



REPUBLIC OF KENYA



KENYA LAW
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**Ingumba v Republic (Criminal Appeal E014 of 2023)
[2025] KECA 1869 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1869 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL E014 OF 2023
AK MURGOR & P NYAMWEYA, JJA
NOVEMBER 7, 2025**

BETWEEN

DANCUN INGUMBA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment and sentence of the High Court of Kenya at Mombasa (A. Ong'injo, J.) delivered on 16th June 2022 in Mombasa High Court Criminal Case Number 50 of 2018)

JUDGMENT

1. The Appellant, Dancun Ingumba was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the Information were that on the 22nd October 2018 at Nyali bridge area within Mvita Sub- County Mombasa County he murdered John Kabare alias Baite (the deceased).
2. The Appellant pleaded not guilty and the matter proceeded to trial where the Prosecution's case was supported by the evidence of 5 witnesses.
3. Amos Kilonzo Kyalo, (PW1) testified that he lived in Buxton near Nyali Bridge and sold water for a living. It was his evidence that on 22nd October, 2018 when he was going to sleep at 11.00 p.m he found the Appellant, Dan, a security guard, and one Aba beating a person on his hands and legs using a rungu and a slasher. They told him they were beating him because he was a thief. Another man, one John was also present at the scene, but he was not beating the deceased. John told the two men to stop physically assaulting the deceased, but they ignored him. PW1 then heard Aba threaten the deceased that it would be the last day of his life, after which, together with the Appellant they crossed to the middle of the bridge with the deceased. While there, Aba told the deceased to put his head on the bridge, to which directive, the deceased refused. PW1 cautioned both men to fear God and the government, but they



- ignored him. PW1 stated that, all of a sudden, the two lifted deceased and threw him over the bridge and into the ocean. The deceased screamed for help, but soon drowned. PW1 went to inform Dan and John about what had happened, and then ran to inform the police at a road block about 50 meters away of what he had witnessed. The police arrested the Appellant, but Aba escaped from the scene. PW1 recorded a statement and after 4 days, he was informed that the body of deceased had been found. PW1 further testified that the deceased was wearing a black shirt with a blue design at the front on the night in question. He identified the black shirt in court as the one worn by the deceased.
4. PW2 was Dancun Wafula Kakai. He testified that he was staying in Buxton near M.M Shah. On 22nd October 2018 at 10.00 p.m, he was sleeping in his house when the Appellant called him to go and identify someone who claimed to know him. He followed him and met John, another guard with the deceased who was sitting on the ground. He identified the deceased as Kabare or Baite. Baite told him that he had been walking around as he had no home. The Appellant called Aba, another security guard over, and they asked Baite if he knew Aba. He answered that he did not, to which Aba replied to him, 'I am the killer.' Aba left and came back with a slasher and rungu. It then started to rain, and PW2 went back to his house to find a weapon with which he could assist the deceased. When he returned, he found John, another security officer, sheltering from the rain under a tree, without any weapon, but he did not find the Appellant, Aba or PW1 where he had left them.
 5. Soon thereafter, PW1 came running back, and told PW2 that the deceased had been thrown over the bridge into the ocean. He went with PW1 to the section of the bridge where the deceased had been thrown and they could see him in the ocean trying to swim and screaming for help, but he then drowned. Aba had disappeared but the Appellant was still at the bridge. PW1 and PW2 went to the nearby traffic Police officers, to report the incident. When the police arrived, the Appellant was still near the bridge sitting on a bench. The Police officers inquired as to where the person who was thrown off the bridge was, but the Appellant did not respond. They arrested John and the Appellant, and two days later PW2 recorded a statement. PW2 stated that the body was later found by police from Makupa police station. He did not identify the body, but he knew the clothes that the deceased was wearing, which was a T- shirt that was blue against a black background. He identified the T -shirt that was produced in court as the one worn by the deceased.
 6. Dr. Fatma Ahmed PW3, a medical officer from Coast General Hospital testified on behalf of Dr. Nabil. She stated that she had the post mortem report for John which she produced in court; that the body was found on 27th October, 2018 at 1.30 p.m on the shore of the Indian Ocean and that the date of death was 23rd October 2018; that the post mortem was conducted on 1st March 2019, by which time, no one had come forward to identify the body. According to the post mortem report, the deceased was strangled by security guards and thrown into the ocean from the Nyali Bridge. The report observations were: Body was decomposed and cause of death was drowning. In cross examination she confirmed that the front part of the post mortem report was not completed. She also stated that the post mortem report was usually handwritten, but it was not an anomaly for it to have been typed. She further testified that the body was decomposed and it was difficult to assess the injuries, and that the clothes found on the body were in a black polythene bag.
 7. C Ashfad Kinyua No. 07014 PW4 testified that on 22nd October 2018 at about 11.00 p.m he was at the Anti-crime desk with Corporal Caroline Malala at Makupa Police Station when two police officers manning Buxton Road block near Nyali bridge came with the Appellant and his colleague John Wesonga Mariko. They were also accompanied by PW1 who informed them that the Appellant and his colleague had beaten someone up and had thrown him off the Nyali bridge and into the ocean. They went to Nyali bridge but did not see any person in the ocean; that they detained the Appellant and John Wesonga, and on the morning of 27th October, 2018 they received information that a body



in a T-shirt and jeans was seen near Tudor Nora; that the scene of crime personnel went to the scene and took photographs of the body. The body was whitish; the mouth and teeth were broken and it had injuries on the head and legs. They took the T-shirt as an exhibit which the witness produced. The body was never identified as no Identity Card was found on it.

8. Safari Chea No. 52225 PW5 took over the investigations, and produced the report and the photographs taken at the scene.
9. When placed on his defence, the Appellant gave sworn evidence that on 22nd October, 2018 at 5.00 p.m he prepared to go to work as a guard at Nyali Bridge. His work was to guard the railings along the bridge. He arrived at 6.00 p.m and his colleague John Wesonga joined him at 6.30 p.m. Whilst they were conducting patrols, they saw two people, one of them Amos who was smoking bhang. They warned Amos that he was not supposed to be there as it was almost 9.00 p.m. He however objected and refused to move. They went to report to the police officers that they had been threatened. The police told them to report back to them in case any incident occurred; that they went back to the middle of the bridge and saw PW1, and another unknown man walking across the bridge towards the traffic lights. Shortly after 11.00 p.m, he saw three people walking toward them one being PW1 and two police men. The police inquired from them where they had thrown a man off the bridge; that this surprised them as they knew nothing of the matter. The policemen then escorted them to M. M. Shah and placed them in a Land cruiser. They were then taken to Makupa Police Station where they were locked in the cell for four days and then brought to court; that Wesonga was called outside the cell, and he never saw him again. He stated that he did not know whether John had recorded a police statement.
10. The trial judge upon considering the evidence convicted the Appellant of the offence of murder.
11. Aggrieved by the trial Judge' decision, the Appellant has filed an appeal to this Court on the grounds that the learned trial judge was in error; i) in holding that the black T- shirt and jeans trouser identified in court by PW1 as the clothes the deceased was wearing on the night of 27th October 2018; ii) in holding that no other reports of a missing person were filed within that time range in the area of the incident; iii) in holding that the body recovered at the shore of the ocean near Tudor Nora was that of the deceased; iv) in holding that the circumstantial evidence was cogent and compelling to prove the fact of death of the deceased; v) in holding that the Appellant's version of events was an afterthought; vi) in holding that the Appellant beat and threw the deceased into the ocean; vii) in holding that the Appellant unlawfully caused the death of the deceased; viii) in holding that the actions of the Appellant were actuated with malice aforethought; and ix) in holding that the prosecution had proved its case beyond reasonable doubt.
12. Both the Appellant and the Respondent filed written submission that they relied upon. In their written submissions, learned counsel for the Appellant, Mr. Mugambi submitted that the trial Judge was wrong to rely on circumstantial evidence that did not prove that the Appellant committed the offence; that the events as narrated by PW1 and PW2 were insufficient for the trial court to safely conclude that the Appellant beat and threw the deceased into the ocean; and that the investigating officer did not carry out any meaningful investigations and instead believed PW1's evidence without question.
13. Counsel further submitted that there was no proof that the body recovered was that of the deceased; that the person who found the body and made a report to the police was not called to give evidence. In addition, it was submitted that the police only brought the T-shirt as evidence, and did not produce the jeans alleged to have been found on the body; that furthermore, the prosecution did not call PW1 and PW2 to identify the body; and finally, no DNA sampling was taken to assist in identification.



