IN THE COURT OF APPEAL
AT NYERI

(CORAM: W. KARANJA, M'INOTI & GACHOKA, JJ.A.)

CRIMINAL APPEAL NOS. E013 & E027 OF 2021 (CONSOLIDATED)

BETWEEN

JACKSON MWONGERA ..... 1ST APPELLANT EDWARD MATHETA.....2ND APPELLANT
AND
REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Ong'injo, J.) dated 30th September 2020

in

HCCRC No. 019 OF 2018)
****

JUDGMENT OF THE COURT

1. This consolidated first appeal arises from the judgment of the High Court of Kenya at Meru ***(Ong'injo, J.)*** dated 30th September 2020. By the said judgment, the High Court convicted the appellants and sentenced them to 20 years imprisonment for the offence of murder, contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***.
2. The information pursuant to which the appellants were prosecuted stated that on 4th February 2018 at Antu Bathea Village in Igembe North, Meru County, they jointly with

others

not before the court, murdered ***Ntongai Matheta (deceased)***. After pleading not guilty to the offence, the prosecution adduced evidence from five witnesses to prove its case. The appellants gave sworn defences but did not call any witnesses.

3. The gist of the prosecution case was that the 2nd appellant was the father of the deceased, who was said to be mentally challenged. On 5th February 2018, the day after the death of the deceased, ***Henry Muthure (PW1)***, a cousin of the 2nd appellant, was on his way to his *miraa* farm when he encountered two schoolboys on their way to school. One of them was ***Daniel Matethia (PW4)***, a standard 4 pupil and also a son of the 2nd appellant. PW1 overheard PW4 telling the other child that the 2nd appellant had killed the deceased and buried him at night. PW1 reported the information to their assistant chief, who did not take the matter seriously.

4. On 9th February 2018, PW1 made a similar report to the OCS, Lare Police Station, who requested him to avail PW4. He did so on 12th February 2012, and PW4 led the police to where the deceased was buried. The next day the body of

the deceased was exhumed. It was covered in blankets and

was buried in a

sitting position. The body was recovered to Nyambene District

Hospital Mortuary where a postmortem was conducted. That was the evidence adduced by PW1 and ***David Mutuma (PW2)***, a neighbour of the 2nd accused.

5. ***Dr. Sammy Githu Wachira (PW3*)** a medical officer at Nyambene District Hospital produced the postmortem report prepared and signed by his colleague, ***Dr. Michael Kariuki***. The postmortem was conducted on 16th February 2018 and indicated that at the time of the postmortem, the body of the deceased was decomposing. There were soil particles in the trachea up to bifurcation, indicating that the deceased was still alive when he was buried. There was also a fracture of the left bone next to the ear, epidural haematoma on the left side of the head, and clotted blood inside the skull cavity. The doctor formed the opinion that the cause of death of the deceased was cardio pulmonary arrest due to a blunt head injury with asphyxiation due to inhalation of soil.
6. PW4, a 10 year old boy testified on oath after a *voire dire* examination. His evidence was fairly contradictory and confused. He stated that the deceased had a mental problem and sometimes used to walk around naked. On

the material

day, as PW4 was preparing to go to school in the morning, he

found the deceased lying dead in the kitchen, and went and informed the 2nd appellant. The deceased had been sick the previous night and was unable to get out of the house. He further testified that he had not witnessed the deceased being beaten and he was not present when he was buried. Subsequently he claimed to have seen the appellants and another brother of his called ***Toba***, carrying the body of the deceased, which they buried behind the house. Yet again it was his evidence that he was told by his sister Kathure that the deceased had been buried and further that he is the one who showed PW1 where the deceased was buried. He also confirmed that it was PW1 who took him to the police. Although he had said he found the deceased lying dead, on cross-examination he stated that he found the deceased with is eyes open and foaming in the mouth.

7. ***PW5*** was ***Chief Inspector Josphat Mukangai***, who testified that on 12th February 2018, in the company of the OCS Laare and others, they visited the home of the 2nd appellant and PW4 led them to the site where the deceased was buried. The next day he obtained a court order for exhumation of the body of

the deceased and they recovered the body, wrapped in

blankets and covered with soil, from a shallow 3-meter-deep grave. The body was taken to Nyambene District Hospital Mortuary where the postmortem was conducted on 16th February 2018.

8. According to this witness, PW4 informed the police that he witnessed the 2nd appellant hit the deceased on the forehead with a spade and he fell down unconscious and that the 2nd appellant warned PW4 not to disclose to anyone what had happened. Then the 2nd appellant hired the 1st appellant to dig a grave at night and, with the assistance of two others, they buried the deceased. The witness further testified that the 2nd appellant did not report the death of the deceased to the police and that after the death of the deceased, he disappeared from the vicinity, only to be arrested after the re-burial of the deceased on 19th February 2018.

9. In his defence, the 1st appellant testified that he is a mason and occasionally digs pit latrines. In early February 2018, while constructing a classroom at Lukununu Secondary School, the 2nd appellant approached him and requested him to assist in digging a grave for his son who had

died. The

deceased was mentally challenged and used to stay at a

dumpsite near his home. The 1st appellant went to the 2nd appellant's home at about 3.00 p.m. and found seven other people digging a grave. He found the naked body of the deceased in the house where he used to sleep. He did not see any injuries. The body of the deceased was covered in blankets and they buried him in the grave. Subsequently, he was arrested and charged with the offence.

10. On cross-examination he stated that the deceased was mentally challenged and that he was buried in a laying rather than a sitting position. It was his evidence that when the deceased was buried, he was dead and that PW4 was present. He also testified that in addition to being a mason and digging pit latrines, he also dug graves.

11. The 2nd appellant's defence was that the deceased was his second born child who was mentally challenged and used to smoke bhang. On the material day, he was woken up in the morning by PW4 and his sister who told him that when they went to make tea for breakfast, they found the deceased lying on the kitchen floor. He proceeded to the kitchen and confirmed that the deceased was dead. He went to report to

the assistant chief, but the assistant chief left him in the

office and did not come back. The 2nd appellant left at about

12.30 p.m. and went back home, where he found the body of the deceased at the same place he had left it. He informed his neighbours of the death of the deceased and they assisted him to bury him at about 4.00 p.m. He confirmed that he was the one who called the 1st appellant to assist with the digging of the grave. He denied having killed the deceased or that he was alive when he was buried. He also denied that the deceased was buried in a sitting position.

12. On cross-examination, the 2nd appellant stated that he was confused when the deceased died and that was the reason why he did not go for a burial permit or call a pastor. He stated that PW4 was present when the deceased was buried and that he could not explain the cause of the injuries that were found in the body of the deceased.

13. As earlier indicated, the High Court convicted both appellants and sentenced them to twenty years imprisonment. In their supplementary memorandum of appeal dated 22nd August 2025, the appellants fault the

High Court for holding that the prosecution proved its case beyond reasonable doubt, and for

failing to properly analyse their defences, which cast serious doubt on the prosecution case.

14. Relying on written submissions dated 22nd August 2025, the appellants' learned counsel, Ms. Ng'ang'a submitted that although the prosecution proved the death of the deceased and the cause thereof, it failed to prove that the appellants caused the death by inflicting the head injuries sustained by the deceased. It was submitted that although PW1 stated that he was informed by PW4 that the 2nd appellant had hit the deceased on the head with a spade, in court PW4 denied having said so or having seen the 2nd appellant hit the deceased.

15. It was also submitted that the High Court erred in concluding that the deceased was buried alive from the presence of soil particles in his trachea. Counsel submitted that the postmortem examination was conducted about two weeks after the death of the deceased when the body was decomposing and that the High Court ignored the possibility of the soil having entered the vulnerable body through the nose, mouth, ears and the skin. She also referred to the

evidence of PW2 who stated that when the body of the

deceased was exhumed, the head was not covered by blankets. In counsel's view, the presence of the soil in the trachea could be explained by ways other than inhalation alone.

16. It was also counsel's submission that from the timelines and chronology of events, the deceased could not have been buried alive. It was contended that his body was discovered at 6 am when the 2nd appellant confirmed that the deceased was dead and that he found the body lying in the same position when he returned from the chief's office at 12.30 pm. Counsel added that the body was buried at about 4.00 p.m. some 9 hours after its discovery in the morning and that both appellants, who participated in the burial, confirmed that the deceased was dead at the time of burial. Further, counsel submitted that even if the deceased was buried alive, which was denied, the prosecution did not prove that the appellants knew the deceased was alive at the time of burial.

17. It was counsel's further submission that the prosecution did not prove malice aforethought because no intention on the part of the appellants to cause harm or death of the

deceased

was proved. Further, it was contended that the prosecution

did not adduce any evidence of a grudge between the appellants and the deceased. Specifically, as regards the 1st appellant, it was submitted that he was merely hired to assist in digging the grave, together with other persons, and had no connection whatsoever with the death of the deceased.

18. The appellants faulted the prosecution for failing to call critical witnesses such as the chief, those who participated in the burial of the deceased, and PW4' sister, Kathure who found the body of the deceased in the morning. It was argued that had these witnesses been called, they would have confirmed the appellants' defences. The appellants relied on the decision in ***Chengo & 2 Others v. Republic*** [2021]eKLR

in support of the submission that failure to call critical witnesses was fatal to the prosecution case. It was also contended that the deceased was buried during the day rather than in secret or at night and that when the 2nd appellant left his home, he had not fled, but went to his in-laws for fear of being lynched by mobs who had been misled into believing that he had murdered the deceased.

19. Lastly, the appellants submitted that the prosecution did not

prove common intention on their part to cause the death of

the deceased by unlawful purpose. They relied on the case of

Wainaina v. Republic [2025] eKLR on the elements of

common intention, namely, commission of an offence by several people; execution of a pre-arranged or planned purpose; and prior meeting of minds.

20. The respondent, represented by Ms. Mango, learned counsel, opposed the appeal vide submissions dated 7th August 2025. It was submitted that the prosecution proved all the ingredients of the offence of murder beyond reasonable doubt. Counsel argued that the death of the deceased and its cause were proved by PW3 who produced the postmortem report in evidence showing that the deceased died from cardio pulmonary arrest due to a blunt head injury and asphyxiation due to inhalation of soil. She relied on the evidence of PW1 on how he heard PW4 narrate that the 2nd appellant had killed the deceased, and submitted that from the evidence, the deceased died from the unlawful actions of the appellants.

21. Counsel further submitted that the case against the appellants was both direct and circumstantial, the direct

evidence having been adduced by PW1 and PW4. It was

further contended that the prosecution proved malice aforethought against the appellants because they buried the deceased when he was still alive, well knowing they were endangering his life and without regard for his life.

22. Lastly, the respondent submitted that the trial court duly considered the appellants' defences and found that they did not displace the prosecution case. Counsel also submitted that the appellants were not innocent because the burial took place at night and that the 2nd appellant fled his home even before the body of the deceased was exhumed.

23. We have carefully considered this appeal. As is the norm in a first appeal, we are expected to re-appraise the evidence on record, subject it to exhaustive evaluation and reach our own independent conclusion. In so doing, we are to make allowance for the advantage which the trial court had and which we do not have, of having heard and seen the witnesses as they testified. (See ***Okeno v. Republic*** *(1972) EA 32)*.

24. It is crystal clear that the prosecution case against the appellants was founded entirely on circumstantial

evidence. None of the witnesses who testified before the trial court saw

the appellants inflict the injuries which the doctor deduced contributed to the death of the deceased.

25. Starting with the case against the 1st appellant, there is absolutely no evidence on record to link him with the death of the deceased. He was going about his masonry work at a school when the 2nd appellant visited him and requested him to assist in digging a grave to bury the deceased. All that the 1st appellant did was to join other people in digging the grave and burying the deceased whom he asserts was dead at the material time. From the evidence on record, there were seven other people assisting in the digging of the grave and there is no rational explanation why, of all the grave diggers, only the 1st appellant was charged with the offence of murder. He was never at the home of the 2nd appellant before 3.00 p.m. on the day the deceased was buried and from his evidence, he found the body of the deceased in the house where he was sleeping, and the other people digging the grave.

26. As regards the 1st appellant, there was nothing, whether from direct or circumstantial evidence to link him with the

death of the deceased. His conviction for the offence of murder of

the deceased had absolutely no basis.

27. Turning to the 2nd appellant, the evidence of PW1 and PW5 was that they were informed by PW4 that it was the 2nd appellant who struck the deceased on the head with a spade, before burying him at night. That evidence was inadmissible hearsay as it was relied upon, not to merely prove that the statement was made, but to prove the truth of the statement.

28. This is how the trial court dealt with that evidence:

> ***"It was by sheer luck that PW1 overheard PW4 telling his fellow pupil while on the way to school that his father and brother had killed the deceased at night and together with A1 (the 1st appellant) buried him in a shallow grave…There is no doubt that the accused persons conspired to kill the deceased and keep the matter a secret." (Emphasis added).***

29. From the above finding, it is plainly clear that the trial court concluded that the 2nd appellant murdered the deceased because PW1 overheard PW4 saying so. We have already noted that the evidence of PW4 in court was littered with fundamental contradictions, and he persistently denied having seen the 2nd appellant strike

the deceased. Taken cumulatively, the evidence of PW1, PW4 and PW5 cannot

alone form the basis of a sound and safe conviction for the offence of murder.

30. Of course, that is not the end of the matter. Subject to scrupulously complying with the test that ensures reliability of circumstantial evidence, that genre of evidence is as good as direct evidence and can form the basis of a safe conviction. In ***Makau & another v. Republic*** [2010] 2 EA 283, this Court explained circumstantial evidence as follows:

> ***"Circumstantial evidence is evidence of surrounding circumstances from which an inference may be drawn as to the commission of a criminal offence. It has been held in previous decisions of this and other courts that such evidence may in some cases prove a fact with the accuracy of mathematics."***

31. The Court further considered in *Sawe v. Republic* [2003] KLR 364 the circumstances under which circumstantial evidence may be relied upon to found a conviction. The Court explained that:

> ***1. 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.

2. ***Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstance weakening the chain of circumstances relied on.***
3. ***The burden of proving facts, which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypotheses of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."***

32. Once the hearsay evidence as regards the cause of the injuries sustained by the deceased is discounted, the circumstantial evidence that the prosecution relied upon to link the 2nd appellant to the death of the deceased was what the court deemed as the hurried and secret burial of the deceased at night; the failure of the 2nd appellant to inform the neighbours and report the death to the authorities; the disappearance of the 2nd appellant from his home after the body of the deceased was exhumed; and the medical evidence that the deceased had been buried alive.

33. We are not persuaded that the above circumstances unerringly prove that the deceased was murdered by the 2nd appellant, and cannot be explained in any other rational way than his guilt. The totality of the evidence on record does not indicate that the burial of the deceased was either secret or at night. The 1st appellant testified that when he joined the grave diggers, there were seven other people digging the grave. It was the evidence of the 2nd appellant that he informed his neighbours of the death and named those neighbours as Mbiti's wife, Ntikiru and Mbiria. His four children where also present during the burial. Other than the alleged statement by PW4 that the deceased was buried at night and which he subsequently denied by claiming that he was not present at the burial, the evidence by both appellants was that the deceased was buried at about 4.00 p.m. No other witness testified to the alleged night burial.

34. It was also the 2nd appellant's evidence that he had gone in the morning to report the death of the deceased to the chief, who kept him waiting until 12.30 pm when he decided to go back home. The prosecution did not call the

chief, as well as

some other significant witnesses who we shall shortly advert

to, to testify. As regards the fleeing of the 2nd appellant from his home after the exhumation of the body of the deceased, he gave a plausible explanation for his action, namely that he had gone to stay with his in-laws in fear for his life because allegations had started that he had killed the deceased. The trial court did not mention or even consider that explanation.

35. The other critical circumstantial piece of evidence is the medical evidence that the deceased was buried alive because of the presence of soil in his trachea. There is evidence on record which, regrettably, the court did not address, showing that the deceased, who the appellants and PW4 testified was mentally challenged, used sometimes to live in a dumpsite, raising the question whether he could have gotten the soil in his system through his lifestyle of ravaging at the dumpsite. From the evidence of the 2nd appellant, from when he was informed of the death of the deceased early in the morning by his children, the deceased was lying unresponsive in the same position on the floor of the kitchen when he came from the Chief's Office at 12.30 pm and at 4.00 pm when he was

buried. The evidence of the 1st appellant was to the same

effect, that when he arrived at the home of the 2nd appellant, he found the deceased lying dead on the floor of the kitchen.

36. We also take note that for reasons which are not explained, the prosecution did not call some vital witnesses who could have shed more light in this case. We have already mentioned the chief to whom the 2nd appellant testified that he went to report the death but kept him waiting for the better part of the morning until he gave up and left. There were the neighbours who are said to have attended the burial and the other grave diggers, some of whom could have shed more light on the circumstances of the burial. There is the other child of the 2nd appellant, Kathure, who was said to have discovered, with PW4 the deceased dead early in the morning. There was the son of the deceased known as Toba, whom PW1 alleged to have participated in the killing of the deceased, together with the appellants. These were important witnesses critical in supporting a prosecution case that was in all respects a borderline case.

37. It is a well-established principle in this jurisdiction that

where the evidence adduced by the prosecution is barely adequate to safely found a conviction, the Court is entitled to

make an adverse inference if the prosecution fails to call vital witnesses. Thus, for example, in ***Donald Majiwa Achilwa & 2 Others v. Republic*** [2009] KECA 163 (KLR), this Court explained the position thus:

> ***"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses 'evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case.'*** **(Emphasis added).**

38. Similarly, in ***Daniel Kuria Guyo v. Republic*** [2011] KECA 208 (KLR) the Court reiterated as follows:

"In view of the contradictory and weak nature of the prosecution's evidence as described above, we think that failure to call the members of the public who had allegedly reported the robbery, would justify the drawing of adverse inference that if they

had been called they could have turned the scales in favour of the defence."

39. The prosecution may have had suspicion, even strong suspicion, that it was the 2nd appellant who murdered the deceased. But suspicion is not enough to found a condition. In ***Sawe v. Republic*** [2003] KECA 182 KLR, this Court held as follows:

> ***"We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence."***

40. Having carefully considered this appeal, we are satisfied that the prosecution did not prove the offence of murder beyond reasonable doubt against the two appellants and

that their convictions are not safe. In the circumstances, we allow the

appellants' appeal, quash their conviction and set aside the sentence of twenty years imprisonment imposed upon them. We direct that the appellants shall be set to liberty forthwith, unless they are otherwise lawfully detained. It is so ordered.

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

W. KARANJA

.....
JUDGE OF APPEAL

K. M'INOTI

.....
JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb.

.....
JUDGE OF APPEAL

I certify that this is
a True copy of the
original
Signed
DEPUTY REGISTRAR