

**IN THE COURT OF
APPEAL AT NAIROBI
(CORAM: KIAGE, JAMILA MOHAMMED & ODUNGA JJ.A.)
CRIMINAL APPEAL NO. 136 OF 2023**

BETWEEN

DANIEL MWANGI CHEGE.....APPELLANT

AND

REPUBLIC

.....

RESPONDENT

*(Being an appeal against judgment and sentence of High Court of Kenya at
Garissa (A. Aroni, J.) delivered on 24th February 2022*

in

HCCR Case No. 15 of 2014)

JUDGEMENT OF THE COURT

- 1.** The appellant, **Daniel Mwangi Chege**, was charged with the offence of Murder Contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars being that between the 6th and 14th August 2014 at an unknown time in Allangho Arba within Garissa County with others not before Court, he murdered **Lawrence Oluoch Ogoro**.

- 2.** The facts of the case were that the deceased, the appellant and one other person, Mwenda, who was not before the trial court, worked together at Bora Mineral

Products, a mining company situated in Allangho Arba
about 40 kms away from

Garissa. The mining company was operated by PW1, **Festus Mulwa Mutungi**, together with his partners. The deceased, **Lawrence Oluoch**, was the supervisor while the appellant, **Mwangi Chege** and one **Mwenda** were machine operators. **Said Dagane**, was a watchman.

3. According to PW1, in July 2014 their excavator broke down and was taken to Nairobi for repairs. At the time the excavator broke down, there were 400 litres of unused diesel remaining which the deceased informed him they had buried in the ground with Mwenda. When he returned to the site on 5th August 2014, he was informed that the diesel was missing and he told the deceased to investigate the matter. However, upon his return to the site on 7th August, 2014, he only found the appellant and Mwenda. Upon inquiry, he was informed by Mwenda that the deceased had left with the appellant to collect an excavator from a nearby site, but the appellant returned alone. On seeking an explanation from the appellant, the appellant informed him that he left the deceased on the main road and proceeded to pick the excavator and on return, he did not find the deceased there.

4. The witness proceeded to Nairobi and upon his return to Garissa on 14th of August 2014, he found Ahmed Bille, a village elder and two watchmen at the site. They informed him that they saw torn clothes resembling those of the deceased. He proceeded to the scene where he saw pieces of human body and tattered clothes. They reported to the police who also proceeded to the scene.
5. In cross examination, he stated that the mine was situated along Dadaab road where the vegetation is semi-arid and there are wild animals, he was unable to tell if the deceased was killed by wild animals.
6. PW5, **Jemima Sangar Kurabu**, a Public Health Officer confirmed that on 15th August 2014, she accompanied her supervisor to the scene where they recovered some human remains, an Identity Card, ATM Card and bus transport ticket for G. Coach. The remains were taken to Garissa General Hospital.
7. According to PW6, **John Misoi**, who was based at Garissa Police station in Crime section, on 15th August 2014, PW1 reported a case of his supervisor at a mining excavation site who had gone missing. PW1 informed the police of

pieces of

clothes recovered at Alangho Arba and the OCS directed that PW1 be detained pending further investigations. The next morning, PW6 sought an exhumation order from the court, which was granted and they proceeded to the scene with PW1 together with other CID officers. On arrival, they recovered scattered pieces of torn clothes: torn trousers, torn sports shorts, a torn t-shirt, and a belt. Inside the trouser, they found a wallet containing an identity card, ATM card and a bus ticket. In the surrounding area, they recovered human body parts: nails, body hair and broken ribs. According to him, there was no disturbed part of the earth. They established that the person went missing on 6th August 2014 and that on 14th August 2014 a group of camel herders found pieces of clothes and reported to the watchman on the site, which prompted the report to the police. The body parts were taken to Garissa PGH Hospital. On 19th August 2014 after tracing the relatives of the missing person they conducted a forensic post mortem in the presence of the deceased's wife and brother.

