Inspector Kurtz and Inspector Marais, respectively. The statement and both photo plans were accordingly admitted into evidence. There is no need to repeat what has been stated in the judgment and it will suffice to state that no evidence was adduced supporting the

accused's allegations of a protracted assault perpetrated on him during his detention at Oshivelo and during investigations done in Grootfontein.

FORENSIC EVIDENCE

[27] Fingerprint evidence:- One set of the deceased's fingerprints was handed over to the Ministry of Home Affairs for possible identification but apparently, without success. The second set was handed over to Sergeant Shipanga, a police officer attached to Interpol at National Head Quarters, Windhoek on 29 October 2007 by Warrant Officer Seraun with the request to determine from the Kenyan authorities whether the deceased was possibly a Kenyan citizen. The fingerprints were electronically transferred to Interpol Kenya. The following day Seraun provided Shipanga with the name 'Rose Kiplangat', which information was also forwarded to the Kenyan authorities.

[28] The reply came one day later, according to which the fingerprints sent could not be matched as is was not legible (clear). An ID Report (Exhibit 'T') of one Rose Kiplangat bearing the photo, fingerprints and personal particulars of the person was also received. Because of the poor quality of the fingerprints received in Kenya, it was proposed that the fingerprints taken of the deceased be locally compared against those appearing on the ID Report received from Kenya. These were taken to the Criminal Record Centre of the Namibian Police where Chief Inspector Dry, a fingerprint expert, compared the two sets of fingerprints and found the left thumbprint to be identical. Although testifying that, for a positive identification there should at least be seven corresponding characteristics, he only testified about *one*. He did not

find any other matching characteristics as the imprints were not sufficiently distinctive for identifying purposes. I shall return to this aspect of his evidence later.

[29] Staying with the fingerprint identification of the body, I now turn to the evidence of two Kenyan nationals namely, Benson Kasyoki and Eric Owino, who testified about their involvement in the identification of one Rose Kiplangat, a person of Kenyan nationality. Their evidence confirms that of Sergeant Shipanga as regards the ID Report and information relating to the fingerprints received from Interpol Kenya.

[30] Superintendent Kasyoki, a police officer attached to Interpol Kenya, confirmed having received a photo and a set of fingerprints sent to him by the National Centre of Interpol, Windhoek on 30 October 2007, for possible identification. With these, he approached the Principal Registrar of Persons in Kenya, but because of the poor quality of the fingerprints, classification was not possible. However, when provided with a name and date of birth – which were received the next day from Interpol Windhoek – this yielded an ID Report (Exhibit 'T') which *inter alia*, reflected the following particulars:- Name: Rose Chepkemoi Kiplangat; Female; Date of Birth: 27/10/1974; Father's Names: Joel Kiplangat Biondo; Mother's Names: Neem Kiplangat. On this document appears a photo of the person, the signature and a full set of fingerprints. It was this witness who proposed to his Namibian counterpart that the matching of the fingerprints should be done in Windhoek with the assistance of the ID Report. He confirmed that an original set of fingerprints were subsequently received from Interpol Windhoek on 22 November 2010 by courier service, which he handed over to the Director: National Registration Bureau for possible identification.

[31] The witness Owino, the Assistant Director: National Registration Bureau in Kenya received these fingerprints and from a manual search conducted, he found identical prints, in respect of which a confirmatory certificate was issued and stamped on the back of the set of fingerprints (Exhibit 'KK'). It was also through his doing that the ID Report was produced. From his testimony I understood that, for purposes of giving evidence in a court of law in Kenya, one is not required to compile a court chart from which (expert) evidence is tendered; because the confirmatory certificate issued by the National Registration Bureau, would suffice as proof of identity. It is for that reason that he (during a court break) made enlarged photo copies of the original fingerprints received from Namibia and that of the person registered with the registering authorities in Kenya as Rose Chepkemoi Kiplangat; and by comparing the middle finger on the left hand, he found it to be identical. He marked only three identical characteristics which, by looking at with the naked eye, in my view, are not clearly visible. This notwithstanding, his evidence is that he found the two sets of fingerprints to be identical in respect of each finger imprint and was therefore able to state that those were the fingerprints of Rose Chepkemoi Kiplangat.

[32] DNA evidence:- In addition to the attempts made to have the body parts identified on the fingerprints, another process was set in motion to do so by means of forensic DNA analysis. Mrs. Swart testified that she took swabs and tissue samples of the head and limbs, which she sealed in tamper-proof exhibit bags used for forensic evidence. On 11 October 2007 these were sent by courier service to the British Columbia Institute of Technology **(**BCIT) in Canada, for DNA analysis. Subsequent thereto she received two unsealed envelopes on 09 April 2008 being 'control samples'

of the parents of Rose which were sent *via* Interpol from Kenya. She placed these in a sealed bag and despatched it to the same institute (BCIT) for DNA analysis. I pause here to observe that Dr. Hildebrand from BCIT testified that the seals of all the tamper-proof evidence bags received from NFSI Namibia in this case, were still intact upon receipt and that he had taken photographs as proof thereof. His evidence on this point was not challenged.

[33] The control samples referred to above, relate to blood samples obtained at the request of Interpol Namibia from the parents of Rose Chepkemoi Kiplangat, residing in Kenya. To this end, Superintendent Kasyoki testified that on 25 February 2008 he – besides the earlier request pertaining to identification on fingerprints – also received a request to obtain blood samples from the parents of the person by the name Rose Chepkemoi Kiplangat. After contacting the parents and making the necessary arrangements, blood samples for DNA purposes were taken of both parents at Longisa District Hospital by Alfred Tanui, a Laboratory Technologist, employed by the Ministry of Medical Services. Subsequent thereto Superintendent Kasyoki personally took the samples to Nairobi where he handed it over to a State "pharmacist" who tested it for transmittable diseases before transferring the blood samples onto swabs, respectively. The swabs were placed in envelopes and sent to Windhoek by courier service. According to Superintendent Kasyoki contamination of the blood by human intervention was avoided at all relevant times. His evidence was corroborated in all material respects by the witnesses Neema Mangana (biological mother); Joel Biomuto (biological father); and Alfred Tanui.

[34] Sergeant Shipanga, from Interpol Namibia, confirmed having received *per* courier service two envelopes sent from Kenya which he personally delivered at the NSFI, Windhoek, that same day. As mentioned, these exhibits (control samples) were also sent to BCIT by Mrs. Swart.

[35] Dr. Dean Hildebrand, currently the Acting Director of the Centre for Forensic and Security Technology Studies at the British Colombia Institute of Technology in Burnaby, Canada is a scientist and a forensic DNA expert. During his testimony Dr. Hildebrand referred to four reports which he wrote pertaining to seventeen questioned exhibits submitted by Mrs. Swart for DNA analysis, which were received by courier service on 23 October 2007. These items covered a variety of tissue samples; panties; a vaginal swab; a drinking glass; an exhibit bag just labelled ‘exhibits’; swabs from gloves; cigarette buds; and ‘swab of head’. On 09 April 2008 a further two more blood samples were received. The purpose of having the first batch of exhibits sent was to attempt to recover DNA profiles from these questioned exhibits for future possible comparison; whilst the second set (blood samples) was for DNA analysis for comparison with the seventeen exhibits already sent during October 2007 for identification purposes. He explained that standard operating procedures are usually applied for various types of different DNA exhibits, which were employed in this case, depending on the type of exhibit. The purpose of this procedure is to isolate any inherent DNA within that evidentiary item; to determine if human DNA was present within that item; and then to attempt to generate a DNA profile that would be of use for comparison with a known reference sample. That was the purpose of all of the procedures performed in this case, relating to the exhibits received.

[36] Dr. Hildebrand gave a detailed exposition (which I do not deem necessary to repeat in the judgment) of the two procedures where first, a DNA extraction sample is generated, which is then placed in an instrument referred to as *Quantifiler* (PCR assay – polymerase chain reaction), a human-specific quantification method used to detect and quantify any human nuclear DNA. This instrument 'looks' for specific sequences that might be present in the sample. If those sequences are indeed present, the instrument will actually detect it, amplify it, and essentially 'see' or 'read' that specific human DNA sequence. Although the first phase is manually performed, the second phase requires a partly manual operation but thereafter the sample is placed in the *Quantifiler* that is specifically designed to do the chemical analysis and which, in turn, is interfaced to a computer that gives a digital reading of the number and the raw data that is looked at in each individual sample. It gives a value and has controls built in for quality assurance purposes. Dr. Hildebrand further explained that this instrument comes with the manufacturer's recommended schedule of calibration dates and has a specific calibration kit used to calibrate the instrument every six months. Also, that the Institute prescribes to that schedule and to the kit used for calibration. The *Quantifiler* method adopted in this instance is, according to the witness, quite common and widely used throughout North America, Europe, and (probably) in parts of Africa.

[37] The first report (No. 2007-D78-1) prepared by Dr. Hildebrand relates to the seventeen questioned exhibits (Q1 – Q17) mentioned above, which were subjected to DNA extraction. Some of the exhibits (Q11 – panties and Q12 – vaginal swab) were tested for semen and the rest for DNA. The vaginal swab tested negative for semen.

Not all the exhibits yielded sufficient quantities of human DNA. A sufficient quantity of human DNA was recovered from the following exhibits: Q6 (tissue from upper right leg); Q7 (tissue from lower right leg); Q9 (tissue from lower right arm); Q12 (vaginal swab); Q15 (swabs from gloves); and Q17 (swab from head). The human DNA recovered from the lower right arm (Q9) yielded a complete, unmixed female profile (of one person/donor) and the donors of the upper and lower right leg (Q6 and Q7), respectively, can not be excluded as a contributor to the lower right arm (Q9). The donors of exhibits Q12 (vaginal swab); Q15-1, Q15-2 (swabs from gloves); and Q17 (swab of head) can equally not be excluded as a contributor to exhibit Q9, the lower right arm.

[38] Putting it in simple terms, the conclusion reached by Dr. Hildebrand is that the DNA of the upper and lower right leg; vaginal swabs; swabs of the gloves and the swab of the head is *inclusive* of the DNA of the right lower arm (and of one person). The same female profile recurred over and over throughout the tests performed on fourteen of the exhibits.

[39] Because he at that stage had nothing to compare that specific profile to, he just calculated a number based on how common that DNA female profile is within a given population and concluded that a random match probability was estimated to be 1 in 107 billion, based on the African American population. In Dr. Hildebrand's view these numbers may differ as it depends on the database, but that they are all astronomically huge. Thus, it would appear that the chances of randomly selecting a person with an identical DNA female profile, identified in respect of the exhibits submitted for analysis, is virtually impossible.

[40] From these findings, and in the absence of any rebutting forensic evidence, it would thus appear that those exhibits with matching human DNA came from one and the same person.

[41] The second report (No. 2007-D78-2) relates to additional tests that were done for completeness sake on the drinking glass, which this time yielded sufficient human DNA. It yielded a complex mixture from at least 3 to 4 individuals, excluding the female donor mentioned in the first report. These profiles were found not to be useful for comparison purposes, add nothing to the case; and as such, are irrelevant.

[42] The third report (No. 2007-D78-3) also relates to additional testing done on seven of the original batch of seventeen exhibits submitted for testing and which at first yielded insufficient quantities of human DNA. These were: swabs from gloves; cigarette butts; swab from right arm; swab from left arm; swab from right hand surface; swab from left hand surface; and swab of the mouth. This time a sufficient quantity of human DNA was recovered from the gloves; which produced the same female profile noted earlier (Q9). Although the cigarette butts yielded a partial female profile, it excluded Q9 as a contributor and remains unassigned as it cannot be associated with any other profile in the case. The cigarette butts therefore had no useful DNA information relating to the case. The swabs taken from the respective body parts on this occasion yielded a sufficient quantity of human DNA. In respect of the swab taken from the right arm (Q18), it yielded a female profile, but excluded Q9 as donor. The reason for this Dr. Hildebrand explained was because it was a marginal profile with clear evidence of degradation within it. However, the profiles in the

remaining four exhibits were consistent, each yielding a partial – except for the swab taken from the mouth yielding a complete – female profile, which can not exclude Q9 as contributor.

[43] The fourth report (No. 2007-D78-4) relates to two items received from Mrs. Swart on 9 April 2008 by courier service, which are described in the report as: 1. "D78-K1: Bloodstained filter paper (Father of missing person)"; and 2. "D78-K2: Bloodstained filter paper (Mother of missing person)". These are referred to as "known samples" pertinent to the case (K1 and K2). The request received from the NFSI of Namibia was an analysis of the known exhibits/samples for comparison to the questioned exhibits, hereinbefore referred to as Q9. Common standard operating procedures were again followed and a sufficient quantity of human DNA was recovered from exhibits K1 and K2 respectively, to proceed with STR analysis. Each yielded a complete profile suitable for comparison purposes to the female profile generated and reported on previously for Q9 (tissue from lower right arm) and Q15 (swabs from gloves). The report in paragraph 2 under the heading "Conclusion" reads as follow:

> *"2. With respect to the identification of the missing person, the genetic evidence is estimated to be 3 million times more likely if the donors of exhibits K1 and K2 are the biological parents of the missing person (based on the African American population database). This represents very strong evidence in support of identification."*

[44] The conclusion reached reflects that an association was found between the female profile and the two parents. Dr. Hildebrand in his testimony explained that the profiles were genetically consistent with a mother/father/child relationship and that

the female profile could be associated with that of the parents' at all nine STR positions; something that could be expected from a parent/child relationship. In this case, he said, there is very strong evidence in support of a biological relationship between the 'missing person' i.e. the unidentified body parts, and the two parents.

IDENTIFICATION OF FINGERPRINTS AND DNA FOUND ON SCENE OF CRIME

Fingerprint evidence:

[45] I now return to the evidence of Capt. Labuschagne. His testimony is that he was present (in Windhoek) when the exhibits he had taken to South Africa for forensic analysis were packed at NSFI. The purpose of having these exhibits analysed was to determine the identification of the suspect, who, at that point, was still unknown. These exhibits i.e. thirteen (black) plastic refuse bags and several Latex gloves, were sealed in two exhibit bags, each bearing different serial numbers.

[46] I pause here to observe that on the evidence of Capt. Labuschagne, the serial number of the exhibit bag containing the 13 plastic bags (NFE 02220) differs from the testimony of Mrs. Swart, who said the number of the bag was NFB 02220. When compiling her report Mrs. Swart clearly made a mistake, because Capt. Labuschagne referred the Court to photo 3 of a photo album he compiled from photos taken of the respective exhibits, clearly depicting the number as NFE 02220. He furthermore explained that the NFE numbering of exhibit bags is unique to Namibia, and is not used in South Africa. As for the wrong serial number (NFB instead of NFE) reflected in his affidavit, he explained that this was a mistake on his part when translating his

affidavit (the morning of the trial) into the official language for purposes of handing it in as exhibit.

[47] When looking at the difference in their evidence pertaining to a single letter, preceding a series of five numbers which otherwise correspond; and the evidence of Capt. Labuschagne that the exhibit bags were packed into a box in his presence at NSFI Windhoek and ever since remained in his custody up to the stage when he opened it in Pretoria, South Africa, I am satisfied that the correct number of the exhibit bag is NFE, as depicted on the photograph, and that Mrs. Swart in this regard made a mistake. There can be no doubt – despite the difference in numbers – that the exhibit bags Capt. Labuschagne testified on, are the same exhibit bags packed by Mrs. Swart at NSFI Windhoek, containing the black plastic refuse bags and Latex gloves.

[48] Capt. Labuschagne said that after opening the exhibit bag containing the Latex gloves, he took a swab from the gloves which were ‘drenched in sweat’ and pressed together. After placing this swab in another sealed exhibit bag, he handed it in at the Forensic Science Laboratory, Pretoria, for DNA analysis.

[49] Regarding the black plastic bags received by Capt. Labuschagne, he testified that, through a process called Cyanoacrylite – generally referred to as the ‘super glue fuming process’ – he developed a fingerprint on one of the bags; which print was further enhanced by a process called Rhodamine 6 G, producing a workable print. That portion of the bag on which the print appeared was cut out and handed in as exhibit.

[50] It is noteworthy to point out that, at that stage the donor of the sweat (moist) found on the gloves, as well as the identity of a person's fingerprint found on the black plastic bag, have not yet been determined.

[51] On 19 November 2007 Capt. Labuschagne received a sealed box under Namibian seal no. 0088 from a certain Professor Gerhard Labuschagne from the Investigative Psychology Unit, Pretoria. This person did not give evidence in this case. Attached to this box was an envelope containing a smaller envelope with a blood sample of which the seal was still intact. He, in turn, sealed it in another exhibit bag and handed it in at the Forensic Science Laboratory the next day.
In the envelope was a set of fingerprints bearing the name Kenneth Bunge Orina (Exh. 'X'). The box itself contained other exhibits, listed on two pages, which were packed by Sergeant Gomeb and sent for forensic analysis.

[52] Having now received a set of fingerprints of the suspect, Capt. Labuschagne compared these with the fingerprint found on the plastic bag and found a matching print of the left ring finger. As indicated on an enlarged chart prepared for court purposes, he found ten corresponding points. Before giving evidence he took fresh fingerprints from the accused and after comparing the fingerprint of the left ring finger with Exh. 'X' and with the print found on the plastic bag, he concluded that the fingerprint developed on the plastic bag, originated from the accused before Court.

[53] The evidence of Capt. Labuschagne was not challenged by the defence as far as it concerns the finding and identification of the fingerprint on one of the plastic bags. The witness meets the requirements set for an expert witness; and it must be observed

that the Court, without attempting to take over the role of the expert witness, was able to observe the corresponding characteristics marked out on the court chart. To this end the State has proved that there is a connection between the accused and one of the bags containing human body parts, discovered in Grootfontein.

DNA evidence:

[54] I have already alluded to the fact that Capt. Labuschagne took a swab from the Latex gloves which was handed in at the Forensic Science Laboratory, Pretoria for DNA analysis on 25 October 2007. Also, that a blood sample marked '333609 KB Orina' was received on 20 November 2007 for DNA analysis. These exhibits were packed and sealed in bags designed and used for exhibits. Both exhibit bags, when received at the laboratory, were sealed and intact with nothing showing that it had been tampered with when received by Ms. Inge Taylor, a forensic analyst attached to the Biology Unit of the Forensic Science Laboratory, on 10 December 2007 and 15 January 2008, respectively. Judging from her qualifications and experience, as stated in her testimony, she is considered to be an expert in the specialised field of DNA analysis.

[55] During her testimony Ms. Taylor explained what human DNA is; its uniqueness and what is looked for during the analysis. It must be observed that no evidence was led specifically on the procedure followed during the examination, except for saying that the results were obtained through the 'SDR DNA' analysis system; which results are set out in a table that reflects ten corresponding places on a double-stranded DNA molecule, generally referred to as a 'string'. Ms. Taylor gave her evidence by referring to these tables.

[56] Both samples (swab of Latex gloves and blood sample marked ‘KB Orina’) were subjected to DNA analysis and the results in respect of each, were by way of comparison, set out in a report compiled by Ms. Taylor, marked Exhibit ‘CC’.

She explained that on the Latex gloves a *mixture* of DNA was found, meaning that there was more than one donor of the DNA analysed. The one DNA donor was female and not identified; however, the DNA profile of this unknown female person was the same as the DNA harvested from the black plastic bag(s) by Captain Labuschagne. I pause here to observe that this aspect of Ms. Taylor’s evidence was elicited during cross-examination and did not form part of Captain Labuschagne’s evidence. Ms. Taylor in her testimony explained that in the absence of a control (blood) sample to compare the DNA profile of the unknown person against, the female donor remains, to date, unidentified. Regarding the second donor whose DNA was also found on the Latex gloves and after comparing it with the control blood sample marked ‘KB Orina’, it was concluded that the donor of the control blood sample (KB Orina) is *included* as a donor of the DNA found on the Latex gloves. In other words, that the DNA of the blood sample marked ‘KB Orina’ is *inclusive* of the DNA found on the Latex gloves; and that the DNA profile of an unknown female donor found on both the Latex gloves and the black plastic bags in which the body parts were allegedly discovered, was *the same*.

[57] It was testified that the possibility of contamination of the samples received for analysis is highly unlikely, as the DNA analysis of the swab of the Latex gloves were submitted for analysis even before the control blood sample was received; furthermore, that the docket and contents pertaining to the forensic analysis were in

Ms. Taylor's safekeeping during the period of its investigation until completion of the analysis.

[58] Ms. Taylor's evidence meets the requirements of expert evidence relevant to the outcome of the case. Furthermore, due to the specialised field of DNA on which the evidence is based; that the Court is obliged to rely on the views and findings of the expert witness when making its own findings on the proved facts. These findings were not challenged or shown to be unreliable; in fact, defence counsel considered it to be reliable evidence.

LAST SIGHTINGS OF THE ACCUSED'S WIFE

[59] The State called several witnesses who testified that they had either seen or had telephonic contact with the accused's wife for the last time during September 2007. Some of the witnesses said that although they did not have personal contact with her, the accused assured them that she was doing well.

[60] Catherine Bonaya, a colleague and friend of the accused, testified that she last saw Rose on 8 September 2007 when she and the accused came to her place to reconcile after some uneasiness had earlier developed in their relationship which caused the witness to keep her distance. Two days later she and Rose spoke over the phone and on 14 September she received a text message sent from the accused's phone to the effect that the person – referring to Rose – was unable to attend the funeral they would have attended together. (From the statement made by the accused

to magistrate Nicolaidis, it would appear that by that time Rose had already died and that the accused attended the funeral alone.)

[61] The last time that Rose was seen alive was on 13 September 2007 when she and the accused, according to the witness Mario Barry, an official from Bank Windhoek Grootfontein, visited the bank in order for them to sign a loan agreement with the bank. The accused's testimony on this point is that he last saw her on the 15th of September 2007.

[62] It is common cause that the accused took compassionate leave from 24 September until 05 October 2007 and the reason for this was that he wanted to visit his mother in Kenya, who had taken ill. Before his departure he told Catherine Bonaya that Rose would stay behind and that she had travelled to Windhoek to see a friend. Later that same day and whilst *en route,* he told Justine Momanyi, a fellow Kenyan colleague and friend staying in Rundu, that Rose was not travelling with him as she awaited her letter of appointment, and that she was doing well.

[63] During his visit to Kenya in September – October 2007, he visited Rose's parents' home at Longisa and according to Rose's mother, Neema Mangana, he was accompanied by his father and uncle. The purpose of their visit, according to her, was to inform the family that things were not going well between the accused and Rose in Namibia. This was denied by the accused, saying that he came there to inform her about his ill mother and to introduce his family, and not to complain about Rose. Mrs. Mangana on that day became worried and wanted to speak to her daughter first, before saying anything. When she told the accused to phone her, he replied that she

had a new phone number and was therefore unreachable. Upon asking the accused why his wife had not accompanied him to Kenya, he gave conflicting answers i.e. that she refused to come along; that there was not enough money to cover travelling expenses for both of them; and that she instead had gone elsewhere. Accused disputed this evidence, saying that he had only told the witness that they did not have enough money for both of them to travel to Kenya. She described the accused's conduct during their visit as being 'uncomfortable' and him not looking her in the eye when she inquired about Rose.

[64] After some few days Mrs. Mangana dialled the number they had of Rose whereupon the accused answered – despite him having told her earlier that Rose had a different cell phone number. The accused told her that Rose had attended a seminar; which the accused now disputes. When phoning a second time, accused said that Rose had travelled and when Mrs. Mangana tried for the third time, the call remained unanswered. Thereafter the accused did not answer his phone and Mrs. Mangana never managed to establish further contact with her daughter. According to her the last time she had spoken to her on the phone was in September 2007.

[65] Although the foregoing circumstantial evidence does not directly incriminate the accused, it must still be considered together with the whole body of evidence presented to the Court.

DEFENCE CASE

[66] The defence case is based on the evidence of the accused and that of Dr. Kabangu, a colleague of the accused at Grootfontein State Hospital during 2006 – 2007.

[67] The evidence of the accused can be summarised as follows: I have already hereinbefore referred to the incident on 9 July 2007 at the police station, Grootfontein, when the accused made a report concerning his wife, having gone missing. Regarding his arrest at the hospital on 30 October 2007, he said that he felt humiliated in the manner he was treated by the police in view of the public when accused of murdering his wife. He confirmed working at the time as theatre nurse at the hospital; which involved his participation in medical operations performed on patients and other theatre activities. He denied, when confronted by the police, having told them that his wife was at home as she was staying with a friend going by the name Agnes, in Omulunga township, Grootfontein.

[68] Regarding Agnes, the accused said that he met with her when she visited his wife once, but that he had no further information about her. He did not know her surname; her residential address; or contact details – this despite the fact that his wife went to stay with Agnes on several occasions. Rose did not tell him why she would go and stay with this friend for up to one-and-a-half months; neither did he ask her why she, being his wife, decided to leave him and move in with Agnes for no apparent reason. The last time he saw her was on 15 September 2007 at home; whereafter he only heard from his neighbour from to time to time that she had been spotted. In view

thereof, so he explained, he could not report her as missing. Personally he made no contact with her – despite Rose's inexplicable behaviour for leaving their common home for long periods at a time and without reason. Accused, on his own evidence, did not contact Rose in order to inform her that he planned on travelling to Kenya in order to see his sickly mother; neither did he invite her to accompany him there.
I pause here to observe that all attempts made by the investigating team to find the person referred to as Agnes, were unsuccessful.

[69] Unlike some of the State witnesses, the accused was unable to identify the person whose head is depicted in the photos before the Court and persisted in denying, that the body parts found, were those of his wife. The reason for this, he said, was because his wife had not undergone a hysterectomy as reflected in the post-mortem report. Pertaining to the latter, the accused's version is supported by Dr. Kabangu, a medical doctor who worked with the accused at Grootfontein hospital and who examined Rose on two occasions. The witness could not recall the date when, or the reason for, seeing Rose the first time; but the second time was on 24 August 2007 after she miscarried. This, he said, would not have been possible if Rose had a hysterectomy as stated in the post-mortem report. In his view, the lower abdominal scar on the body is not necessarily indicative of a hysterectomy as it could also be as a result of other procedures i.e. Caesarean section; tube pregnancy; a cyst on the ovary; and infection of the appendix.

[70] Dr. Kabangu explained that a hysterectomy can be performed through the vagina and where this would be done after death, much will depend on the state of decomposition of the body. Regarding the accused's experience pertaining to

operations of this nature, he said that the hospital records would show that the accused, as a theatre nurse, had experience in that regard; and that in some countries like Malawi, nurses are trained to perform such procedure. However, he was not sure what the situation in Kenya is pertaining to training in that field.

[71] When shown the photographs depicting the head of a person, Dr. Kabangu relied on the dentures – protruding teeth with an opening between the upper front teeth – and the high (withdrawn) hair line, when identifying the person depicted in the photograph as Rose.

[72] A statement made by the accused to Detective Warrant Officer Kandjimi who charged the accused on the 1st of November 2007, does not take the matter any further.

[73] Regarding the statement made to magistrate Nicolaidis and the pointing out to Chief Inspector Kurtz and Inspector Marais, respectively, the accused maintained – as he did during the trial-within-a-trial – that he made these statements and pointing out under duress, in that he was coached and forced by unknown police officers to do so. After admitting these statements into evidence no conflicting evidence was adduced – either by the State or the defence – compelling the Court to come to a different conclusion. In view thereof, the Court is entitled to have regard to the content of the statement and pointing out when deciding the case against the accused.

[74] Regarding the accused's fingerprint allegedly found on one of the black refuse bags in which some body part was found; his DNA allegedly found on Latex gloves found at the scene; and DNA evidence relating to the identity of the body, the accused

had no comment, except for pointing out that the relevant bag was found in his working environment.

[75] Lastly, the accused denied that he had any prior knowledge about his wife having been appointed as a nurse by the Ministry of Health and Social Services; and that the letter of appointment was found in his flat during a police search. He furthermore disputed allegations that he had killed Rose and thereafter dismembered her body.

EVALUATION OF EVIDENCE

[76] Ms. *Mainga* submitted on behalf of the accused that the State on several issues failed to prove its case beyond reasonable doubt, namely, the identification of the body; the finger print on one of the plastic bags found at the scene where the first body parts were discovered; the different numbering of one of the exhibit bags; the number of Latex gloves found at the scene; the involuntary making of a statement to the magistrate; the fact that no traces of blood were found in the accused's flat; and the conflicting evidence between the port-mortem report and the evidence given by Dr. Kabangu as far as it relates to Dr. Shangula's finding that a hysterectomy was performed on the body which was later identified as being that of Rose.

[77] I shall deal with each of these points raised separately and revert to the evidence summarised *supra.*

[78] Ms. *Mainga* contended that the Court must disregard the evidence given by those witnesses who claimed to have identified the body, as they were unable to identify the person the first time when a photo of the person's face was published in the printed media. This relates to the evidence of the witness Phyllis Njeru, who said that although she saw the photo in a newspaper she did not recognise the face being that of Rose; but only came to realise this after the accused was arrested as a suspect and she again looked at the photo from which she then identified her. Falling in the same category is the evidence of Catherine Bonaya, who were asked to identify the person at Windhoek mortuary. By that time she already knew that the accused had been arrested in connection with the case and that she was required to identify Rose, a person known to her. Both witnesses based their identification on two features namely, the short hair and protruding teeth. Besides these features – which in my view cannot be described as unique – there was nothing else on which the identification was made. The reason for this, I believe, is because of the visible injuries to the face and the state of decomposition of the head, clearly visible on the photographs, making it extremely difficult for identification.

The same would equally apply to other witnesses who testified that they were able to identify the person as Rose, namely both her parents and Dr. Kabangu.

[79] Although I am not prepared to find that the evidence given by the respective witnesses should, for the abovementioned reasons, be rejected as false, I am of the view that the Court should be very cautions in relying on such evidence where the identification of the deceased person relies solely on such evidence. The fact that each of the witnesses at the time of making the identification beforehand knew that the accused was charged with the murder of his wife, there is a real likelihood that

each anticipated that it was indeed Rose; a factor that may have influenced their respective identifications. I say this with the deepest of respect to the parents of Rose, who were required to give evidence on identification from the photos presented to them in Court; which in itself, was a very emotional and tearful experience. I am also mindful that parents know their children and are likely to identify them; however, in the light of the generality of the features relied on in this instance, a Court, notwithstanding, should follow a cautious approach when solely relying on such evidence to convict in criminal proceedings. Therefore, not much weight should be given to the visual identification made by these witnesses.

[80] Regarding the identification of fingerprints by Chief Inspector Dry, Ms. *Mainga* submitted that it was unreliable as no distinctive characteristics were pointed out; neither was the Court provided with a Court chart, enabling the Court to verify the witness' testimony from the chart. The Court raised this issue *mero motu* with the witness during his testimony and it was explained that Chief Inspector Dry was unable to prepare a Court chart because the exhibits were collected by the investigating team before be could do so. Although not raised by counsel, the same would apply to the evidence of Eric Owino of the National Registration Bureau in Kenya, about his identification of fingerprints allegedly being that of Rose Chepkemoi Kiplangat.

[81] As mentioned, in respect of these two expert witnesses, no court chart was prepared and handed in from which the Court would be able to see for itself any matching or identical characteristics testified on by the witness. In the absence thereof the Court is hardly in a position to verify the probative value of such evidence,

which evidence was not only crucial, but formed the pinnacle of each witness' testimony. It is normal practice in our courts that the fingerprint expert prepares a court chart on which enlarged fingerprints of exhibits relating to the suspect are depicted next to each other; and on which the corresponding characteristics are clearly marked out. Identical characteristics alleged to exist, are usually visible to the naked eye; and in this way, the Court is able to form its own opinion, not solely relying on the opinion of the expert witness. *In casu*, the Court was not placed in the position to form its own opinion as, according to Chief Inspector Dry, the exhibits ('M' and 'T') were collected before he could prepare the court chart. But, is this a requirement or merely an assistance to the Court; and would absence thereof be fatal to the State case one may ask?

[82] In *S v Segai*[1] it was held that the procedure followed when comparing the different fingerprints, was unsatisfactory as there was no comparative chart before the Court from which it could verify the evidence of the expert witness in regard to the different fingerprints, and adjudicate the reliability of such evidence. In that case there was evidence that there were ten points of similarity between the two prints – while seven points are sufficient to prove identity beyond reasonable doubt.[2] In *S v Nala*[3] the Court of Appeal said that *"where comparison revealed seven points of correspondence, the identity of the disputed fingerprint was positively established. …… On the face of it, this approach appears to be logical sound and, according to his evidence, is the accepted current practice."* The same approach has been followed by the courts in this jurisdiction and generally accepted as practice. I have no reason to think otherwise.

[1] 1981 (4) SA 906 (O)
[2] *S v Phetshwa* 1982 (3) SA 404 (ECD) at 405H
[3] 1965 (4) SA 360 (A) at 361H

[83] The *Segai* case (*supra*) was however *not* followed in later judgments in different divisions of South Africa and in *S v Van Wyk*[4] and *S v Phetshwa* (*supra*), it was held that it was totally unnecessary to insist on the preparation of a comparative court chart in respect of the fingerprints that were to be compared. The approach a court should follow when assessing fingerprint evidence was stated in the head note of the *Nala* case (*supra*) as follows:

> *"Where a trial Court investigates the evidence of a fingerprint expert regarding points of identity it does so, not in order to satisfy itself that there are the requisite number of points of identity, but so as to satisfy itself that the expert's opinion as to the identity of the disputed fingerprints may safely be relied upon. If the Court is itself able to discern all the points of identity relied upon by the expert, it wil no doubt more readily hold that the opinion of the expert may safely be relied upon than in the case where, e.g., it is quite unable to discern any of the points of identity relied upon."* (emphasis added)

[84] From the above it seems clear that, irrespective of the number of corresponding characteristics found between the two fingerprints, it remains for the Court to determine the *reliability* of the expert's opinion, pertaining to the identification of the fingerprints under consideration. That obviously, would depend on the facts of each case. I respectfully find the reasoning sound, as it could hardly be expected from a presiding officer to step into the shoes of the expert witness and to adjudicate facts falling outside the field of knowledge of such presiding officer; for which he then

[4] 1982 (2) SA 148 (NKA)

would be required to rely only on his own observations and limited knowledge of a highly specialised field of science.

[85] It is trite law that the Court is not bound by the opinion of an expert witness and the reliance placed on such evidence will largely depend on whether the reasons advanced by the witness for having formed that opinion are credible, and as such, reliable; supporting the opinion expressed by the expert witness.[5] In this case the reasons advanced by the witness Dry are far from satisfactory and fall short from the high standard required by the courts when it comes to fingerprint evidence. Despite the requirement that for fingerprint identification there at least must be seven identical characteristics, the witness testified that he could see one ('a small whirl starting in the middle'). On cross-examination when asked how many corresponding characteristics he could observe between the two sets of fingerprints, he replied that he was <u>not sure</u> and *"that there must have been more than seven."* What is clear from this answer is that the Court cannot rely on the witness' evidence regarding the positive identification of the fingerprints in question, and therefore, in my view, has little, if any, probative value.

[86] As for the evidence given by the witness Eric Owino, who compared the same fingerprints in Kenya and found it to be identical in all respects, the witness, during his testimony and for the convenience of the Court, prepared a court chart on which three corresponding points were highlighted. Although this number also falls short from the seven points of correspondence usually accepted by the courts, I am satisfied that the evidence given by this witness is reliable and can safely be relied upon. The witness testified that in Kenya they do not work on the number of corresponding

[5] Schwikkard & Van der Merwe – Principles of Evidence (Second Ed) par 8-3, p 85.

points, but compare the fingerprints one by one; which he, in this case, found to be identical. According to his evidence the prints were all clear and matched. This evidence was not challenged and there is nothing showing why the Court should not adjudge that evidence to be reliable

[87] In the result, the Court is satisfied beyond a reasonable doubt that the fingerprints taken from the hands of the unidentified body were positively identified by the witness Owino to be that of Rose Chepkemoi Kiplangat, a Kenyan national.

[88] As regards the collection of exhibits and the chain of custody pertaining to DNA testing done on swabs taken from different aspects of the body; as well as the collection of blood samples of both parents, counsel conceded that the chain of custody over the exhibits were duly proved. However, it was submitted that the blood samples collected and subjected to testing at a State "chemist" (laboratory) in Nairobi leaves much to be desired. This view is based on the evidence of the police officer attached to Interpol Nairobi, Benson Kasyoki, who was responsible for the collection and dispatching to Namibia, the blood samples taken from the parents of Rose. More specifically, his evidence that after obtaining the samples, he took these to a pharmacist in service of the government who was responsible for its packaging; and after testing the blood for transmittable diseases, the issuing of a declaration stating that the blood was not "infectious", a requirement stated by the courier service, DHL. Although Mr. Kasyoki at all relevant times had control over the blood samples and remained present when the blood was tested, he was unable to state exactly what test was performed. The samples were thereafter poured onto swabs, which were packed in envelopes and sent to Namibia.

[89] Ms. *Mainga* submitted that in view of the Court not knowing exactly the nature and impact of the 'tests' performed on the blood, it might be possible that it could have changed the DNA of the donors. Although true that the nature of the test performed on the blood samples is unknown, I have not been referred to any authority suggesting that this is even possible. On the contrary, Dr. Ludik during his testimony stated that contamination of the samples should at all times be avoided; packing can adversely affect the exhibits as DNA can disintegrate; that additives found in blood tubes are aimed at preserving the quality of the blood and none of these will *change* the DNA. From this I understand that if samples are not properly preserved, the DNA may integrate, but not change. Counsel's reference to the work of *L Meintjies- Van Der Walt: DNA in the Courtroom (Principles and Practice)* as authority, in my view, finds no application to the testing of blood samples, but merely emphasises the need for proper evidence collection. At p. 13 it is stated that *"if there is a problem at the evidence collection stage – the most important phase of the process – the laboratories will demonstrate flawed statistics, and success will be difficult to achieve."*

[90] From the evidence before the Court relating to the testing of the blood samples, there is nothing that supports the view that a substance was added to the samples or that it was subjected to a process which may change the DNA – if that is at all possible. In the present circumstances the Court, in the absence of any evidence supporting counsel's contention, is not persuaded by the argument that it may be possible that the test could have changed the DNA of the blood samples. In my opinion, that amounts to nothing more than speculation and conjecture.

[91] The evidence of Dr. Hildebrand pertaining to the DNA tests performed on several exhibits forwarded to him for analysis, was criticised by defence counsel for its generality. It was argued that, compared to the DNA evidence given by Ms. Taylor about DNA found on the Latex gloves, which counsel considered to be 'clear', Dr. Hildebrand failed to present his evidence in the same manner. I do not agree.

[92] In his testimony Dr. Hildebrand made it clear that there are different tests when testing for blood, saliva or semen; and in much detail (at the Court's instance), described the whole procedure of extracting DNA from several samples of the exhibits; from the beginning, up to the stage of generating a human DNA profile. The fact that he did not state his findings in tabular form does not mean to say that his evidence therefore does not meet the requirement of being reliable. The evidence given by Dr. Hildebrand has been summarised in some detail hereinbefore and need not be repeated.

[93] In *Menday v Protea Assurance Co Ltd*[6] the following was said pertaining to expert witnesses:

> *"In essence the function of an expert is to assist the Court to reach a conclusion on matters on which the Court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reason for the opinion which he expresses are acceptable … However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic."*

[6] 1976 (1) SA 565 (E) at 569

[94] The Court must be satisfied that a witness is competent to testify as an expert and has the necessary expertise on the subject he is called upon to testify. In its determination whether the expert witness' evidence is relevant to the case, the Court will follow a realistic approach.[7] It is further required that the Court be apprised of the facts and the reasoning on which the opinion is based. It is however not an absolute rule that the basis of the opinion must be stated, because sometimes it may be impracticable to insist on a comprehensive explanation of how an apparatus or a device functions.[8] If the Court is satisfied that the evidence of the expert can assist it in its determination of the facts and as such is reliable, it may rely thereon. However, in the final instance it remains for the Court to decide whether the opinion is correct. Where the Court deals with highly technical evidence – as in this case – and is unable to draw a reliable inference on its own, the Court is obliged to fully rely on the expert's opinion, even where the opinion would concern the very question that the Court must decide. In such an instance a high level of precision and care is expected from the expert witness when conducting his/her tests. It has been said that the courts should not assume the function of the expert witness and base its judgment on own observations and deductions in what should be an area of expertise.[9]

[95] When applying the foregoing principles to the evidence given by Dr. Hildebrand, I am not persuaded by counsel's submission that the Court should not rely thereon, and the conclusions reached by the witness. From his testimony it is clear that he is highly qualified in the science of DNA and has the required practical experience; making him an expert in that field. Counsel's averment that his

[7] *S v Nangutuuala* 1974 (2) SA 165 (SWA)
[8] *Schmidt & Rademeyer: Law of Evidence (Eight' Issue) at 17-14*
[9] *R v Fourie* 1947 (2) SA 972 (O) at 974

conclusions were merely generally stated is unsubstantiated, for every procedure was carefully explained to the Court, thereby giving the Court the opportunity of following and, to some extent, understanding the procedure to extract DNA from exhibits. As stated above, the Court is not required to assume the role of the expert and in some instances where the evidence is technical or specialised; the court would be unable to draw its own reliable inferences and is then obliged to place full reliance on the expert's opinion.

[96] In my view, this is such an instance and in the Court's evaluation of the expert evidence, I am unable to come to any other conclusion but finding that Dr. Hildebrand is an expert in DNA science; that he performed his investigation relating to exhibits and samples in connection with this case with the necessary care and precision; and that his opinion is reliable in respect of all tests performed by him on these exhibits and samples. Accordingly, I am satisfied beyond reasonable doubt that DNA analysis done on swabs taken from several aspects of the body parts, produced a human DNA profile that cannot be excluded from the human DNA profile of the parents of Rose Chepkemoi Kiplangat. Hence, the identity of the deceased based on genetics, has duly been established.

[97] Counsel did not attack the credibility of the witness Taylor, who performed DNA tests on the Latex gloves and a blood sample of the accused, respectively; thereby conceding the correctness and reliability of the conclusion and opinion expressed by the witness. The concession, in my view, is well made. Ms. Taylor is a forensic analyst specialising in the field of genetics; has approximately fourteen years of experience in biology and as such, considered to be an expert. She briefly

explained the procedure adopted during the extraction of human DNA from samples related to this case and noted her findings in her report. These findings were not challenged in any manner; neither was evidence adduced or any reason given why this Court should doubt the credibility of this witness, and the reliability of her opinion.

[98] In the result, the Court finds Ms. Taylor to be a credible witness and the findings and opinions expressed in her evidence, to be reliable. Obviously, the finding pertaining to the Latex gloves would only be relevant once it has been established that the gloves are related to one of the crime scenes where body parts were found.

[99] It was contended by defence counsel that Capt. Labuschagne testified about a 'bundle of gloves' from which he took a swab which was eventually sent for DNA analysis to Ms. Taylor; whereas there is no evidence that there were more than two gloves found during the investigation.

[100] Detective Sergeants Lungameni and Apollos were the first police officers attending the first scene where body parts were found and their evidence differ from one another pertaining to the number of gloves found at the scene. Lungameni said he was not sure whether there were two, and Apollos said they were two *pairs*, i.e. one glove over the other. On Exh. 'H' photograph 5, only two gloves are depicted when photographed at the scene; however, it is not possible to tell from the photograph whether there were more than the two gloves, the one inside the other. These gloves were removed from there and placed in an envelope which Apollos claimed, was sealed. He then handed it over to Detective Constable Shikongo, who said that it was

open and when he looked inside, he saw two gloves. He did not take them out from the envelope. He in turn handed it over to Detective Warrant Officer Gomeb, who said that the envelope was closed (stapled) and that he did not check the contents. After Gomeb placed the envelope in an exhibit bag and sealed it, he handed it over to Detective Sergeant Dax, who delivered it at the NFSL. This exhibit was photographed at the NFSL and is depicted in photographs 14 and 15 of Exh. 'V'. On photograph 15 three Latex gloves are clearly visible. These gloves were packed at the NSFL in exhibit bags and taken to South Africa by Capt. Labuschagne himself on the 5th of October 2007. His testimony is that when he took a swab of the gloves, they were in a bundle and drenched in sweat.

[101] Although the two police officers who visited the scene contradict one another as to the number of gloves found, these gloves were placed in an envelope (not sealed) and made its way to the NFSL where it turned out to be three gloves – as depicted on the photograph. It must be pointed out that the exact number of Latex gloves was never questioned or determined during the trial and the Court is now required – in the light of conflicting evidence – to rely on what is visible from photographs handed in as exhibits; which may not correctly reflect the exact number. Despite the uncertainty as to the exact number of gloves found and forwarded for forensic analysis, the chain of custody of this particular exhibit was duly proven, thus excluding the possibility of any tampering with it. In coming to this conclusion I have taken into consideration that the only other evidence pertaining to Latex gloves found in connection with this case, is that of Detective Sergeant Hoa-Khaob, who during a search of the accused's home, has come across similar gloves. That was on the 30th of October, the date of the accused's arrest and twenty-five days *after* the gloves in

question, were sent for forensic analysis to South-Africa. Contamination of the respective gloves could therefore not have been possible. Neither could anyone beforehand have known, at the time of despatching the gloves for testing, that the accused would turn out to be the suspect. To me, that efficiently excludes the possibility of framing the accused and planting exhibits that would falsely incriminate him; or the fabrication of evidence that would connect the accused to the Latex gloves.

[102] I have therefore come to the conclusion that, despite the discrepancies in the evidence pertaining to the number of Latex gloves found at the scene; and whether the envelope was sealed or not, that it does not meaningfully mar the credibility of the witnesses and the reliability of their evidence to the point where the Court should give little or no weight thereto. Capt. Labuschagne's use of the collective word 'bundle' when referring to the gloves, does not necessarily suggest that the gloves were more than what was originally found and sent for forensic analysis. The submission by counsel is therefore without merit.

[103] Defence counsel equally submitted that evidence is lacking pertaining to the thirteen black plastic bags that were received for examination, as reference was only made to three by the witnesses i.e. those found at the first scene. By looking at the photographs taken from the different scenes where the other body parts were found, there are several other black plastic bags visible. Evidence supporting counsel's contention is also lacking. The submission is based on the wrong facts and is therefore without merit. It is common cause that the fingerprint of the accused was lifted by Capt. Labuschagne from one of the plastic bags found at the scene of crime.

[104] I have already discussed the contradicting evidence between Ms. Swart and Capt. Labuschagne pertaining to the serial number of the exhibit bag in which the black plastic bags were sent to Pretoria for forensic analysis. At this stage it will suffice to state that Ms. Swart clearly erred when she stated the number as NFB in her report, instead of NFE and that Capt. Labuschagne making the same mistake in his report when referring thereto. Whereas, the number depicted in photograph 3 of Exh. 'AA' is clearly legible, namely, NFE-02220, it can safely be accepted that both witnesses erroneously referred thereto in their respective reports as NFB. Counsel for the defence argued that Capt. Labuschagne's explanation was a mere probability and referred the Court to the case of *S v Phiri*[10] where the Court commented on three different reference numbers given to the same exhibit; and in addition, remarked that there was *no evidence* before the Court as to *'who took the samples, how the blood was taken (sic), how it was sealed, the serial numbers of the containers, the competence of the person who took the blood [sample] and to whom the blood [sample] was handed after having been taken.'*

[105] The facts of the *Phiri* case are clearly distinguishable from the circumstances of the present case and the *dictum* enunciated in that case, does not support counsel's submission *in casu*. The questions that remained unanswered in that case did nor present itself here and issues pertaining thereto were covered in respect of each exhibit that was eventually subjected to forensic examination; as the collection of these were duly proved. This includes the chain of custody of the respective exhibits from the point of its collection up to where it was examined. There was no incorrect numbering of exhibits in the present case. What happened is that a typographical

[10] 2008 (2) SACR 21 (T)

error was made in respect of one letter (of an exhibit bag) in two reports, when referring to the particular bag. In addition thereto, the evidence is clear than in not a single instance was there any indication, or suggestion, that there had been tampered with any of the exhibit bags prior to the examination done on the exhibits contained therein.

[106] In the result, I am convinced beyond any doubt that the incorrect numbering of one exhibit bag referred to in the respective reports, was *bona fide* and unintentional. I find nothing sinister about the typographical mistakes made by the two witnesses; also, that it has no impact on the outcome of the finding of the accused's fingerprint on one of the plastic bags which, at relevant times, were in the sealed bag and in the custody of Capt. Labuschagne.

[107] It was furthermore contended that the accused, during his testimony, persisted in saying that he did not make the statement to the magistrate freely and voluntarily; and in view of the Court's earlier finding being interlocutory, the Court, in the light of the evidence adduced, must find in favour of the accused. The contention is based on the discrepancies in his version which, so it was argued, is indicative of the accused having been dictated to on what to say to the magistrate and the police officers during the pointing out.

[108] Having heard the accused testify during the trial, it is evident that he is proficient in the English language; hence, there would be no room for any misunderstanding when his statement was recorded by magistrate Nicolaidis; and accused thereafter afforded the opportunity to read through the statement. His

insertion of one word on page six of the statement supports this view – although denied by the accused. When looking at the statement one is struck by the detail in which it is recorded, for example, every time the accused used the words that were spoken either by him or his wife, these were recorded *verbatim* and put in inverted commas. Although reference was made during the trial to the statement as a confession, it is anything but, for at no stage did the accused confess to murdering his wife. He merely described an incident where he was the victim during which he had to defend himself against an unlawful attack made on his life; where the deceased in the process of disarming her, was accidentally stabbed on the neck and died as a result thereof.

[109] I find the story narrated to the magistrate by the accused – as allegedly dictated to him by three unknown police officers – out of the ordinary and highly unlikely to have come from anyone who forced him to admit to a crime he did not commit; because he never confessed to that in his statement. According to him what is recorded is what he had told the magistrate. He did not say that he narrated to the magistrate something else from what was dictated to him. If regard is had to the smallest of detail in which the story was narrated to the magistrate, one is inclined to conclude that this is not something that had been dictated to him by someone else; but rather something coming from the accused. It is not to say that therefore, it has to be the truth. The explanation given by the accused contains certain admissions which connect him to the death of Rose Chepkemoi Kiplangat. These admissions are consistent with the circumstantial evidence placed before the Court, linking the accused to at least one scene where the body parts were later found.

[110] Although it would appear from the statement that the accused admitted having dismembered the body in the flat, it does not mean to say that, because the investigating team was unable to find traces of human blood in the drains and downpipes, that therefore, the accused was forced to make the admissions as he did. It was testified that it was possible that traces of blood could be erased, pending on the detergent used to clean up afterwards. Another possibility would be that the body was not dismembered in the accused's home, but elsewhere, for example in the mortuary. Bearing in mind that the accused had the intention of taking the body there in the first place – which suggests that he had access to the hospital mortuary – would, to my mind, be a real possibility. Be that as it may, the admissibility of the warning statement is not dependent on the truth of its entire contents.

[111] In the absence of evidence to the contrary and in view of the evidence as a whole, there is no basis for the Court to overturn its earlier ruling on the admissibility of the statement made to the magistrate, or the photo plans compiled by the two police officers.

[112] The last point raised by defence counsel relates to the conflicting evidence between the post-mortem report and Dr. Kabangu's evidence as to whether or not a hysterectomy was performed on the deceased's body. From Dr. Kabangu's point of view it would not have been possible for Rose to miscarry if she had a hysterectomy; and whereas he performed an 'evacuation' on her less than one month prior to her disappearance, his evidence would be inconsistent with Dr. Shangula's finding during the autopsy that a hysterectomy had been performed on the body; and showed a scar on the lower abdomen as proof thereof.

[113] Although a swab was taken of the torso by Ms. Swart and sent to BCIT for forensic analysis, Dr. Hildebrand testified that insufficient quantities of human DNA were recovered from it (Q1) and that it was therefore impossible to connect it to the rest of the body parts that were interlinked. The vaginal swab (Q2) however, yielded the same complete, unmixed female profile from which the donor of Q9 cannot be excluded.

[114] The Court did not, due to the passing of Dr. Shangula, have the benefit of hearing her testimony on what facts she based her finding pertaining to the hysterectomy; and whether there was an explanation for what now appears to be inexplicable. The Court should not speculate as to possible causes – such as decomposition of the body – and must decide the case on the *totality* of the evidence and not only on one aspect thereof. Despite the apparent contradiction between the post-mortem report and the evidence of Dr. Kabangu, there is forensic proof that the donor of the DNA found on the vaginal swab of the torso in question, cannot be excluded as donor of the lower right arm (Q9). Hence, the torso must be part of the same body.

