IN THE COURT OF APPEAL AT NYERI

(CORAM: JAMILA MOHAMMED, KIMARU, & MUCHELULE, JJ.A.)

CRIMINAL APPEAL NO. 60 0F 2020

BETWEEN

LIZA DIANA WANJA WANJIRU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Nyeri (Mshila, J.) delivered on 19th December 2019

in

Criminal Case No. 35 of 2012)

****

***** JUDGMENT OF THE COURT**

Background

1. **Liza Diana Wanja Wanjiru** (the appellant) was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code.** The particulars of the charge were that on the night of 25th to 26th October 2012 at Skuta Estate in Nyeri County, the appellant murdered her husband, **Peter Kariuki Ngacha** (the **Deceased**), by stabbing him twice in the lower

abdomen, which resulted in his death.

2. The prosecution presented ten (10) witnesses in support of its case.

   Ezekiel Wachira Mwangi, (PW1), the watchman at the estate where the

Deceased resided together with the appellant, testified that on the material day at about 11.45 p.m., he opened the estate gate for the Deceased who was slightly intoxicated, but otherwise in good health. A short while later, the appellant's minor son known as **VNK (PW9)**, went to him and informed him that his parents were fighting. Moments later, PW1 saw the appellant and the Deceased's driver carrying the Deceased, who was bleeding from the chest. He testified that the appellant explained to him that the Deceased had stabbed himself and that they were taking him to the hospital.

3. **Charles Mwangi Ngacha**, **(PW2),** the Deceased's brother, testified that he was contacted by the Deceased's first wife, **Florence Wangari Gichia**, **(PW3).** She informed him that a neighbour in Nyeri had called her with news that the Deceased had been involved in an accident on the night of 25th October 2012 and requested him to make inquiries. PW2 testified that when he called the appellant to confirm the situation, she gave inconsistent accounts, at one moment saying that the Deceased arrived home already injured, and at another she claimed that he had stabbed himself. PW2 also testified that he visited the Deceased's house and found suspiciously cleaned blood stains on the furniture and fresh patches of blood outside. He further confirmed that upon conducting a search with the police, the appellant's house help, one

Yvonne Mwendwa, (PW7), led them to a dumpsite where she had been instructed by the appellant to dispose of blood-stained clothes.

4. PW3, the Deceased's first wife, corroborated PW2's account. It was her testimony that she went to the Deceased's house at Skuta with police officers and observed that cushions had been stripped and washed, yet blood stains remained embedded in the sponge. She confirmed that PW7 handed over blood-stained clothing hidden at the dumpsite which had apparently been given to her by the appellant.
5. **Fredrick Simiyu, (PW4),** a Scene of Crime Police Officer, testified that he visited the Deceased's house at Skuta Estate, documented what he saw, and took photographs. He noted visible blood stains on the floor and on furniture inside the house as well as patches of blood outside the house. The photographs he took were produced in evidence.
6. **Gladys Waihuini Muriuki**, **(PW5),** the proprietor of a car wash near the Deceased's place of residence, testified that in the days following the incident, a carpet was brought to her premises for cleaning by the appellant. She recalled that one of her workers, one Daniel Kihara, remarked that the carpet had a lot of blood stains. Although Daniel was not called as a witness, PW5 confirmed that the carpet in question was later collected by police and produced in

evidence as one of the exhibits.

7. **Dr. William Kibe**, **(PW6),** the pathologist attached at Outspan Hospital

   in Nyeri, testified that the Deceased suffered two penetrating stab

wounds to the abdomen, causing injuries to vital organs and massive internal bleeding. He formed the opinion that the cause of death was cardio respiratory failure due to severe chest injuries and massive bleeding and blood loss following the assault.

8. **Cleophas Muteti, (PW8),** the Investigating Officer, testified that he visited the Deceased's home and interviewed the appellant, her son, and the house help, Yvonne Mwendwa (PW7). PW7 disclosed that she had been instructed by the appellant to clean blood stains in the house and furniture and to dispose of blood-stained clothes. Acting on this lead, PW8 recovered from the compound's dustbin a trouser, vest, and other items stained with blood which were produced in court as exhibits. He also inspected the Deceased's vehicle but found no blood inside, contradicting the appellant's account that the Deceased came home already injured. PW8 added that a carpet from the house had been taken for cleaning at a carwash, but it had already been washed by the time it was traced.
9. **PW9,** a minor son of the appellant and the Deceased, testified that the last time he saw his father alive was on a Tuesday evening, a day before the incident. He told the court that on the night of Wednesday, 25th October, 2012 when the Deceased is said to have sustained fatal injuries, he did not see him at all.

