IN THE COURT OF APPEAL
AT KISUMU
[CORAM: NYAMWEYA, ACHODE & MATIVO JJ.A.]

CRIMINAL APPEAL NO. E033 OF 2022

BETWEEN

CYNTHIA MUHONJA ELVIS.....APPELLANT

AND REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Bungoma (Abida Ali-Aroni, J.- as she was then) dated 15th June 2015 in Criminal Case No.47 of 2007).

JUDGMENT OF THE COURT

1. Cynthia Muhonja Elvis (the appellant), was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code in **Bungoma High Court Criminal Case No. 47 of 2007.** The information stated that on 3rd November, 2007 at Mukhuyu Village, Webuye Township in Bungoma, she murdered Esther Nasimiyu. She pleaded not guilty to the charges and in the ensuing trial, the prosecution called a total of nine witnesses while her defence rested on her sole unsworn testimony. At the conclusion of the trial, she was convicted and sentenced to death.
2. Aggrieved by the said verdict, the appellant is now before this Court seeking to overturn both the conviction and sentence essentially faulting the trial Judge for: (a) convicting her on the basis of circumstantial evidence; (b) rejecting her defence; (c) imposing an excessive, harsh, unconstitutional and an unlawful sentence, and (d) failing to weigh the conflicting prosecution evidence. The appellant prays that the conviction and sentence be quashed and this appeal be allowed.
3. **PW1, Julia Nalyaka Soita**, the deceased's aunt testified that she left the deceased who was 9 years old at home together with her one-year-old son

EW. She later learnt from her husband that her niece had been assaulted. She went home and, on the way, she met with an ambulance and near her home, a mob had arrested the appellant. Upon entering her house, she found blood splashed all over. She headed to the Webuye District Hospital where the deceased had been rushed. She found the deceased on oxygen but she died shortly thereafter. At home, she found that her T.V set, one battery, clothes and beddings had been stolen. However, the said items were recovered in a nearby bush. PW1 later met the accused at the police station, and the accused told her that she had been sent to the house but did not give details of who sent her. Answering questions upon cross-examination by the appellant, she confirmed that there was a blood-stained knife and a panga in the sitting room.

4. **PW2 Abdalla Mabonga Kulasi,** recalled that on 3rd November 2007, he went to Henry Wafula's house to pick a gear box. On arrival, he found a woman outside the house who informed him that the owners were away. He stated that the said woman was "pushing the door inside while a child was pushing the door outwards while crying loudly." Upon asking the appellant why she was not allowing the child to get out, she stated that the children would disturb her. PW2 went behind the house and saw a child trying to climb near the window. He thought there was a problem and called Mr. Henry Wafula, the owner of the house and informed him what he had seen but Mr. Henry Wafula said he would call his wife and pass the information to her. **PW2** pointed to the appellant from the dock as the woman he saw outside the house on the material day. In cross-examination, he confirmed that they used to sell spare parts with Henry Wafula but he did not know who used to take care of Wafula's children. PW2 also confirmed that he could not remember the colour of clothes the appellant was wearing, nor did he not see her armed.

5. **PW3, Centry Wamalwa** testified that she used to leave her key at PW1's house. On the material day she took her key to PW1's house and found a woman in the house whom she did not know. Later she received a call from **PW1** asking her to go back and check what was happening at the house. She went back and found the door open. She called the deceased 3 times but she did not answer. Instead, the woman, who she identified as the lady she had seen earlier came out carrying the keys and closed the door behind her and spoke to her while outside the house. When **PW2** asked the appellant about the deceased's whereabouts, the appellant informed her that the deceased had gone to the river. However, she noticed blood stains on the appellant's clothes especially the sleeves of her sweater and her dress.

6. It was **PW3's** testimony that the appellant kept moving closer to her. Being scared she ran to her mother in laws house with the appellant in pursuit while holding her keys in her hand. The appellant subsequently threw the keys at her mother in law's feet. **PW3** asked the appellant what she had done to **PW1's** children, she started running away and **PW3** and her mother-in-law followed calling for help. The appellant was arrested by the members of public as she ran towards the road. **PW3** entered into **PW1's** house and found the siting room full of blood and the deceased under the table covered with a jacket and bleeding profusely. She was groaning in pain and had difficult breathing. **PW1's** son stood near the deceased crying. The deceased had stab wounds on the chest, neck, head and hands. An ambulance came and took her to hospital. However, she died while being attended to. Near the deceased's body was blood-stained knife and a panga.