8. In cross-examination he conceded that the route to Modicar- Dadaab has wild animals. He suspected that

the

deceased was devoured by wild animals as he saw hyena faeces at the scene. The scene was 600 to 800 meters from the excavation site and across the road. The deceased had at the time been missing for nine (9) days.

9. PW7, **Corporal Simon Njogu**, of DCI Office Central Nairobi and formerly DCI Garissa, on his part testified that on 15th August 2014 upon the instructions of the DCIO, a team visited Alongho Alba 40 Km away from the station. On arrival, they were taken through the gypsum mining site, where they met the appellant and learnt that another machine operator was missing. In the company of the appellant was one Festus, a supervisor who took them round the site. At the place where the excavator was parked, they saw fresh markings of the movement of the machine in the bush (100 meters away). After following the marking, they discovered a heap of fresh soil, and upon searching the area, they recovered human remains (body) near the heap of the soil. With the assistance of PW5, they put the remains in the bag. They then interrogated and arrested the appellant for investigations. The remains were placed in PGH morgue for forensic testing and DNA conducted by Dr.

Njoroge, a pathologist whose result was that the pieces collected at the site were human remains. In his opinion, the deceased was hit using the excavator machine and the reason for the arrest of the appellant was that he knew how to operate the machine. The appellant had differences with the deceased.

10. **Dr. Julius Kipkenda**, testified as PW8 on behalf of his colleague, Dr. Njoroge, who carried out the forensic investigations. It was his evidence that the report of Dr Njoroge confirmed that the parts were for an adult human being but the cause of death was unknown.
11. PW2, **Emily Adhiambo Omolo**, the widow to the deceased testified that she was with her husband in the month of June 2014 at their home in Athi River, and he informed her that the excavator was faulty. The deceased was recalled to work by PW1 on 3rd August 2014 and travelled to Garissa on 4th August 2014. On 5th August 2014 the deceased called her and informed her of the missing fuel and stated that he had tried to resolve the issue with PW1 and the appellant but they had failed to reach an understanding. On 6th August 2014, when she was unable to reach the deceased

on phone, she called Mwenda who informed her that the deceased had left his employment. When she called PW1, she was informed that the deceased had been sent with the appellant to another site to bring an excavator mower but the deceased had not returned. She then reported the matter to Athi River Police station which circulated the information of a missing person. On 14th August 2014, PW1 informed her that he had reported the matter to Garissa Police Station. She travelled to Garissa on 15th of August 2014 and the following day she was taken to the scene and shown where the deceased was buried in a hole. She was later taken to the mortuary where she identified the deceased's body parts and his torn clothes. DNA confirmed the body parts to be the deceased's. PW3, **Paul Onyango Ogolla**, a brother to the deceased, corroborated the evidence of PW2. He recognized the deceased from the toes.

12. PW4, **George Okuku Odongo**, one of the partners of the mining Company testified that the first time he met the appellant was on 7th of August 2014. While engaging in talks with the workers, he learnt that the appellant had differences with the deceased arising from allegations by

the

appellant that the deceased practiced witchcraft, and the appellant claimed to be praying to ward off evil spirits. He tried to solve the issue before leaving the site. It was his evidence that both the deceased and the appellant were accountable for the missing diesel and that the deceased agreed to have the amount in respect of the diesel deducted from his monthly wages.

13. At the close of the prosecution case the appellant was found to have a case to answer. In his unsworn statement, the appellant stated that he was summoned by CID officers while he was at the mining site. They took him to the scene where they found scattered clothes and human remains. He was then placed in custody for 3 months and later charged with the offence of murder. He denied having any business and/or relationship with the deceased although he admitted that he was operating the excavator.