10. Finally, **Dr. Moses Richu**, **(PW10),** a Consultant Psychiatrist attached to the Nyeri County Referral Hospital, produced a Mental Assessment Report for the appellant, which contained findings that the appellant was fit to take plea and proceed with the trial.
11. The prosecution submitted that taken together, the evidence from its witnesses formed an unbroken chain of circumstances leading to only one conclusion, that the appellant fatally stabbed the Deceased.
12. In her sworn defence, the appellant stated that the Deceased returned home already injured and bleeding, and that she immediately called the Deceased's driver, who lived nearby and rushed him to hospital. She denied assaulting him, denied concealing evidence, and explained that in the confusion of the night she may have told PW1 that the Deceased stabbed himself, but her consistent position was that he came home already wounded. She urged that her conduct was misinterpreted and that she was in shock at the time.
13. The trial court in its judgment found that the prosecution's circumstantial evidence established the appellant's guilt beyond reasonable doubt. The trial court held that the appellant was the last person seen with the Deceased, that she deliberately inflicted the stab wounds, and that her conduct in cleaning the scene and giving

inconsistent versions pointed to her guilt. The trial court inferred malice aforethought from the severity and location of the injuries. Her defence

was rejected as improbable, and she was sentenced to thirty (30) years' imprisonment.

14. The appellant, being dissatisfied by the conviction and sentence, filed the instant appeal. The appeal raises four grounds: that the trial court erred in relying on circumstantial evidence without excluding co- existing circumstances consistent with innocence; that malice aforethought was wrongly inferred simply because the appellant was the last person with the Deceased; that the charge sheet and prosecution evidence lacked complete particulars; and that her defence was not properly considered contrary to section 169(1) of the Criminal Procedure Code.,

Submissions by Counsel

15. When the appeal came up for hearing, learned counsel **Mr. Ombongi**, for the appellant, relied on the written submissions that he had filed, save to state that he urged this Court to find that the trial court erred in its findings on the issue of malice aforethought.

16. Counsel contended that the appellant's conviction was based on unsafe circumstantial evidence. He submitted that the trial court failed to account for co-existing circumstances consistent with innocence. By way of example, counsel asserted that the trial court assumed from PW1's testimony that the Deceased came home uninjured, yet the

appellant’s own sworn defence was that he arrived home already

bleeding and she tried to stop the flow with a towel. He further disputed the finding that the appellant interfered with the crime scene, noting that she rushed the Deceased to hospital openly, and told the watchman to open the gate, which could not be termed clandestine.

17. Counsel also impugned the trial court's reliance on PW5's statement about the presence of blood on a carpet, terming it as hearsay, since the person who observed the bloodstains, was not called to testify. As regards the appellant's off-hand remark to PW1 that the Deceased may have stabbed himself, counsel contended that it should not have been treated as a formal "version" of events as the appellant's only sworn version was that the Deceased returned home already injured.

18. Regarding the trial court's finding of malice aforethought, counsel contended that the trial court wrongly inferred ill motive merely because the appellant was the last person who had contact with the Deceased. Counsel criticized the finding that the appellant must have acted with "medical precision" when inflicting the stab wounds, arguing that no evidence supported such a conclusion. Counsel further maintained that the appellant's failure to immediately report to the police was due to shock, not indifference, and that she had in fact asked her brother-in- law, (PW2), to contact the police.

19. Thirdly, counsel contended that the charge sheet and prosecution

evidence were incomplete and defective. According to counsel, the

charge was initially filed without a clear date and lacked proper particulars of the alleged act of murder, thereby shifting the burden to the defence to fill in gaps. Counsel asserted that the prosecution case was built on speculation rather than concrete proof.

20. Lastly, counsel contended that the trial court failed to properly consider the appellant's defence as required by section 169(1) of the Criminal Procedure Code. In this regard, counsel pointed out that the appellant's explanation that the Deceased came home already injured; that she rushed him to hospital; that no weapon was recovered in the house; that her son did not hear any commotion; and that she voluntarily surrendered clothes to police was ignored. It was also contended that the house help was simply carrying out her normal cleaning duties rather than executing deliberate instructions to conceal evidence.

21. In sum, counsel's position was that the appellant's conviction and sentence were based on uncorroborated allegations and a misapprehension of the evidence. Counsel therefore urged that the appeal be allowed, the conviction quashed, and the sentence set aside.

22. On his part, **Mr. Naulikha,** the learned Assistant Director of Public Prosecutions for the respondent, opposed the appeal and maintained that the prosecution tendered consistent and cogent

circumstantial

evidence which placed the appellant at the scene of crime at the material

time. According to counsel, PW1 testified that the Deceased came home uninjured, and PW7 confirmed that the appellant instructed her to clean and dispose of blood-stained clothes. PW9, the appellant's minor son, reported to PW1 that his parents were fighting before the Deceased was carried out of the house bleeding. According to counsel, these accounts coupled with the appellant's own admission that she was the last person seen with the Deceased when he was alive and well, pointed irresistibly to her guilt.