7. On cross examination, **PW3** confirmed that the appellant was wearing a black skirt and a top, she saw the appellant twice on the material day and

she thought she was **PW1's** sister. **PW3** also confirmed that the appellant was arrested by a mob but she was not beaten.

8. **PW4, Jacinta Nafula Wamalwa**, recalled that on 3rd November 2007, she met the appellant on the road wearing a blood stained t-shirt. She later met a woman crying that some children had been killed at **PW1's** house. **PW4** rushed to **PW1's** house and found a girl bleeding. She accompanied those taking the deceased to the hospital. The deceased had injuries to her head and arms, she later died. The appellant ran and hid in her toilet but she was flashed out and arrested by members of the public. It was **PW4's** testimony that she had never met the appellant before.

9. **PW5, Mary Wafula** recalled that on the 3rd November 2007 a pregnant woman rushed to her house and asked her to help her to hide. She declined and the woman asked to be shown a toilet. PW5 pointed the toilet to her. A mob subsequently arrested inside the toilet. She said that the appellant was wearing a grey T-shirt socked in blood and her legs also had blood. On cross-examination, **PW5** confirmed that she did not go to the house where the incident had happened.

10. **PW6, Grace Wafula**, recalled that on 3rd November 2007 at about 11.00.a.m, **PW3** ran to her house and told her something had happened at **PW1's** house. They left for **PW1's** house and on the way they met the appellant running towards them who had blood all over her clothes. The appellant dropped keys and did not talk to them. She ran towards the road. On arrival at **PW1's** house, they pushed the door open she saw a child lying on the floor bleeding with an injury on her head. A small boy was crying. There was no one at home. The deceased was unconscious but breathing. She had injury on her head and neck. Besides the deceased was a panga and a knife. She identified both in court. She stated that the appellant was arrested by members of the public as she tried to ran

away. She identified the accused as the woman she saw. The deceased was her grandchild.

11. **PW7, Simon Makokha Makhanu** recalled that on 3rd November 2007, he met a crowd that had arrested the appellant and were taking her to the police. He went to **PW1's** house where a crowd had gathered outside and inside the house, he saw a knife and a panga. He did not see the deceased. He later went to the police. The appellant was interrogated by the police and she said she was with two other boys whose names she gave as Richard and Alex. **PW7** accompanied the police to Richard's house where Richard was arrested. Richard in turn took them to the house of Alex whom they did not find. He identified the appellant whose clothes he said were soaked in blood on the material day.

12. **PW8 Raphael Ingati**, a police officer testified that on 3rd November 2007 while at the Webuye police station they received information of an assault at a Webuye home. They learnt that the victim had been rushed to hospital. Together with PC Kirui and one other officer, they rushed to the scene and found the girl had been rushed to the hospital and the assailant arrested and taken to the police station using a different route. They rushed to the hospital where the E.N had been admitted with injuries to her head and chest. After seeing the girl they went back to the police and found the assailant already there having been beaten by wananchi. They recovered a knife, a panga and jembe from members of the public who had arrested her. The appellant wore a blood soaked t-shirt. They gave her another t- shirt and retained the one with blood. At 1 p.m. the hospital called to inform them the girl had passed on.

13. **PW9, Dr. Inwani Nicholas** of Webuye District hospital produced a post mortem report prepared by Dr. Ngige who had since been transferred. The report indicated that the post mortem was conducted on 5th November, 2007 at 11.55 a.m. It indicated that the deceased had stab

wounds on the

side of the chest measuring 2 x 5 cm penetrating to the lungs which had collapsed. There was haemorrhage, multiple cut wounds on the head on the parietal and occipital region and bruises on the scalp. Cause of death was severe haemorrhage leading to cardio vascular collapse as a result of penetrating chest injuries (haemothenia) and head injuries.

14. The appellant gave an unsworn statement in her defence. She stated that she was prostitute and as usual she had not slept in her house and on 3rd November 2007, she woke up to search for a job of washing clothes and ended up at **PW1's** home where she found two children and upon asking them where their mother was, they said she would be back at 11.00am, but when her patience wore out, she left. However, she saw three boys approaching the home. Among them was Richard whom she knew since he had seduced her before. Richard told her that he had come to do some work in **PW1's** home. They went back to the house where Richard gave her some alcohol and since it was her first time to take alcohol, she felt weak and she could not see. However, Richard took things from **PW1's** house and pushed her out of the house telling her to leave. He took one of the children, a girl aged about 11 years to the bedroom. Thereafter, they left. Later, people came and arrested her. She denied killing the deceased.

15. During the virtual hearing of this appeal on 4th September 2025, the appellant, who was represented by learned counsel ***Ms. Mboya*** who held brief for ***Ms. Awuor***, appeared virtually from Kisumu Women Prison, while learned prosecution counsel ***Ms. Kibet*** represented the respondent. Both counsel relied on their respective written submissions.

16. In her written submissions dated 11th June 2025, Ms. Mboya maintained that the prosecution did not prove its case beyond reasonable doubt. While agreeing that the deceased lost her life, she maintained that there is no evidence showing that it is the appellant who killed her, save that she was found at the wrong place at the wrong time.

17. It was her submission that **PW3** testified that the murder weapons before court were not the same as the ones found at the scene of the crime, which means, the murder weapons were never recovered, therefore the prosecution failed to prove the *actus reus* and *mens rea* which are vital elements for establishing the offence of murder. To buttress her submission counsel cited the case of ***Joseph Kimani Njau vs Republic [2014]eKLR*** and ***Dickson Mwangi Munene & Another vs Republic[2014]eKLR*** in support of the proposition that the prosecution must prove the elements of murder before a conviction can be entered. Counsel maintained that the elements of the offence of murder were not proved, therefore the appellant ought to be acquitted.

18. Ms. Mboya contended that the deceased was killed by unknown persons and there was no proof that the appellant had a common intention with the perpetrators. Furthermore, the appellant was not known to either the parents of the deceased or any witness and they all testified that it was the first time they were seeing her, therefore, the appellant could not have any intention of killing someone she did not know or interacted with before. For authority, she cited the case of ***Augustino Orete & Others vs Uganda [1966] E.A. 430***. However, we must point out that the said decision addressed the principle of common intention in the context of mob violence situations, unlike this case.

19. Regarding the sentence, Ms. Mboya submitted that the mandatory death sentence is unconstitutional because it violates the right not to be subjected to cruel, inhuman and degrading treatment, the right to dignity and the right to life guaranteed by Articles 29 (f), 25(a), 28, and 25 (c) of the Constitution, therefore, the sentence should be set-aside. To fortify her submission, counsel cited the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs Republic [2017] eKLR*** in submitting that mandatory sentences, to the extent they deprive the court the

discretion to

impose appropriate sentences after considering the peculiar circumstances of the case are unconstitutional. Counsel also urged this court to consider the time she spent in custody during the trial pursuant to section 333(2) of the Criminal Procedure Code.

20. The appellant's counsel also submitted that the circumstantial evidence of identification was flawed and inconclusive since nobody saw the appellant inflicting the injuries on the deceased. Further, the alleged blood-soaked t- shirt was not subjected to DNA to link the blood with the deceased or the appellant since she was also beaten as was stated by **PW8**. Counsel also argued that the appellant was caught 200 meters away from the scene.

21. Counsel contended that the prosecution evidence was full of contradictions since **PW4** stated that she met the appellant and she entered into her toilet and hid there. However, **PW3** stated that the appellant was arrested by members of the public as she ran down towards the river. **PW5** on the other hand testified that she saw a pregnant lady in her house asking to be hidden, and after she declined, the lady asked to be shown the toilet, from where she was arrested. Counsel posed the following questions: was the appellant arrested in a toilet or towards the river; did PW3 and PW6 identify the right suspect since they differed on where she was arrested; whether the woman who was arrested was pregnant or not; whether the right culprit was arrested.

22. The appellant's counsel argued that there was contradiction on what the woman in the house wore since **PW3** stated that she wore a black skirt and top and her clothes had blood stains especially on the sweater sleeve and dress while **PW4**'s evidence was that the woman was wearing a t-shirt. **PW5** on the other hand stated that the appellant was wearing a grey t-shirt, while **PW7** stated that the lady was wearing a white t-shirt. Counsel maintained that the lady arrested was not wearing a sweater.

Counsel maintained that the appellant ought to be convicted on the strength of the

prosecution evidence as opposed to the weakness of her defence to avoid shifting the burden of proof from the prosecution to the appellant.

23. Learned counsel for the respondent Ms. Kibet, opposed the appeal through her written submissions dated 20th June 2025 urging that the prosecution case was based purely on circumstantial evidence and that the appellant was the only person seen at the **PW1's** home where the deceased was attacked and fatally injured. She cited ***Sawe vs Republic [2003] KECA 182 (KLR)*** a leading decision which underscored the probative value of circumstantial evidence and the Court's duty while considering such evidence and this Court's holding in ***Ahamad Abolfathi Mohammed & another vs Republic [2018] KECA 743 (KLR) eKLR*** that before circumstantial evidence can form the basis of a conviction, it must be demonstrated that it unerringly points to the accused person's guilt and no other person.

24. Regarding sentence, Ms. Kibet cited the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs Republic [supra]*** in support of proposition that sentencing is a discretionary power of the court that should be exercised on a case-to-case basis, a position recently underscored by this Court in ***John Bundi Koome vs Republic, Criminal Appeal No. 22 of 2017*** while affirming the legality of a sentence imposed after considering the appellant's mitigation and the circumstances of the offence.

25. Our mandate as stipulated under section 379 (1) of the Criminal Procedure Code is that this appeal is akin to a retrial because it involves a reconsideration of the facts and the legal principles relevant to the conviction and sentence. The parties' expectation is that this Court will conduct a thorough and fresh examination of the evidence, carefully weigh conflicting testimonies before reaching our own independent conclusions on issues of fact and the law. In doing so, we must remain

aware that we did not have the opportunity to hear and observe the witnesses as they

testified in order to gauge their demeanour, therefore, we must give room to that fact. (**See *Mark Oiruri Mose vs. Rep [2013] eKLR***). Alive to the above stated mandate, we have considered the record, submissions by counsel and the law. From the testimony of the doctor who produced the post mortem report, there is be no doubt that the deceased's death was caused by severe haemorrhage leading to cardio vascular collapse as a result of penetrating chest injuries which damaged the lungs (haemothenia) and head injuries. In fact, the appellant's counsel was clear that the fact of death is not contested. Therefore, proof of death is not in doubt.

26. The contestation is who caused the death. It is common ground that there was no eye witness to the murder. The appellant maintains she was wrongfully implicated as the offender claiming that her conviction is essentially founded on circumstantial evidence, which she urged did not meet the required threshold. We agree that the appellant's conviction was purely based on circumstantial evidence. In a criminal trial, the prosecution evidence is crucial for establishing the accused's guilt beyond a reasonable doubt. This evidence, which can be direct or circumstantial, aims to prove every element of the crime and build a compelling narrative that supports the prosecution's case. The strength of the prosecution's evidence directly impacts the outcome of the trial, potentially leading to conviction or an acquittal. The question is whether the circumstantial evidence in this case met the required threshold to sustain the conviction and whether it proved that it is the appellant who caused the deceased's death.

27. Circumstantial evidence refers to indirect evidence that does not directly prove a fact but suggests a conclusion based on a series of related facts. Unlike direct evidence (such as eyewitness testimony), circumstantial evidence is inferred from the situation and surrounding facts. Decided

cases have set out five essential principles for evaluating circumstantial evidence. These are: (a) the circumstances must be fully established; (b)

the facts must be consistent with the hypothesis of the accused's guilt; (c) the circumstances should have a conclusive nature and tendency; (d) every possible hypothesis, other than the one that proves guilt, must be excluded;

(e) the chain of evidence must be complete, leaving no reasonable doubt as to the innocence of the accused. The Supreme Court in ***Republic vs. Mohammed & Ano. [2019] KESC 48 (KLR)*** citing numerous decisions stated:

> ***"(55)The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is "indirect (or) oblique evidence … that is not given by eye witness testimony" It is "(a)n indirect form of proof permitting inferences from the circumstances surrounding disputed questions of fact." It is also said to be "(e)vidence of some collateral facts from which the existence or nonexistence of some facts in question may be inferred as a probable consequence ….***
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> ***(56)On its application, circumstantial evidence is like any other evidence. Though, it finds it probative value in reasonable, and not speculative, inferences should be drawn from the facts of a case, and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding disputed questions of fact, circumstantial evidence should never be given a derogatory tag ….***
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> ***59.To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative, but also, in the words of the Indian Supreme Court, "the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established…." As was stated in the case of Kipkering Arap Koskei & Another v. R (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial 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 his guilt, …***
>
> ***"68.As was further stated in the case of Musili v. Republic CRA No.30 of 2013 (UR) "to convict on the basis of circumstantial***

evidence, the chain of events must be so complete that it establishes the culpability

<u>of the appellant, and no one else without any reasonable doubt."</u> The chain must never be broken at any stage.16 In other words, there "must be no other co-existing circumstances weakening the chain of circumstances relied on" and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. "Suspicion however strong, cannot provide a basis for inferring guilt.

28. This Court in ***Mwangi & Another vs. Republic [2004] 2KLR 32*** this court was emphatic that in a case depending on a circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of events as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge. The trial judge after evaluating the evidence had this to say:

"Evidence before court by prosecution witnesses clearly indicates that the accused was alone in the house with the two children at the material time. PW3 went to the house twice, before and after the heinous act and saw none other than the accused. On her second visit to the house PW3 found the accused with her clothes soaked in blood. The accused came out with the witnesses keys; this in my view was so that the witness does not get into the house. Thereafter the accused went towards the witness as if to attack and when the witness started moving away, the accused followed her and on being asked what she had done to the child, the accused attempted to run. The accused asked PW4 for a place to hide, and ran into a toilet where she was accosted and arrested by members of the public.

It is my considered opinion that the evidence of the prosecution was credible and cogent. The defence by the accused introduced two other people and evidence of intoxication. The court does not find this evidence credible neither did it displace the evidence of the prosecution witnesses. The above summary of events narrated by the witnesses irresistibly point to the accused as the person who was found with the children before and after E N sustained injuries. The chain of events given by the prosecution is so complete, so clear, so credible, as to allow this court to arrive at no other conclusion other than that the accused herein is the one who brutally, mercilessly and

severely injured E N on the fateful morning and that the said injuries were

fatal leading to the loss of E N's life several hours after she sustained the same.
It is so evident that no one else but the accused herein caused the death of the young girl. I find her guilty of the offence of murder as charged. I accordingly convict her of the same."

29. As decided cases suggest, the application of circumstantial evidence requires that the facts and circumstances presented lead to reasonable inferences, proving the accused person's guilt beyond a reasonable doubt, to the exclusion of any other hypothesis. This means the evidence must be consistent with guilt, inconsistent with innocence, and form a complete picture that cannot be reasonably explained otherwise. To satisfy ourselves whether the above stated threshold was met in this case, we must consider both the prosecution and the defence case. When assessing the credibility of the witnesses, it is crucial to bear in mind that there is no one-size-fits- all approach. The evidence presented by both sides must undergo the same rigorous scrutiny. Just like the trial court, we are tasked to meticulously evaluate the evidence, taking into account both the strong points and the shortcomings. After this thorough examination, we must then determine whether, despite potential flaws or inconsistencies in the testimony, we are convinced of the truthfulness of the witness's account(s). This careful and balanced evaluation is fundamental to ensuring a fair and just legal process.

30. The appellant's defence is that she went to **PW1's** house looking for a menial job of washing clothes only to meet one Richard and Alex. She said since Richard was known to her and he was seducing her, he asked her to join them and gave her a drink which made her feel weak and she could not see. She stated that Richard took the deceased to the bedroom, and he pushed the appellant and told her to leave but she was unable to walk. It is important to note that the appellant clearly admits that she was in **PW1's** house. She did not deny that **PW2** and **PW3** found her in the

house. Therefore, in her own words, having admitted she was in **PW1's** house,

the key question remains what transpired in the said house. Importantly, in a criminal trial, an accused person's defense is not evaluated in isolation but considered holistically alongside the prosecution's evidence to determine guilt or innocence.

31. Also critical is the fact that this Court must assesses the credibility and reliability of all the evidence presented by both sides to arrive at a fair and informed judgment. This ensures that the defense is not dismissed without context and is weighed within the entire legal framework of the trial.

32. As highlighted earlier, **PW1** left the children in the house. **PW2** went to the house to pick a gear box. He confirmed finding a woman outside the house. The woman told him the owners were away. He noted that the woman kept pushing the door inside while a child was pushing the door outwards while crying loudly. He asked her why she was not allowing the child to get out, and she replied that the children would disturb her. Behind the house, **PW2** saw a child trying to climb near the window. Concerned, he called Mr. Henry Wafula, the owner of the house and reported to him what he had seen. Mr. Wafula promised to inform his wife. **PW2** identified the appellant at the dock as the woman he saw at Mr. Wafula's house. Notably, this evidence squarely placed the appellant at the scene.

33. **PW3** used to leave her key at **PW1's** house. On the material day she found a woman in the house whom she did not know. Later, **PW1** called and asked her to go back and check what was happening at the house. She found the door open, called the deceased 3 times, but she did not answer. Instead, the same woman she had seen earlier came out carrying the keys and closed the door behind her. **PW3** asked her the deceased's whereabouts, and she told her that the deceased had gone to the river. However, she noticed blood stains on her clothes. When **PW3** asked her

what she had done to **PW1's** children, she started running away. **PW3** and her mother-in-law followed calling for help. Shortly, she was arrested by the members of

public. In the house, **PW3** noted that the siting room full of blood and the deceased under the table covered with a jacket and bleeding profusely and groaning in pain and had difficult breathing. The deceased had stab wounds on the chest, neck, head and hands. Near the deceased's body was blood-stained knife and a panga. Like **PW2**, this witness placed the appellant at the scene and noted that her clothes had blood stains. Her account of what she saw inside the house after the appellant fled gives a glimpse of what the appellant was run

34. **PW2 & PW3's** evidence was collaborated by the testimony of **PW4** who met the appellant on the road running wearing blood-stained clothes. **PW5** also saw that the appellant wearing a grey t-shirt socked in blood and her legs also had blood. The appellant was arrested by members of the public while hiding in a toilet.

35. From the above evidence, the appellant was the last person to enter into **PW1's** where the children were left alive and well barely hours before. This brings into fore the *doctrine of last seen alive*, a legal principle which holds significant importance in cases where the cause and nature of a person's death are in dispute. The *"last seen alive"* doctrine establishes a legal presumption that the person last seen with a deceased individual is responsible for their death, requiring the accused to provide a reasonable explanation. It's a key piece of circumstantial evidence. According to this doctrine, if an individual is the last person seen with a deceased individual, they are required by law to provide an explanation regarding the circumstances surrounding the death. The burden of proof lies on the person last seen with the deceased to provide at least a minimum explanation regarding their knowledge of the events leading to the death. In the absence of a satisfactory explanation, both the trial court and the appellate court are justified in drawing the inference that the accused person was responsible for killing the deceased. (See this Court's

decision

in ***Kamau vs Republic (Criminal Appeal E131 of 2022) [2024] KECA 1193 (KLR) (20 September 2024) (Judgment) - Criminal Appeal E131 of 2022.***

36. The reasoning in the preceding paragraph accords with section **111(1)** of the Evidence Act which provides: (insert quotation marks)

> ***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.***

37. The Supreme Court in ***Republic vs Ahmad Abolfathi Mohammed & Another [2019] eKLR*** had this to say regarding the above provision:

> ***"Section 111(1) deals with the burden of proof and only comes into play in the trial when the prosecution has proved, to the required standard of beyond reasonable doubt, that the accused person committed an offence and part of the prosecution case comprises of a situation only "within the knowledge" of the accused person so that if he does not offer an explanation, he risks conviction."***

38. This Court in ***Dida Ali Mohammed v R Nakuru Court of Appeal Criminal Appeal No. 178 of 2000 (UR)*** held that:

> ***"Then there is the circumstantial evidence which shows that it was the appellant who was the last person seen with the deceased before her death…As to when the deceased left the appellant's home and up to where the latter escorted her are maters which were peculiarly within the appellant's knowledge which we think, under section 111(1) of the Evidence Act, he was the only person who could but did not explain. And the evidence of recovery of the deceased's body***

consequent upon information the appellant gave are all circumstances which when taken cumulatively lead to irresistible conclusion that the appellant and no other person killed the deceased, and which exclude any other reasonable hypothesis than that the appellant killed the deceased."

39. The two children were left alive in the house by **PW1**. When the appellant entered into the said house, both children were alive and well. Therefore, the appellant was the last person to enter into the said house when both children were still alive. **PW2** saw the appellant standing at the door pushing the door even as the deceased was also pulling it crying. **PW2** asked the appellant why she was preventing the children from exiting the house and she said she did not want them to disturb her. At the back of the house, **PW2** said he saw a child trying to climb the wall. The one-year-old baby could not climb the wall, which means the deceased was still alive at this point and she was struggling to escape. After the appellant escaped from the house with blood-stained clothes as narrated by **PW3**, the deceased was found in the house bleeding from severe stab wounds and groaning in pain and experiencing difficulties in breathing. The appellant, in such circumstances, had the duty to provide an explanation regarding how the deceased met her death. In the absence of a satisfactory explanation, both the trial court and the appellate court are justified in drawing the inference that the appellant was responsible for killing the deceased. (See ***Kaburu vs Republic [2024] KECA 536 (KLR))*.**

40. We are satisfied that, the facts of this case all pointed to the appellant as the last person to have entered the house. The appellant's action of standing at the door and telling **PW2** that she did not want to let the deceased and her younger cousin out because they would disturb her and the action of telling **PW3** that the deceased had gone to the river are incompatible with her innocence. Therefore, the circumstantial evidence adduced in this case

is not only compelling, but it meets the high threshold set out in decided cases.

41. The appellant urged that the blood on her t-shirt was as a result of the beating from the mob. However, there was uncontroverted evidence by **PW2, PW3, PW4** & **PW6** that the appellant wore a blood-stained t-shirt even before she was arrested and assaulted by the mob. We find no other co-existing circumstances that would weaken the inference of guilt on the part of the appellant.

42. The appellant raised the possibility of another person having committed the offence. In particular, she mentioned one Richard and Alex both whom she said they had gone there to steal from **PW1's** house. She said Richard took the deceased to the bed room. However, none of the prosecution witnesses mentioned seeing another person in the house or at the vicinity. Notably, the appellant in her defence potrayed Richard as the murderer claiming that Richard went with the deceased in a room leaving behind the young cousin. There is scanty information about Richard and Alex and why they were not charged. But this notwithstanding, it will suffice to mention that the elements of common intention as defined in ***Njoroge vs Republic [1983] KLR 197*** and ***Solomon Munga vs Republic [1965] EA 363*** do apply in the circumstances of this case. The Court in the above decisions stated:

> ***"If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavors to effect the common object of the assembly."***

43. Accordingly, if at all the appellant was in the company of other persons as she wants us to believe, that cannot exonerate her because the only reasonable conclusion that can be drawn is that their common intention was undoubtedly to kill the deceased.

44. The other essential ingredient which must be proved is whether the appellant was positively identified as the offender. Positively identifying an accused as the person who committed an offense is a critical requirement for a conviction in a criminal trial to stand. The prosecution must prove the identity of the perpetrator beyond reasonable doubt to establish guilt and impose a sentence. Identification is a fundamental aspect of due process and a fair trial, especially when the case relies heavily on circumstantial evidence or the testimony of a single witness. In essence, a clear and reliable identification of the accused as the offender is a cornerstone of a successful criminal prosecution. From the evidence of **PW2, PW3, PW4, PW5** and **PW6**, we are fully satisfied that the appellant was positively. This is reinforced by her own evidence placing her at PW1's house.

45. The appellant argues that there were contradictions in the prosecution case. She cited contradictions regarding the murder weapons used urging that **PW3** disowned the Panga and the knife showed to her by the prosecution. However, **PW6, PW7** and **PW8** confirmed that the knife and the panga were recovered from the scene. The appellant also cited minor inconsistencies regarding the colour of the t-shirt she was wearting. However, what was constant regarding the appellant's t-shirt was that it was blood stained. Therefore, the cited inconsistencies are in our view minor and they did not shake the overwhelming prosecution evidence. In ***Joseph Maina Mwangi vs Republic [2000] eKLR***, this Court stated:

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 CPC, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."***

46. We also associate ourselves with the observations of this Court in the case of ***Philip Nzaka Watu vs Republic [2016] eKLR***, that:

"While PW3 did not see the appellant actually stab the deceased, the evidence, which is circumstantial, points to the appellant, and to nobody else, as the deceased's assailant. We are satisfied that the evidence on record is incompatible with the innocence of the appellant and incapable of explanation by any other reasonable hypothesis except his guilt. In addition, there are no other co-existing circumstances, which would weaken or destroy the inference of guilt on the part of the appellant."

47. The appellant has also contended that the motive of the murder was not proved to establish her guilt since the prosecution relied on circumstantial evidence. This Court in ***Libambula vs Republic [2003] KLR 683*** stated:

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

48. The failure to prove motive does not, *per se*, vitiate the appellant's conviction. In this regard, section 9 (3) of the Penal Code provides:

"Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility."

49. In any event, while motive may in some cases be a relevant factor, the primary ingredients of the offence of murder as defined inn section 203 of the Penal Code are clear from the wording of the said section which reads:

"any person who of malice aforethought causes death of another by unlawful act or omission is guilty of murder."

50. A reading of the above section shows that the three core ingredients that the prosecution must prove beyond reasonable doubt for the offence of murder are: (a) the death of the deceased and its cause; (b) the accused committed the unlawful act or omission that caused the death; and (c) the act was committed with malice aforethought. We have already

established that death is not disputed and that from the evidence, the appellant was the last person to be seen with the deceased alive, and eliminated the possibility

of any other person causing the death. We will now address the question whether malice aforethought was proved.

51. Malice aforethought refers to the accused's mental state (*mens rea*) at the time of causing a death, specifically the conscious intent to kill or inflict grievous bodily harm, or a reckless indifference to human life, even if the specific victim wasn't intended. It does not require prior motive, hatred or an extended deliberation period, as the intent can be formed instantly before the act. Section 206 of the Penal Code provides that malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

> ***a) an intention to cause death of or to do grievous harm to any person whether that person is the person actually killed or not;***
> ***b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
> ***c) An intent to commit a felony; and***
> ***d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony.***

52. Malice aforethought can be inferred from the way a murder is carried out. This means that the circumstances surrounding the killing, such as the type of weapon used, the number and nature of injuries inflicted, and the attacker's conduct before, during, and after the act, can provide evidence of the killer's intent and state of mind. (See this Court's decision in ***Kaburu vs. Republic [2024] KECA 536***).

53. PW9's opinion upon conducting post mortem examination was that the cause of death was severe haemorrhage leading to cardio vascular collapse as a result of penetrating chest injuries which extended to the lungs (haemothenia) and head injuries. Considering the severity of the

multiple

injuries inflicted on the deceased, a helpless 9 year old child, we are persuaded that the appellant intented to kill, or cause grievous bodily harm. The appellant acted with knowledge that the injuries posed a risk of death or grievous harm, and that her actions were without lawful excuse. Arising from our analysis of the issues discussed above and the conclusions arrived at, we find that the offence of murder was proved to the required standard. We therefore find no basis to interfere with the conviction. Accordingly, the appeal against conviction is dismissed.

54. Regarding the legality of the death sentence, section 379 (1) (a) & (b) of the Criminal Procedure Code provides that:

> ***379. Appeals from High Court to Court of Appeal***
> ***1.A person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding twelve months, or to a fine exceeding two thousand shillings, may appeal to the Court of Appeal—***
> ***a) against the conviction, on grounds of law or of fact, or of mixed law and fact;***
> ***b) with the leave of the Court of Appeal, against the sentence, unless the sentence is one fixed by law.***

55. The Supreme Court of India in ***Alister Antony Pariera vs State of Mahatashtra*** **(2012) 2 SCC 648 r**egarding the objective of sentencing stated as follows:

> ***"70. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."***

56. While imposing the death sentence, the trial judge observed as follows:

"the court found the accused herein to be the author of the death of the young Esther Nasimiyu who no doubt died a very painful death having been robbed of her childhood by the barbaric and inhuman acts of the accused herein a person who in my view ought to have protected and preserved this young life. There was no justification for the death of Esther."

57. In the impugned judgment delivered on 15th June 2017, the trial judge was constrained by the mandatory nature of the death sentence prescribed in section 204 of the Penal Code. Notably, this judgment was rendered prior the Supreme Court in ***Francis Karioki Muruatetu & Another vs Republic & 5 Others*** **[supra]** delivered on 14th December 2017 in which the Supreme Court stated:

"Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

58. Sentencing is primarily a discretionary matter for the trial court. This discretion allows the trial court to consider the specific facts and circumstances of each case and determine a fair and appropriate punishment. However, this discretion is not unfettered. It must be exercised judicially, meaning the trial court is bound to consider relevant legal principles, evidence, and mitigating or aggravating factors, and must exclude irrelevant ones. An appellate court may intervene if the trial court has overlooked important matters, considered irrelevant factors, or acted on a wrong principle, but it will not easily interfere with the exercise of discretion unless there is a clear error or misdirection.

59. The appellant argued that in light of Supreme Court decision in ***Francis Karioki Muruatetu & Another vs Republic & 5 Others*** **[supra],** courts have a discretion in sentencing persons convicted of the offence of murder and other capital offences. We have carefully considered the

above decision and the circumstances of this case and in particular the manner in

which the offence was convicted. Undeniably, the murder was a brazen and pre-meditated. A deep stab wound in the chest injuring the lungs and multiple wounds on the head were certainly well designed to kill. The life of a 9 year innocent and defenseless child was lost. In our view, the learned Judge properly exercised her discretion in sentencing the appellant to death. We see no reason to disturb this deterrent sentence meted since the same remains a lawful sentence. The upshot of the foregoing is that the appellant's appeal against both the conviction and sentence is without merit. The same is hereby dismissed in its entirety.

60. Orders accordingly.

Dated and delivered at Kisumu this 30th day of January, 2026.

P. NYAMWEYA

.....
JUDGE OF APPEAL

L. ACHODE

.....
JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed
DEPUTY REGISTRAR