14. In her judgment, the learned Judge appreciated that the unlawful act which caused the death of the deceased was solely based on circumstantial evidence and that the prosecution led evidence that the appellant was the last person seen with the deceased, that there was evidence

of

disturbance of the ground at the scene which they attributed to the excavator shovel. They also sought to prove motive from the relationship between the appellant and the deceased and the fact that there were pending investigations over the missing 400 litres of diesel. Citing the cases of **Abanga alias Onyango v R Cr. App. No 32 of 1990**, **Charles Mathenge Mwangi & Another v Republic CA Case No. 72 of 1997** and **David Munyui Chiragu & Samuel Mungai Nganga v R (2021) KECA 342 KLR** in

which this Court set out the test for conviction based on circumstantial evidence, the learned Judge while appreciating that the cause of death was not conclusively attributed to an injury occasioned prior to the death of the deceased, found that there was evidence of heaped soil where the remains were found. The learned Judge relied on the evidence of PW7 that there were fresh markings on the excavator that led them to the site a few meters away and concluded that an excavator was used to dig the soil. Although there was evidence alluding to the possibility of the deceased having been mauled by animals, the learned Judge was not certain whether this

was before death or after
death.

15. The learned Judge found it telling that the excavator on site had fresh soil and there were excavator marks from the site of mining to the place the remains were found. The learned Judge took into account the fact that the other mining site was far and there were only two machine operators on this site; and that the appellant did not deny that he left the site in the company of the deceased to collect an excavator; that he was the last person to be with the deceased; and that although on interrogation he stated that he left the deceased on the road, he failed to explain why he did so. The learned Judge concluded that the appellant appeared to be nonchalant towards his work mate who had disappeared. Applying the decision in the cases of ***R v EKK (2018) eKLR*** and ***David Munyui Chiragu & Samuel Muigai Nganga v Republic*** (supra), as well as ***Sections 111(1) and 119*** of the ***Evidence Act***, the learned Judge held that the prosecution's evidence placed upon the appellant a statutory burden to discharge a rebuttable presumption that having been the last person with the deceased before he died, he should explain how he died but failed to do so.

16. The learned Judge then considered the role of Mwenda, and his conduct when called by PW2 concerning the whereabouts of the deceased. According to the learned Judge, the considered circumstantial evidence separately was so strong that when the same is placed together, it unerringly points to no other hypothesis other than to the fact that the deceased was killed by the appellant and Mwenda, due to the investigations that the deceased was carrying out regarding the missing diesel. The learned Judge further found that the two upon killing the deceased used the excavator machine from the mining site, to dig a shallow grave where they buried his body. The learned Judge, therefore, found the appellant guilty of the offence of murder as charged and convicted him accordingly. The appellant was sentenced to serve 25 years imprisonment. The court further recommended to the Director of Prosecution the need to find and charge Mwenda, if still alive, with a similar offence.

17. Dissatisfied with the decision, the appellant lodged this appeal in which he contends: that the learned Judge failed to appreciate that the basic elements required to prove

murder were not proved beyond reasonable doubt; that the learned Judge relied on circumstantial evidence that was disjointed yet there existed extenuating circumstances that weakened the prosecution's evidence; that the learned Judge failed to comply with **Sections 200(3) and 201(2)** of the **Criminal Procedure Code**; that the trial was grossly unfair as the appellant was inadequately legally represented.

- 18.** We heard this appeal on 29th April 2025 when learned counsel, **Mr Achapa**, appeared for the appellant while learned Assistant Director of Public Prosecution, **Mr Jami**, appeared for the respondent. The appeal was conceded by Jami. However as held by this Court in **Lamek Omboga v R. Kisumu Court of Appeal Criminal Appeal No. 122 of 1982 (UR)**:

“An appellate court is not in any way bound by the opinion of State Counsel as to the merits of an appeal.”

19. On behalf of the appellant, it was submitted that the prosecution failed to establish beyond reasonable doubt that he caused the death of the deceased; that the trial court predominantly relied on circumstantial evidence with

disjointed aspects whose evidence was based on suspicions

and circumstantial deductions; that the cause of death was not definitely proven and there was no specific unlawful act or omission attributed to the appellant, linking him to the death of the deceased; that it was not established with clarity that the death could not be attributed to the *actus reus* (sic) of wild animals, or other potential independent causes; that there was no specific element establishing malice aforethought on the part of the appellant; that the learned Judge failed to comply with **Sections 200(3) and 201(2)** of the **Criminal Procedure Code** rendering the trial null and void; and that the appellant was not accorded a fair trial due to ineffective legal representation.