23. On motive, counsel contended that the appellant stabbed the Deceased twice with a kitchen knife in the abdomen, deliberately targeting vital organs such as the liver, stomach, and lungs. The delay of almost two hours in taking the Deceased to hospital despite the short distance of six kilometers from Skuta Estate to Outspan Hospital was highlighted as further evidence of ill intent. Counsel maintained that the stab wounds, their severity, and the delay in seeking medical care demonstrate malice aforethought.

24. As to whether the charge was defective and whether the defence by the appellant was not considered, it was submitted that the prosecution discharged its burden beyond reasonable doubt through the testimony of ten witnesses, including the doctor who performed the post-mortem, and the Investigating Officer. It was contended that the alibi defence

was raised belatedly and never at the earliest stage of the proceedings.

According to counsel, in the event that this Court were to find that minor inconsistencies existed in the prosecution case, the Court should find that the said inconsistencies were not material as to weaken the strong circumstantial evidence linking the appellant to the offence.

25. Lastly, on the issue of sentence, counsel contended that the sentence of thirty years' imprisonment imposed was not excessive, given the nature of the offence. The respondent therefore urged that the appeal be dismissed in its entirety as both the conviction and sentence were sound and lawful.

Determination

26. We have considered the record, the rival submissions, the authorities cited and the law. This being a first appeal, the duty of this Court is to re-analyze the entire evidence and reach its own conclusions, while bearing in mind that it did not see or hear the witnesses testify. See ***Okeno v Republic [1972] EA 32*** and ***David Njuguna Wairimu v Republic [2010] eKLR***.

27. We discern the issues for determination in this appeal to be whether the circumstantial evidence presented by the prosecution proved the appellant's guilt beyond reasonable doubt; whether malice aforethought was established; whether the charge against

the appellant was fatally defective; whether the defence was properly evaluated; and whether the sentence imposed was lawful.

28. As regards the first issue of whether the circumstantial evidence presented by the prosecution proved the appellant's guilt beyond reasonable doubt, this Court has consistently held that circumstantial evidence can form the basis of a conviction if it meets the legal test.

29. In ***Sawe v Republic [2003] KECA 182 (KLR)***, this Court held:

> ***"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."***

30. At the hearing before the trial court, PW1, the watchman of the estate where the Deceased and the appellant resided, testified that the Deceased returned home on the night in question in apparent good health, and that shortly thereafter, he saw the appellant and the Deceased's driver carrying him out while bleeding. PW2 and PW3 observed suspiciously cleaned blood stains in the house, while PW7, the appellant's house help, testified that she was instructed by the appellant to wash and dispose of blood-stained clothes which were later recovered. PW4, the scenes of crime officer, corroborated these

accounts with photographs showing blood stains inside and outside the Deceased’s

house. PW6, the pathologist, confirmed that the Deceased died from two deep stab wounds that penetrated vital organs, injuries inconsistent with self-infliction. PW8, the Investigating Officer, recovered blood- stained items from the compound and confirmed the absence of blood in the Deceased's car which he had driven home on the night of the incident in question, contradicting the appellant's explanation that he came home already injured.

31. In this case, the chain of circumstances, *viz*, the Deceased returning home uninjured, the immediate bleeding thereafter, the concealment of blood-stained clothes, and the medical findings of stabbing, in our view, overwhelmingly point to the appellant as the perpetrator. As held by the trial court, and correctly so in our view, the appellant's explanations were inconsistent and did not dislodge the prosecution's case. Put differently, the circumstantial evidence presented by the prosecution was sufficient to establish the appellant's guilt beyond reasonable doubt.

32. As regards the issue of malice aforethought, **section 206** of the **Penal Code** defines the circumstances under which it can be inferred, including intention to cause death or grievous harm. This Court in ***Nzuki v Republic* [1993] KECA 83 (KLR)** stated thus:

> ***"Malice aforethought" is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a***

lethal

weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result."

33. In ***Republic v Tubere s/o Ochen [1945] 12 EACA 63***, the Court identified relevant factors in the establishment of malice aforethought such as the type of weapon used, the manner of its use, the part of the body targeted, and the conduct of the accused before and after the attack.