EVALUATION OF EVIDENCE

[115] What needs to be determined is whether, in the light of the evidence as a whole adduced during the trial, the guilt of the accused was established beyond reasonable doubt. Although the breaking down of a body of evidence into different components is quite useful, one must guard against a tendency to focus too intently on the separate and individual parts thereof; instead of evaluating it together with the rest of the evidence. When dealing with circumstantial evidence the Court should not approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of, whether it excludes the possibility that the explanation given by an accused, is reasonably true (*Reddy and Others*[11]). The cumulative effect of all the circumstances must be weighed together and only after this has been done, the accused is entitled to the benefit of any reasonable doubt which the court may have as to whether the inference of guilt is the only inference which reasonably can be drawn. It is trite law that the accused does not have the onus to prove his innocence; the onus is on the State to prove beyond a reasonable doubt that the accused's version is not only improbable, but that it is false beyond all reasonable doubt.

[116] In the present circumstances the State case is based on real, direct and circumstantial evidence. The fingerprint and DNA evidence is real evidence which undoubtedly proves the identity of the deceased person as being Rose Chepkemoi Kiplangat, the accused's wife. It furthermore proves the fingerprint and DNA of the accused connected to a plastic bag containing some of the deceased's body parts; and Latex gloves, found at a scene where the first body parts were dumped. In addition thereto, is the direct evidence given by the accused in statements and pointing out voluntarily made to a magistrate and two police officers, respectively. Circumstantial evidence, *inter alia,* would be the evidence of clear plastic (sheets) used for wrapping

[11] 1996 (2) SACR 1 (A) at 8c

furniture found in the accused's home, similar to what was used to wrap some of the body parts in; Latex gloves found in the flat identical to those found at the scene; the disappearance of the accused's wife under circumstances that appear suspect; and explanations given by the accused to several independent witnesses concerning the whereabouts of the deceased, in circumstances where she in all probability, was already dead.

[117] On the opposite side stands the evidence of the accused disputing all allegations that he is responsible for the killing of his wife, who, to his mind, has left his home on 15 September 2007 and has not returned ever since; his torturing by three unidentified police officers forcing him to confess to a crime he did not commit; and the contradictions in the State case.

[118] In the oft quoted *dictum* of Denning J (as he then was) in *Miller v Minister of Pensions*[12], when dealing with the onus resting on the State and the adequacy of proof, the following was said:

> *"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt."*

CONCLUSION

[12] [1947] 2 All ER 372 at 373H

[119] When the Court looks at the totality of the evidence adduced against the accused in respect of the first count, it is evident that a very strong case been made out against the accused; a case to which the accused's response is a bare denial of all evidence which might connect him to the crime of murder. State counsel argued that: *"He distances himself from anything implicating him, with fanciful, improbable and inconsistent explanations."* Despite the conflict of fact pertaining to the issue of the hysterectomy between the evidence of the defence witness and the post-mortem report; and other immaterial differences in the testimony of some of the State witnesses, the Court is convinced beyond reasonable doubt that, when these short comings in the State case is weighed against the evidence as a whole, that the accused's version is not reasonably possibly true, but false; and stands to be rejected where in conflict with the State case. In the circumstances, the only reasonable inference to draw from the evidence considered as a whole is that the accused unlawfully killed his wife, Rose Chepkemoi Kiplangat. I accordingly so find.

[120] The rejection of the accused's version as being false, is not without consequence. In the case of *The State v Gerald Kashamba,*[13] this Court endorsed the *dictum* enunciated in *R v Mlambo*[14] where Malan JA said:

> *"… if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escape conviction altogether and his evidence is declared false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate*

[13] (Unreported) Case No. CC 05/2008 delivered on 03.04.2009
[14] 1957 (4) SA 727 (A) at 738B-D

the gravity of the offence, he should nevertheless receive the same benefits as if he had done so."

[121] It must however be borne in mind that full effect should be given to the words *'in suitable cases"* and the learned authors *Hoffmann & Zeffert: The South African Law of Evidence, (4th Ed)* at 603 state the following:

> *"An instance in which the dictum can be applied could be found in the facts of* ***Mlambo's*** *case: if the accused has killed someone in an unlawful assault, and, if the accused alone is in a position to explain the circumstances of the fatal assault, and if he gives an account that is rejected as false, then the court can draw an inference that the accused committed the assault with the intent to kill rather than with a less serious form of mens rea. Everything depends on the facts of each case; …… A proper application of the* ***Mlambo dictum*** *merely signifies that an accused cannot complain if, because of his falsehood, the trier of fact does not give him the benefit of the doubt in this context, that he killed the deceased without intending to kill him with a lawful purpose."* (emphasis added)

It is thus clear that the Court when drawing conclusions that would determine the accused's guilt, should not attach too much weight to the untruthful evidence of the accused and the weight to be attached thereto must be related to the circumstances of that case (as encountered in *Mlambo*).

[122] Having already found the accused's evidence untruthful; and him being the only person in the position to explain the circumstances under which the deceased was killed, the only reasonable inference to draw is that the accused committed an

assault with the intent to kill, acting with *dolus directus*. Whereas the circumstances of the killing remains unknown to the Court, the Court may be guided by the post-mortem findings that the cause of death was due to the incised wound to the throat. The exact cause of death however, was not proved through *aliunde* evidence. The dismembering of the body in all probability was not a 'cause of death' as reflected in the report, but rather something that happened subsequent to death.

[123] I turn now to consider count 2 in which the accused stands charged with defeating or obstructing the course of justice, or attempting to do so. This charge is based on the dismembering of the body; a panty and face cloth having been inserted into the vagina and an open wound on chest; the dumping of the dismembered body parts at various places in the district of Grootfontein; and, tampering with the scene of crime.

[124] There can be no doubt that the dismembering of the body is directly related to the killing of the deceased. Judging from the circumstances of this case, where different body parts were strewn at different sites and near the main roads of Grootfontein, the only inference reasonably to draw from the facts is, that this was done in order to mutilate the body beyond identification; and by discarding it at different places, to destroy any possible ties with the culprit. I am unable to see how the insertion of fabric into the body openings can be seen as an act to obstruct the course of justice. Regarding the alleged cleaning up of the flat afterwards, there is no reliable evidence before the Court that the dismembering of the body was indeed done in the flat; and for purposes of deciding the second charge, this cannot be accepted as a fact.

[125] The Court is therefore convinced that due to the close relation between the two offences, the only reasonable inference to draw from the proved facts would be that the accused, after murdering the deceased, dismembered the body and dumped it at various places in and around Grootfontein with the intent of defeating or obstructing the course of justice. In circumstances where the accused was successfully prosecuted on a charge of murder, he cannot be convicted of the completed offence of obstructing or defeating the course of justice, but merely of an attempt to do so.

[126] Whereas the alternative charge to count 2, namely, violating a dead human body, is already embodied in the main count, it deserves no further attention.

[127] In the premises, the Court finds the following:

1. Count 1 – Murder (read with the provisions of the Combating of Domestic Violence Act, 2003): Guilty
2. Count 2 – Attempting to defeat the course of justice: Guilty

   Alternative to Count 2 – Violating a dead human body: Not guilty and discharged.

LIEBENBERG, J

ON BEHALF OF THE ACCUSED	**Ms. I. Mainga**
Instructed by:	**Directorate: Legal Aid**
ON BEHALF OF THE RESPONDENT	**Mr. N. Wamambo**
Instructed by:	**Office of the Prosecutor-General**