20. Conceding the appeal, Mr Jami submitted that the evidence in support of the “last seen with” principle if it was intended to be received as the truth by the trial court, as it did, its admission offended the rule against hearsay evidence since Mr. Mwenda did not come to testify to that fact. According to learned counsel, the fact that the appellant did not say anything in his defence regarding that particular allegation is neither here nor there, because: firstly the burden is on the prosecution

to establish and prove a fact and in any

case, at the time that the appellant was being placed on his defence to explain himself, that fact had not been established; and secondly, the evidence on record was that the appellant did not know where the missing fuel was buried and there was no evidence that the appellant was suspected of having been involved in the same. Further, apart from just being the person last seen with a deceased alive, there have to be other events which tie and complete the chain. The bigger concern for learned counsel, however, was non-compliance with **Section 200(3)** of the **Criminal Procedure Code** since there were two trial Judges who handled the matter without compliance with the said provisions.

21. It was noted that the statement attributed to Mwenda was itself exculpatory in so far as the appellant was concerned since it introduced a fact that was inconsistent with the guilt of the accused, by explaining how the deceased and the appellant parted ways. It was pointed out, further, that Mwenda was also a driver or a machine operator for the excavator, so there were 2 machine operators at that particular time and not the appellant only as was wrongly

concluded by the investigator, a fact that seemed to have swayed the learned Judge as well. Learned counsel noted that it was Mwenda who knew about the fuel and when asked the whereabouts of the deceased by PW2, misled her that the deceased had left employment. It was submitted that there was nothing to indicate that there was a joint commission of the offence between Mwenda and the appellant to justify the appellant being convicted. We were urged find that the conviction was unsafe and allow the appeal.

22. We have considered the submissions made in this appeal. This being a first appeal, we are alive to our duty, as a first appellate court as set out in ***Okeno v Republic [1972] EA 32***, which is to subject the evidence as a whole to a fresh and exhaustive examination and to arrive at our own decision thereon by weighing conflicting evidence and drawing our own conclusions thereon. In other words, our function is not to merely scrutinize the evidence to see if there was some evidence to support the trial court's finding and conclusion. Only then can we decide whether the trial court's findings should be supported. However, in doing

SO,

we must make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

See also ***Pandya v Republic [1957] EA 336***.

23. The first issue for our determination is whether **Sections 200(3)** and **201(2)** of the **Criminal Procedure Code** were complied with and the affect, if any, of such non-compliance. From the record, **Dullu, J.** took the evidence of the first 6 prosecution witnesses. After that the matter was taken over by **Kariuki, J.** who, *suo moto*, directed that the matter would proceed from the stage at which it had reached. The learned Judge does not seem to have heard the parties before giving those directions. **Kariuki, J.** completed hearing the prosecution case before the matter was taken over by **Aroni, J.** (as she then was) at the defence hearing stage. **Aroni, J.** similarly directed that the matter proceeds from where it had reached without hearing either the appellant or the prosecution.
24. **Section 200** of the **Criminal Procedure Code** provides as follows:

1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction

therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

- a. deliver a judgment that has been written and signed but not delivered by his predecessor; or**
- b. where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.**

2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

25. Section 201(2) of the Criminal Procedure Code (the Code) provides that section 200 of the Code applies

mutatis mutandis to trials held in the High Court.

26. It is evident from the various decisions of this Court that compliance with section 200 of the Code and particularly section 200(3) thereof is mandatory, as its purpose is to protect the rights of an accused person to a fair trial as guaranteed by the Constitution under **Article 50(2)** of the **Constitution**. The only discretion which the trial court has is as regards the choice of the course of action to take after complying with the provisions of section 200(3), between proceeding with the trial from where it has reached, or starting the hearing *de novo*. This position was extensively explained by this Court in the case of **Abdi Adan Mohamed v Republic [2017] eKLR** where the Court, in explaining the decision in **Ndegwa v Republic (1985) KLR 534**, in which it was held that the provisions of **Section 200** aforesaid should be resorted to sparingly, opined that as much as is practically possible, it is desirable that the trial magistrate or Judge must hear the case to conclusion and ultimately render judgment as it is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanour of witnesses.

27. The Court advised that even where the trial magistrate or Judge has been transferred, arrangements ought to be made for him or her to return to the former station to complete the trial, unless in cases where only a few witnesses had testified, in which cases the succeeding magistrate may continue with the trial from the stage it had reached, or where the evidence already recorded is more or less formal or largely uncontroverted. Further, the purpose particularly of **Section 200(3)** of re-summoning of witnesses and re-hearing of the case is to ensure that the succeeding magistrate or Judge is able to assess, personally and independently, the demeanour and credibility of the particular witness or witnesses and to weigh their evidence accordingly. Compliance with **Section 200(3)** of the Code is therefore mandatory.

28. The next question, arising from that determination is the effect of non-compliance. **In Abdi Adan Mohamed v Republic** [supra] the Court held as follows:

“Because of the importance of having a trial conducted from commencement to conclusion by the same magistrate or judge, Section 200(4) provides that;

‘Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.’

Section 200 therefore entrenches the accused person’s rights to a fair trial as provided for today under Article 50(1) of the Constitution.”

29. The Court emphasised that:

30. It then concluded that there was a mistrial when the trial magistrate reviewed his earlier order of a fresh hearing and directed that he would rely on the previously recorded evidence without giving the appellant an opportunity to comment.

31. In the present appeal we find that non-compliance with section 200(3) of the **Criminal Procedure Code** did prejudice the appellant for two main reasons. Firstly, six prosecution witnesses had already testified, whom **Kariuki,**

J. had not had the opportunity to assess; and secondly, by

the time **Aroni, J.** took over the matter, all the prosecution witnesses had testified.

32. That determination would have sufficed for the purposes of this appeal. However, the determination of what course to adopt upon reaching that conclusion enjoins us to determine the other issues in the appeal.

33. It is not in doubt that the conviction of the appellant was based on circumstantial evidence. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence, the courts have established the threshold to be met if a conviction is to be based thereon. In **Sawe v Rep [2003] KLR 364** this Court held that:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

34. This Court in **Abanga Alias Onyango v Rep CR. A No.32 of 1990(UR)** set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction in the following terms:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

35. Therefore, for this Court to find the appellant guilty, the inculpatory facts must be incompatible with his innocence and be incapable of explanation upon any other hypothesis than that of his guilt. In this case the inculpatory facts relied upon in convicting the appellant were that he was the last person to be seen with the deceased alive and that there was disagreement between the two.

36. Regarding the principle of “last seen with”, we are persuaded by the position adopted in the Nigerian case of **Moses Jua v The State** (2007) **LPELR-CA/IL/42/2006** that:

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

37. The explanation for this position was made in another Nigerian Supreme Court decision in the case of **Stephen Haruna v The Attorney General of the Federation** (2010) 1 Ilaw/CA/A/86/C/2009 that:

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

person killed the deceased.”

38. However as cautioned in the Indian Supreme Court case of **Ramreddy Rajeshkanna & Anr. v State of Andhra Pradesh, JT 2006 (4) SC 16:**

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

39. We also agree with the position in the Indian case of **Anjan Kumar Sarma v State of Assam Criminal Appeal No. 560 of 2014** that:

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

40. The principle has been applied by our courts by virtue of **Section111(1)** of the **Evidence Act** which provides that:

“(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact, especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

41. This Court in the case of **Kimani v Republic (Criminal Appeal 41 of 2022) [2023] KECA 1390 (KLR)** held that;

“The doctrine of ‘last seen alive’ is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before their death was responsible for his or her death and the accused is expected to provide an explanation as to what happened.”