34. In the present circumstances, the Deceased sustained two deep stab wounds to the lower abdomen which penetrated vital organs including the liver and stomach. According to PW6, the pathologist, these injuries caused massive internal bleeding leading to hemorrhagic shock and death. The force and precision of the stabs which were directed at vital organs was, in our view, inconsistent with an accident or self-infliction and instead pointed to a deliberate act aimed at causing death or grievous harm. Further, the appellant's act of interfering with the crime scene and/or concealing material evidence reinforces the inference of ill intent. Therefore, taken together, the nature and location of the injuries, the number of stab wounds, and the appellant's post-offence conduct provide a firm basis upon which malice aforethought could be inferred. The trial court did not therefore err in concluding that the prosecution

had established the mental element required for the offence of murder.

35. The appellant also contends that the trial court failed to give due consideration to her defence, in particular her assertion that the Deceased came home already injured and that she had no role in the fatal stabbing. She framed this as an alibi, distancing herself from the commission of the offence.

36. The law on alibi is settled. An accused person who raises an alibi does not assume the burden of proving it. The burden remains on the prosecution to displace the alibi by showing that the accused was present at the scene of crime and participated in the offence. See ***Kimotho Kiarie v Republic [1984] KECA 65 (KLR).*** In addition, and

    although it is desirable that an alibi be raised at the earliest opportunity to allow the prosecution an adequate chance to investigate and rebut it, a late-raised alibi may be treated with caution, though it must still be weighed against the totality of the evidence.

37. In the instant case, the appellant's position was that the Deceased arrived home already injured and that she immediately sought help by calling the driver and rushing him to hospital. This explanation was, however, contradicted by key prosecution witnesses. PW1 confirmed that the Deceased entered the house in apparent good health, only to be carried out minutes later bleeding. PW7 testified

that she was instructed by the appellant the following morning to clean blood-stained clothes and dispose of them at a dumpsite. PW8 confirmed that no blood

was found in the Deceased's car thereby undermining the appellant's version that he sustained injuries before reaching home.

38. In addition, the appellant's remark to PW1 that the Deceased had stabbed himself further undermined her own sworn statement that he returned home already wounded. These inconsistencies rendered her defence incredible. The trial court, while obliged under section 169(1) of the Criminal Procedure Code to consider the appellant's defence, was entitled to reject it if found improbable when weighed against the prosecution's evidence.

39. On the totality of the record, the prosecution's circumstantial evidence placed the appellant at the scene, with opportunity, means, and post- offence conduct inconsistent with innocence. The alibi defence, in our view, was contradicted by other evidence and the trial court was right to dismiss it.

40. The appellant also raised issue with the charge sheet, contending that it was defective for want of particulars and that this deficiency prejudiced her right to a fair trial. Specifically, it was argued that the initial charge lacked clarity as to the date and particulars of the offence, and therefore did not disclose the offence of murder with sufficient precision.

41. The law is that under **section 134** of the **Criminal Procedure Code,** a

charge must contain such particulars as are reasonably necessary to

give the accused notice of the nature of the offence with which they are charged. However, as this Court held in ***Jason Akumu Yongo v Republic [1983] KECA 44 (KLR)***, a charge is not defective merely because it could have been more fully framed; a defect is only fatal if it misleads the accused or occasions a failure of justice.

42. In the circumstances herein, the record shows that the charge as amended specified the offence as murder contrary to **section 203** as read with **section 204** of the **Penal Code,** and identified the Deceased, the date and the place of commission of the offence. On 10th November, 2015 when the prosecution made an oral application to amend the charge, the appellant's counsel indicated that she was not opposed to the said application. In addition, the appellant was represented by counsel throughout the proceedings, she participated in cross- examination of witnesses, and mounted a substantive defence. There is no indication that she was misled as to the charge she was facing, or that her ability to prepare her defence was impaired. This ground therefore is without any merit.

43. Lastly as regards the sentence imposed upon the appellant, **section 204** of the **Penal Code** prescribes the death penalty for the offence of murder. The Supreme Court in ***Francis Karioko***

Muruatetu &

another v Republic [2017] eKLR declared the mandatory nature of that

sentence unconstitutional, thus leaving discretion to the trial court. In

the circumstances herein, although the prosecution had urged the trial court to impose the mandatory death sentence, the trial court sentenced the appellant to thirty (30) years' imprisonment. That sentence was, in our view, in tandem with the mitigation offered by the appellant and as per the decision in ***Francis Karioko Muruatetu & another v Republic*** (supra). In any case, in the circumstances of this case, the sentence cannot be termed excessive.

44. In the end, we are satisfied that the appellant's conviction was safe, and the sentence passed was lawful. This appeal is therefore devoid of any merit and is accordingly dismissed in its entirety.

Dated and delivered at Nyeri this 28th day of November, 2025.

JAMILA MOHAMMED

.....
JUDGE OF APPEAL

L. KIMARU

.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
..... JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR