

**IN THE COURT OF
APPEAL AT NYERI**

**(CORAM: M'INOTI, KANTAI & ALI-ARONI,
JJ.A.) CRIMINAL APPEAL NO. 7 OF 2019**

BETWEEN

JOHN MWANIKI NJURU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal against the Judgment of the High Court at Nyeri
(Ngaah, J.) delivered on 25th January, 2019*

in

HC. CR.34 of 2008.)

JUDGMENT OF THE COURT

This is a first appeal from the judgment of the High Court of Kenya at Nyeri where the appellant **John Mwaniki Njuru** had been charged with two counts of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. It was alleged in the Information that on the night of 8th and 9th December, 2007 at Kieni village in Nyeri District, he murdered **Teresiah Wangechi Mwangi (deceased)**. Count II of the charge which related to the murder of Wilson Thuku Mwangi, was dismissed by the Judge who found that the charge was wrongly framed. The appellant was acquitted of that charge but convicted of the murder of the deceased, and he was

sentenced to 40 years imprisonment to run from when he was first incarcerated.

Our mandate on a first appeal like this one is stated in **rule 31 (1)(a)** of the **Court of Appeal Rules 2022** as;

**“31.(1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power-
to re-appraise the evidence and to draw inferences of fact...”**

The prosecution called 18 witnesses in support of the charge while the appellant gave sworn evidence in his defence and did not call any witness. The evidence by the prosecution painted a grim picture leading to the death of the deceased, who was the appellant’s cousin, and her toddler son, Wilson.

Joseph Mwangi Thuku (Thuku-PW1) was husband to the deceased and father to Wilson. He knew the appellant, who was a cousin to his late wife and lived in the same neighbourhood. He told the court that on the material day, he went to Nanyuki while his wife and two children went to a party at his parents’ home. Later that evening, he would try to call his wife unsuccessfully on her mobile phone. Thuku travelled back home the next morning only to learn that the bodies of his wife and son had been found dumped in a river. When he went to the scene he observed that both bodies were cut at the neck, among other injuries. His wife’s phone, make Motorola C113, was missing from the scene.

Cecilia Jane Gasha (Cecilia-PW2) was passing through a maize plantation the next morning 9th December, 2007 when she saw something covered with a green jacket and a sheet. She was scared to check what was underneath and she opted to call a friend to check. As they returned to the scene, they found people already gathered there. Cecilia testified that she did not view the bodies but only saw the clothes.

Eliud Wangai, (Wangai-PW3) accompanied Thuku to Nanyuki and they returned home together the next morning only to learn of the discovery of two bodies at the river. Following a search, some clothes were discovered hidden in a thicket about 30 meters from the bodies. Wangai observed that the recovered clothes belonged to the appellant who was wearing them as he was farming on 8th December, 2007. The clothes were a pair of khaki trousers, a dotted shirt, a green jacket, a small cap and a pair of shoes.

Peter Macharia Gichau (Macharia-PW4) was a relative of the deceased who identified the bodies to Dr. Kitito (PW7) for post mortem.

Dominic Njuru (Njuru-PW5), the appellant's father, saw a huge crowd of people gathered at the edge of his land on the morning of 9th December, 2007. Upon approaching the scene, he saw the bodies of the deceased and Wilson. He also noted that there was an identification card (ID) at the scene. Njuru said that the appellant had a house in his compound but he had not

seen him

since the previous day. He confirmed that the clothes he was shown in court were the ones he saw the appellant wearing the previous day, and the said clothes were discovered in a hole in the dirt on the edge of his land.

Paul Chira Kanyi (Kanyi-PW6) was drawn to the scene that morning by screams and when he went there he saw the bodies of a woman and a child next to the river. The bodies were taken away by the police. On 12th December, 2007 he was part of a search party with police when the items of clothing were recovered. He had seen the appellant wearing those clothes on 8th December, 2007 at the farm. He noted that the green jacket which was recovered had blood stains and he knew that the sports shoes recovered belonged to the appellant.

Dr. Dindi Kitito (PW7) performed post mortems on the two bodies on 11th December, 2007. The post mortem revealed that the body of the deceased had a severe wound at the neck which had severed the spine, cut and fracture of the thumb and a deep wound on the head. The cut wounds and trauma on the neck were the cause of death.

Margaret Wambui Njoroge (Wambui-PW8), mother to the deceased, on 8th December, 2007, received her daughter and her children. She spent the day with the children and her daughter returned in the evening and left for her home with her son Wilson

but she was to learn the next morning that both of them had been killed and their bodies dumped in a river.

Daniel Ngure Thuku (Ngure-PW9) upon learning of the discovery of the bodies at the river, visited the scene and saw the dead bodies of a mother and child.

Eunice Chepkemo (Chepkemo-PW10) worked in a security firm with the appellant. She told the court that the appellant sold her a mobile phone, make Motorola C113, which she later came to know had belonged to the deceased after the police came to her and confiscated the phone.

John Kimotho Mwangi (Kimotho-PW11), a neighbour, was part of the group that searched the crime scene on 12th December, 2007 and recovered the clothes.

Corporal Fredrick Maina (PW12), the Investigating Officer, received information regarding the whereabouts of the appellant, and on 5th June, 2008, he went to a home where the appellant had been employed as a gardener in Karatina. They arrested him and he informed them of the whereabouts of the deceased's phone and they managed to recover it from Chepkemo who had bought it from the appellant.

Inspector Julius Mwangi Ithara (PW13), received a report on 9th December, 2007 of two bodies at a river. He and other police officers went to the scene, cordoned the area and recovered an ID for Joseph Wambua in a pool of blood. The

deceased's body was 43

meters from the pool of blood while her son's body was 10 meters from the mother. He observed that the bodies had deep cuts and the heads were almost severed. The team photographed the bodies and removed them from the scene. The following day he went to the appellant's house and recovered a panga, which smelled of blood. The appellant was not at home. On 12th December, 2007, the witness was informed of the clothes which were found at the river. He also followed up on Joseph Wambua and found that he had reported his national identity card stolen prior to the murders. He concluded that Wambua was not involved in the crime. He produced a statement by the former Investigating Officer, Chief Inspector Nzau, who had since passed on. He also produced a psychiatric report showing mental examination of the appellant. The author of the report, Dr. Ouma, was also deceased.

Inspector Dean Mugo (PW14), a Scenes of Crime Officer, took photographs of the scene and produced the same as part of his evidence.

Stephen Matinde (PW15), a Government Analyst, received various items for analysis. In the end, the analysis revealed that there were no blood stains on the panga or on the appellant's clothes.

Joseph Ndori Mwaniki, (Mwaniki-PW16) was father to the deceased. He confirmed that on 8th December, 2007 the deceased went to a party and left her children with him and his wife. She

later returned for her children but the elder child opted to remain. The deceased then left with her son at around 7 p.m. and to his shock the bodies of the two were found at the river the next morning.

Paul Gicheri Wangui (PW17), an assistant chief, received a call about two bodies found at the river. He went and viewed the scene and called the police.

Josephine Wanjiku Mwangi (Wanjiku-PW18) was called by the prosecution to confirm that she knew Joseph Wambua who was with her at a wedding in Karatina on 8th December, 2007 and that he could not have been at the scene of the crime.

The High Court considered the prosecution's evidence and placed the appellant on his defence. The appellant gave a sworn statement and denied committing the murders stating that he left for Karatina on 8th December, 2007 looking for casual work and had been there for 5 months before he was arrested. He knew nothing about the deaths he was accused of and stated that the phone that was recovered was not his. He also stated that his employer had died, that nothing was recovered from him and that the clothes found in a hole were not his. He confirmed knowing Eunice (PW10), who he said used to come to his workplace.

In a judgment delivered on 25th January, 2019, the court convicted the appellant as we have already seen.

The appellant was aggrieved by his conviction and sentence and filed the present appeal through a supplementary Memorandum of Appeal drawn for him by **M/s J. K. Ntarangwi & Co. Advocates**, where 7 grounds of appeal are set out. The Judge is faulted in law and fact for basing the conviction on circumstantial evidence which did not meet the required test hence not sufficient to sustain the conviction; that the Judge erred in law and fact in shifting the burden of proof by requiring the appellant to explain how he came to be in possession of the mobile phone; that findings were not supported by evidence; that vital witnesses were not called whose evidence would have been adverse to the prosecution case; that there were major discrepancies into the prosecution's case which the Judge did not note; that the Judge erred in law and fact in rejecting the appellant's defence and, finally, that the Judge failed to take into account the period which the appellant had been in custody and that the sentence of 40 years imprisonment was manifestly excessive. We are asked to quash the conviction and set aside the sentence.

In written submissions the appellant collapses all grounds of appeal into one submitting that evidence of recovery of the mobile phone was not sufficient to convict the appellant on the charge of murder. The appellant submits that although it was proved that Thuku had bought the phone for his wife (the deceased) the appellant was arrested 10 months after the murder and the arresting officer did not reveal who pointed out the

appellant to him

for arrest. It is submitted that there is a contradiction on whether Eunice Walela from whom the sim card of the phone was recovered was the same person as Eunice Chepkemo (PW10) who the appellant pointed out to the police as the person who he had sold the phone to. It is further submitted that the prosecution should have called the person who had employed the appellant and Chepkemo when the appellant sold the phone to Chepkemo. The appellant submits that the circumstantial evidence did not meet the required test for inference of guilt to be established. The appellant concludes his written submissions by stating that the period of about 11 years that the trial took when he was in custody should have been taken into account in sentencing.

The respondent in written submissions recognizes elements to be proved in a charge of murder as stated in **Anthony Ngari Ndegwa vs. Republic [2014] eKLR** as the death of the deceased; that the accused committed the unlawful act which caused the death of the deceased, and that the accused had malice aforethought.

It is submitted that the death of the deceased was proved through the testimonies of PW2, PW4, PW5, PW6, PW9, PW13 and PW14 who went to the scene of crime and found the body of the deceased dumped at the river on the morning of 9th December, 2007. The pathologist who performed post mortem testified on the cause of death.

On whether it was proved that it was the appellant who killed the deceased it is submitted by the respondent that Thuku found the body of his murdered wife at the river with cut wounds on the neck amongst other injuries and that he was shown a mobile phone at the police station which he identified as the one he had purchased for his wife. It is further submitted that there was the evidence of Chepkemo who worked with the appellant and had bought the said phone from him.

The respondent cites the case of ***Roba Galma Wario vs. Republic [2015] eKLR*** on the need for the prosecution to prove that killing of a deceased was accompanied with malice aforethought. It is submitted that the pathologist found deep cut wound on the neck and also on the right palm and that the appellant then disappeared from the village after burying his clothes and shoes a few meters from where the body of the deceased was, which was also near his home. It is submitted that witnesses testified how they had seen the appellant wearing the recovered clothes on 8th December, 2007, clothes that were discovered at the crime scene, and that, upon arrest the appellant led police to Chepkemo to whom he had sold the mobile phone.

On whether the appellant was the perpetrator of the offence it is submitted by the respondent that although there was no eye witness to the killing, there was circumstantial evidence because the appellant fled from the village after committing the offence; his clothes were found at the scene immediately after the

discovery of

the body of the deceased and the sale of the phone belonging to the deceased. It is further submitted that the appellant's alibi defence was only raised in defence.

On sentence the respondent cites this Court's decision in ***Bernard Kimani Gacheru vs. Republic [2002] eKLR*** to the effect that sentence is at the discretion of the trial court.

The respondent submits, wrongly as this is not factually supported, that the death sentence awarded was sufficient. We note from the record that the appellant was sentenced to 40 years imprisonment.

This appeal was heard on 15th October, 2025 on the Court's virtual platform. Learned counsel **Miss Athieno** appeared holding brief for **Mrs. Ntarangwi** for the appellant. Learned State counsel **Mr. Naulikha** appeared for the respondent. Counsel relied fully on their written submissions and opted not to highlight any point.

We have considered the record of appeal at length, as well as the written submissions by the parties and the relevant laws.

For the prosecution to prove a case of murder, it has to establish that there was an unlawful death, that the death was caused with malice aforethought and that the accused before the court is the person who committed the offence.

The fact that the deceased was killed by having her throat cut, is not in dispute. Her death was confirmed by several eye witnesses who saw the bodies at the river and by the pathologist, PW7.

The appellant contends in his grounds of appeal that malice aforethought was not proved. The predecessor of this Court in the case of ***Republic vs. Tubere s/o Ochen* [1945] 12 EACA 63**, set out the following factors to be considered in determining whether malice aforethought has been established:

“The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident.”

Without a doubt, the type of injuries caused to the victim in this appeal, was a cut to the neck, a critical part of the body. The cut inflicted was described as being so deep that the neck of the victim was almost severed off the body. The nature of injuries herein and the part of the body targeted are a clear indication of malice aforethought by the person who inflicted the injuries. That ground of appeal therefore fails.

Regarding the identity of the perpetrator, there was no eye witness to the killing and the evidence adduced at the trial court was largely circumstantial evidence.

While discussing the place of circumstantial evidence, this Court in the case of **Ibrahim Chacha Mwita vs. Republic** [2004] eKLR stated:

“It is trite that in a case depending exclusively upon circumstantial evidence the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt.”

Similarly, this Court in the case of **Kimani vs. Republic** [2023] KECA 1390 (KLR) extensively discussed circumstantial evidence as below:

“In the case of Ahmad Abolfathi Mohammed & another vs. Republic [2018] eKLR, this Court had this to say on circumstantial evidence:

“However, it is altruism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence. Way back in 1928 Lord Heward, CJ, stated as follows on circumstantial evidence in R v. Taylor, Weaver & Donovan [1928] CR. App. R. 21:

“It has been said that the evidence against applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of Mathematics. It

is no derogation from evidence to say that it is circumstantial.”

22. Further, the principles for reliance on circumstantial evidence to sustain a conviction in any criminal trial have been laid down in several authorities of this Court. In Abanga Alias Onyango vs. Republic, Cr. Appeal No. 32 of 1990 (UR), this Court held as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***
- ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”***

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 remains with the prosecution. It is a burden, which never shifts to the party accused.”

The main ground of appeal is that the appellant was convicted based on circumstantial evidence.

The evidence before the trial court was that the deceased left her parents' home accompanied by her 3 year old son. Thuku, the husband of the deceased, tried unsuccessfully to reach his

wife that evening and the next morning her body and that of her son were

found dumped in a river. It was the evidence of various witnesses including Wangai, Njuru and Kanyi, that they had seen the appellant farming on 8th December, 2007 during the day. After the body of the deceased was discovered, a search party which included the witnesses recovered the clothes which the appellant was wearing on the said date buried near the scene of crime. The appellant disappeared immediately after the murder and when he was found at his hiding place in June 2008, he readily led the police to Chepkemo to whom he had sold the phone that had been stolen from the deceased. Thuku, who had purchased the phone for his wife proved the fact of purchase by producing a receipt which bore the serial number of the recovered phone. Those circumstances taken together - the dead body in the river; the appellant's clothes found buried nearby; the disappearance of the appellant from the village immediately after the murder; his arrest several months later and his leading the police to where he has sold the phone and the phone being positively proved as being that of the deceased - lead to the inference of guilt of the appellant. Those inculpatory facts are incompatible with the innocence of the appellant and are incapable of any explanation other than his guilt- See ***Republic vs. Kipkering Arap Koskei & Another [1949] XVI EACA 135.***

The appellant further complains that vital witnesses were not called and that such witnesses would have given evidence adverse to the prosecution's case.

Section 143 of the **Evidence Act** does not require any number of witnesses to be called to prove any fact. The appellant identifies in written submissions his employer and Chepkemo as a witness who should have been called. The case by the prosecution was not about that employment at all. It was that during the employment, the appellant sold the stolen phone to Chepkemo. Chepkemo testified to that fact and we doubt that calling their employer would have added any value to the case. In any case, it was held on the issue of calling witnesses in the case of ***Bukenya vs. Uganda [1972] EA 549***, at page 550 that:

“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

We find on the issue of alibi that the same was properly dismissed as it was displaced by the strong prosecution case.

The conclusion of all the above is that the prosecution's case was proved beyond reasonable doubt and the appellant was rightly convicted of the charge he faced. We therefore find that the appeal on the conviction is unmerited and the same is dismissed.

The appellant argues that during sentencing, the court did not consider the time he spent in custody; which assertion we find is incorrect. We note that the appellant took plea on 22nd October, 2008 and there is no indication that he was ever released on bail. In sentencing, on 31st January, 2019, the court clearly indicated that the sentence would run from the date when he took plea. There is no reason to review that proper order.

This appeal fails in its entirety and is dismissed.

Dated and delivered in Nyeri this 6th day of March, 2026.

K. M'INOTI

.....
JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF APPEAL

ALI - ARONI

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JUDGE OF APPEAL

*I certify that this is
a true copy of the
original*

Signed
DEPUTY REGISTRAR