14. It was further asserted that the evidence concerning the T-shirt was inconclusive; that PW1 stated on the one hand that the deceased was wearing a shirt, whereafter he stated that the deceased was wearing a black T-shirt; that PW1's evidence was inconsistent as to whether the T-shirt was black or blue.
15. Counsel took issue with the trial court's finding that no missing person was reported, particularly since no such evidence was at any time produced. It was further asserted that there were witnesses that did not testify, including, one John the security guard who allegedly witnessed the Appellant assaulting the deceased, the arresting officer, and the persons who found the deceased's body; that without the testimonies of these witnesses, the prosecution evidence was inconclusive.
16. Counsel went on to submit that the police believed the evidence of PW1, a single witness to the extent that they did not interrogate the Appellant after they arrested him; that if they had, they would have recorded his statement which would have assisted in the investigations; that the trial court also believed PW1 and went outside the evidence on record to find reasons to convict the Appellant, yet the weight of the evidence did not point to him as the person who murdered the deceased.
17. On her part, Ms. Mutua, learned Assistant Director of Public Prosecutions for the Respondent submitted that the evidence relied upon by the trial court was sufficient to warrant a conviction of the Appellant as it was water tight and well collaborated, and established all the ingredients of murder as envisaged under Section 203 of the Penal Code.
18. It was submitted that the fact of death was proved, and that the cause of death pointed to the Appellant and no other; that the body of the deceased was recovered near Tudor, located at the upper end of the Nyali Bridge which confirmed the evidence of PW1 and PW2 who stated that they saw the Appellant throw the deceased over the bridge after beating him, and how he screamed for help and later drowned; that this evidence was further supported by the postmortem of Dr. Nabil, that showed that the person died as a result of drowning.
19. Counsel submitted that the evidence showed that Appellant together with his colleague caused the injuries the deceased sustained by beating him with a rungu and a slasher and subsequently throwing him over the Nyali bridge into the ocean at night; that he was well aware that the deceased would die as a result of drowning, since he could not swim due to the injuries he sustained.
20. Counsel further submitted that all the crucial witnesses testified and that the evidence on record sufficiently proved the offence of murder. Consequently, counsel concluded that the Appellant's conviction by the trial court was safe and should be sustained and the sentence upheld.
21. This is a first appeal, and our duty as a first appellate court is to re- evaluate and re-analyse the evidence adduced before the trial court. In so doing, the Court should bear in mind that it neither saw nor heard the witnesses testify. This mandate was explained in *Okeno vs Republic* [1972] E.A. 32 where it was stated:

"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*SHANTITLAL MRUWALA V R*, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness."
22. Having considered the record of appeal, the respective rival submissions and the law, we find that the issues that are for determination are:



- i) whether the prosecution proved the offence of murder to the required standards;
 - ii) whether the deceased died;
 - iii) whether the Appellant was identified as the perpetrator of the offence; and
 - iv) whether the trial court disregarded the Appellant's defence.
23. Under Section 203 of the Penal Code, for the offence of murder to be established, the prosecution must prove three main elements. First, that the death of the deceased occurred, second, that the death was caused by an unlawful act or omission on the part of the accused person and third, that the accused person had malice aforethought in causing the act or omission.
24. In the case of *Chiragu & another vs. Republic* [2021] KECA 342 (KLR) this Court restated that:
- “The prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the appellant and that the appellant had malice aforethought as he committed the said act.”
25. We turn first to consider the question of whether the deceased died, which issue, it is observed, was central to the Appellant's appeal. According to the Appellant, it was not established that the deceased died as there was no proof that the body recovered at Tudor Nora was that of the deceased. It was further asserted that the person who found the body and made a report to the police was not called to give evidence, and that the prosecution did not call PW1 and PW2 to identify the body; and finally, that no DNA sampling was taken to assist in the identification of the body.
26. In addressing the fact and cause of the death the trial court stated:
- “Accused asserts that fact of death was not proved conclusively as the body was never identified as that of the person he is alleged to have thrown into the ocean over Nyali bridge from evidence on record, PW 1 and PW 2 confirm that when a body was recovered at the source of the ocean near Tudor Nora on the upper part of Nyali bridge, they were never called to identify it. However, it is the evidence of PW 1 and PW2. Confirm that the Accused and his colleagues beat up Baite and PW 1 saw the Accused and Aba throw the deceased into the ocean and he screamed for help and later drowned. PW3 produced a post mortem report prepared by Dr. Nabil confirming that body recovered died as a result of drowning PW 1 and PW2 also gave evidence that that Baite was wearing a black t-shirt at the time of the incident. PW4 PC Kinyua said the body recovered on 27th October 2018 was dressed in a black t-shirt and jeans trousers which PW 1 identified in court as exhibit 1 and was what Baite was wearing that night. The body was recovered five days after Baite was drowned, was thrown into the ocean and not far from where he was thrown and no other report of a missing person was filed within that time range in that area. These bits of circumstantial evidence draw the conclusion that the body recovered was that of Baite.”
27. In concluding that the deceased died since the body that was recovered belonged to the deceased, it is evident that the trial Judge relied on circumstantial evidence.
28. Black's Law Dictionary, Ninth Edition defines 'circumstantial evidence' as "Evidence based on inference and not on personal knowledge or observation" and "All evidence that is not given by eyewitness testimony."



29. In the case of *R. vs Taylor Weaver & Donovan* [1928] 21 Cr. App. R. 20, circumstantial evidence is defined as:
- “Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics.”
30. In the case of *Kariuki Karanja vs R* [1986] KLR 190, this Court addressed the elements of circumstantial evidence thus:
- “In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts: *Rex v. Kipkering Arap Koske*, 16 EACA 135. An aggregation of separate facts inconclusive because they are as consistent with innocence as with guilt is not good enough evidence.”
31. In the case of *Abanga alias Onyango vs Republic*, CR. App No. 32 of 1990 [UR] this Court also held:
- “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.”
32. In other words, circumstantial evidence is considered to be a chain of evidence, with each piece of evidence being a link in the chain, which when taken together all lead to a conclusion of guilt.
33. In applying the above requirements to the circumstances of this case, and beginning with whether it was the deceased, and no other who died, the evidence is clear that on the evening of 22nd October 2018, the deceased was being physically assaulted by the Appellant and one Aba, two security personnel, who were guarding the railing of the Nyali Bridge. PW1 cautioned them but they ignored him. The deceased was known to PW2. Suddenly PW1 saw the Appellant and another security guard take the deceased to the middle of the bridge and throw him into the ocean. Together with PW2, they saw the deceased drowned.
34. According to PC Kinyua, PW4, a body wearing a black T- shirt and jeans was recovered 5 days later on the sea shore near Tudor Nora, an area located within the vicinity where the deceased was thrown off the bridge. He stated that a post mortem on the body was conducted which found that the cause of death was drowning. Neither PW1 nor PW2 were called to identify the body, but during the trial, they identified the black and blue T- shirt that was recovered from the body as the one worn by the deceased on the night that he met his death.



35. When the circumstantial evidence is considered, the question that begs is whether the prosecution proved the first element of the offence, this being, the fact and cause of the death of the deceased. As a starting point, the evidence of PW1 and PW2, is uncontroverted that the deceased was thrown over the bridge and drowned. About 5 days later, a body alleged to be that of the deceased was recovered on the sea shore at Tudor Nora.
36. As to whether the body did indeed belong to the deceased, was a matter that required to be discerned from a positive identification of the deceased, the postmortem report and the T-shirt. But upon re-evaluation of the evidence, we find that there were fundamental discrepancies in the evidence surrounding the identity of the recovered body. To begin with, it is instructive that the first page of the postmortem report was incomplete, so that, the name of the body under examination, its physical description and other relevant information was distinctly absent. This was confirmed by Dr. Ahmed whilst under cross examination. Further, according to the doctor, by the time of the post mortem examination the body had not been identified. As a consequence, it could not be stated with any level of certainty that the report produced was in respect of the deceased. In point of fact, it could not be ascertained as to who the body belonged, or to whom the post mortem report related. So that, since the body was not identified prior to or during the post mortem, it could not be said that it belonged to the deceased.
37. Secondly, though PW1 and PW2 saw the deceased being thrown into the ocean, they were not present when the body was recovered. More importantly, the evidence is clear that they did not at any time identify the body. Their evidence identifying the body was necessary in establishing whether it belonged to the deceased. And, if they had positively identified the deceased, this evidence would have amounted to proof that he had in fact died, having been allegedly murdered by the Appellant. It is also not lost on us that the proceedings do not also show that any of the persons who were present when the body was recovered testified.
38. What becomes apparent from this evidence is that, at no point was the body recovered at Tudor Nora positively identified, either by the post mortem report or by PW1 and PW2 as belonging to the deceased. As a result, it could not be concluded that the body was that of the deceased, nor could it be relied upon as proof that the deceased died.
39. Third, though the evidence shows that the body was recovered with clothes which PW1 and PW2 stated the deceased wore at the time of the incident, once again, having been with the deceased before he died, it was crucial for them to have confirmed at the time of recovery, that the clothes found on the body were the same clothes that he was wearing on the night in question. It is apparent from the evidence that PW1 and PW2 only identified the T-shirt during the trial and not at the time of recovery of the body. Since they had not identified the body, it could not be said with certainty that the T-shirt was the same one worn by the deceased on the night in question.
40. It cannot be gainsaid that the evidence of identification would have gone a long way towards demonstrating beyond doubt that the person who was recovered from the ocean was the deceased. It would have been proof that he died. Additionally, it would have established a connection with the Appellant's action of throwing the deceased to his death in the ocean. Without scientific proof from a post-mortem report or proof of his death, there was nothing that demonstrated beyond doubt that the deceased died, or that established the cause of his death. As such, following our reanalysis of the evidence, we are not satisfied that the learned Judge properly interrogated the post mortem report or whether the body that was recovered was positively identified, as if she had, she would have found that, without such identification, there was a break in the chain of circumstantial evidence, since no



nexus between the Appellant's actions and the body recovered at Tudor Nora was established. As a consequence, there was no evidence before the trial Judge, that was supportive of the conviction.

41. With respect to whether the Appellant was responsible for the deceased's death, the learned Judge was satisfied that the Appellant was one of the persons who assaulted the deceased with rungas and a slasher, and thereafter threw him over the bridge into the ocean. But as seen above, without proof of death, the evidence that the Appellant threw him into the ocean was not sufficient to establish the offence of murder. The failure to prove that the person the Appellant was alleged to have murdered had died, and his body was the one recovered at Tudor Nora, was fatal to the charge.
42. We therefore allow the appeal, set aside the Judgment of the High Court and quash the conviction and sentence of the Appellant. We direct that the Appellant shall forthwith be released unless otherwise lawfully held.
43. Lastly, this judgment is delivered and signed under Rule 34(3) of the Court of Appeal Rules (2022), following the untimely death of the Hon. Mr. Justice Fred Ochieng, JA prior to its delivery.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF NOVEMBER, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