42. And in the case of **Moingo & Another v Republic [2022] KECA 6 (KLR)** the Court reiterated that:

“The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to

give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen

doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased).

See also ***Ngeno v Republic (Criminal Appeal 24 of 2016)***

[2024] KECA 757 (KLR).

43. In order for the “last seen with” principle to be applied, the evidence relied upon must itself be credible. In this case the information that it was the appellant who was the last person to have been seen with the deceased was given by PW1 who himself obtained the information from Mwenda. Mwenda, whose conduct was itself questionable, did not give evidence. Clearly that piece of evidence was inadmissible hearsay and could not be the basis upon which the principle of “last seen with” could found a conviction. As was appreciated in ***Teper v. R [1952] AC at p. 489:***

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.”

44. Apart from the foregoing, the statement itself was not

inculpatory because it went on to explain that the
appellant

and the deceased parted ways on the road at the instance of the deceased. The learned Judge formed the view that the appellant appeared to be nonchalant towards his work mate who disappeared for not seeking to know why the deceased asked to be dropped on the road. The deceased was the appellant's supervisor and the appellant cannot be blamed for not insisting that his superior explains to him the reason for seeking to be dropped on the road. In **Simon Musoke v Republic [1958] EA 715** it was emphasized that:

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

45. From the prosecution's own evidence, there were co-existing circumstances that weakened the inference that the appellant was responsible for the death of the deceased on the basis of having been the last person to be seen with the deceased. This is not a case where there was no explanation but one where the prosecution itself explained the circumstances under which the deceased and the appellant parted ways.

46. In this case, there was clearly no corroboration. An attempt was made, through PW4, to show that there was disagreement between the deceased and the appellant. PW4's evidence regarding the alleged disagreement was based on information received from "the workers" who were not named and were not called to testify and was therefore worthless. Accordingly, there was no evidence to corroborate the allegation that the appellant was the last person to have been seen with the deceased, even if that evidence had been credible. From the prosecution's evidence, it is clear that the deceased parted with the appellant safely and must have met his death after their parting with the appellant. In fact, the prosecution witnesses did not rule out the possibility of the deceased having been a victim of wild animals.

47. Apart from the foregoing the conduct of Mwenda was questionable. He was the one who was aware of the place where the missing diesel was buried. When asked about the whereabouts of the deceased by PW1, he alleged that the deceased had left with the appellant. When PW2, the deceased's widow inquired from him the whereabouts of the

deceased, he informed her that the deceased had left employment. Shortly thereafter he disappeared and switched off his phone.

48. Having considered the evidence on record, we are not satisfied that the inculpatory facts (which we find do not exist) were incompatible with the innocence of the appellant and were incapable of explanation upon any other reasonable hypotheses than that of his guilt.

49. It is on this basis that we decided not to determine the appeal only on the basis of non-compliance with **Sections 200(3) and 201(2)** of the **Criminal Procedure Code** which then would have opened the option of a de novo trial. However, a retrial ought not to be ordered where the evidence on record even if the trial was properly conducted, would still have failed to meet the standard of proof in criminal cases. To do so would be to avail the prosecution a second bite at the cherry by filling in the gaps that existed during the trial.

50. In the premises, we agree with both **Mr Achapa** and **Mr Jami** that this appeal is merited. Having re-evaluated the evidence adduced, we come to the inescapable

conclusion

that the prosecution failed to prove that the death of the deceased was caused by the appellant. That being the case, we find merit in the appeal, set aside the conviction of the appellant in Garissa **High Court Criminal Case No. 15 of 2014** and quash the sentence imposed upon him. We direct that the appellant be set at liberty forthwith unless otherwise lawfully held. Those shall be our orders.

Dated and delivered at Nairobi this 3rd day of October, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

JAMILA

MOHAMMED

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the

*true copy of the original
signed*
DEPUTY REGISTRAR