IN THE COURT OF APPEAL
AT NYERI

(CORAM: KANTAI, LESIIT & ALI-ARONI,

JJ.A.) CRIMINAL APPEAL NO. 98 OF 2017

BETWEEN

SAMWEL MWENDIA MUGIIRA …… 1ST

APPELLANT DAVID MWITI MUGIIRA……2ND

APPELLANT

SILAS KIRIMI KABURU……3RD APPELLANT

AND

REPUBLIC……RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Meru (Wendoh, J.) dated 29th May 2017

in

HCCRA No. 60 of 2012)
****

JUDGMENT OF THE COURT

1. **Samwel Mwendia Mugiira, David Mwiti Mugiira** and **Silas Kirimi Kaburu,** the appellants herein, are before this Court by way of a first appeal, judgment having been entered against them by the High Court (Wendoh, J.) on 29th May 2017.

2. The appellants had been charged before the High Court at

Meru with two counts of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code.

In Count 1, the particulars of the offence were that the appellants, between the night of 31st August and 1st September 2012 at Muuti Village, Nkandone Sub-Location, Nduruma Location of Imenti Central District within Meru County, jointly murdered **John Mbae Mugiira.**

3. In Count 2, the particulars of the offence were that the appellants, between the night of 31st August and 1st September 2012 at Muuti Village, Nkandone Sub-Location, Nduruma Location of Imenti Central District within Meru County, jointly murdered **Alice Nkatha M'iruare.**

4. The appellants pleaded not guilty to both counts, and the matter proceeded to trial, where the prosecution called 9 witnesses. The appellants were found to have a case to answer and were placed on defence. Upon considering the evidence, the learned Judge convicted the appellants of the offence of murder and sentenced them to suffer the death penalty.

5. Aggrieved by the conviction and sentence, the appellants lodged the instant appeal based on following grounds; the learned Judge erred in law and fact; by failing to take into account that the prosecution witnesses gave inconsistent and contradictory testimonies; failing to establish that the evidence presented did not support the conviction and the excessive sentence; by overlooking the fact that the prosecution's case relied heavily on hearsay evidence; ignoring the absence of eyewitnesses to the alleged act;

rejecting the appellant's defense without providing

sufficient reason; and failing to recognize that the prosecution did not prove its case beyond a reasonable doubt.

6. This being a first appeal, our duty is to subject the evidence to fresh examination, evaluation and analysis in order to arrive at our own independent decision; it is a retrial so to speak, based on evidence on record, and we must bear in mind that the trial court had the advantage of seeing and hearing the witnesses first-hand and an allowance should be given to that fact. In this regard, the Court in ***Okeno vs. Republic [1972] EA 32,*** set out the duty of a first appellate court in the following words:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

7. Equally, the principle that must guide us is that we ought not interfere with the findings of fact made by the trial court unless they are based on no evidence, or are based on a misapprehension of the evidence, or the Judge is shown

demonstrably to have acted on wrong principles in reaching the

findings. In ***Makube vs. Nyamiro* [1983] eKLR** this Court stated the ground rule as follows; -

> ***"A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."***

8. Before addressing the grounds, we will summarize the evidence presented in the trial court. According to **Rebecca Mukomwari (PW1),** on 31st August 2012, she visited her daughter in Meru and then travelled home with her husband and grandchildren. The 1st and 2nd appellants happened to have travelled in the same vehicle. They arrived at Chaaria at 5:00 pm and then headed home, while the appellants and others stayed behind. The next morning at 5:00 am, PW1 heard screams and later learned that Johana, the deceased and his wife Alice were dead.

9. PW1 testified that the appellants were Johana's half-brothers. They shared the same father. During cross-examination, she stated that a land dispute was causing unrest between the deceased and the appellants.

10. **Fredrick Kinyua, PW2,** testified that he knew both the deceased, John Mbae, and his wife, Alice. John was his uncle, and they were neighbours. One evening in 2012, the deceased passed by his house, and he gave him his phone to charge, as John used a solar battery to charge phones and

batteries for a small fee. The phone Fredrick gave John was a red-and-black

Tecno model. The next morning, while at work, he heard screams coming from John's house. He had given John the phone around 7:30 p.m. the previous night, but did not go for it that night. Upon hearing the screams, he rushed to John's house, where he found a crowd had gathered. He was then informed that both John and Alice had been murdered. John's house was locked. He found John's body outside and Alice's body behind the kitchen. John had a head injury, but Alice had no visible injuries. He left to attend a Harambee function until evening. He informed two officers from Kaguma Police Station about his phone and produced a receipt. The phone was a Tecno 35 with a serial number 861710016412282, purchased for Kshs. 1700/- on 28th August 2012, and a memory card was bought for Kshs. 200 at Mamohitect Clinic Centre.

11. **Samson Kinyua Mureithi, PW3,** testified that on 13th September, he went to Gaitu Police Station, where he was asked to identify Nkatha's phone, which he did. The phone had Alice’s name on the back cover and the battery. It was a Nokia 1209. He had previously seen Alice using the phone when she came to his home, and when it ran out of charge, Alice had asked him to charge it for her.

12. **David Kirimi, PW4,** testified that Alice was his younger sister. On 1st September 2012, PW4's nephew, Macharia, came to his house and informed him that his sister and her husband had died. He went to the scene and found both of them dead. One body was located behind the house, while

the other was next to

the fence. John had injuries on his chest and neck. The police took the bodies to the mortuary for autopsies, and later they prepared them for burial. On 11th September 2012, the police arrived with the 2nd appellant and went to his house. After the police left, PW4 and several others were instructed to go to the police station for questioning. During interrogation, PW4 was asked to identify Alice's phone, and he did so. He had borrowed this phone from the deceased on previous occasions whenever she visited his home. In collaboration with PW3, PW4 recorded their statements. The phone had Alice's name written on it.

13. **CIP Josphat Mbingu Kijingu, PW5,** testified that on 11th September 2012, he left his office at Kariene Police Station and went to Gaitu Police Station, where he met Gambo, who was on his way to interrogate murder suspects, including the appellants and others. Subsequently, the 2nd appellant led PW5, along with Cpl. Tarus and PC Tachu, to his residence in Kamaguna Village, located within the Marathi Location in Abothuguchi West. They searched a one-room wooden house and recovered several items: one black striped shirt, one pair of blue jeans, one travel bag, and a Nokia mobile phone. After the recovery of these items, PW5 prepared a search certificate, which was signed by PW4, Cpl. Tarus, and the 2nd appellant. The mobile phone had the name "Alice Mbae" inscribed on both sides.

14. **Charles Mayamba, PW6,** a Senior Resident Magistrate at Githongo Court, informed the court that on 11th

September

2012, he was approached by the DCIO Imenti Central to record a confession from David Mwiti Mugiira, in accordance with ***section 25A*** of the Evidence Act. The confession was taken in his chambers at Nkubu Law Courts, where he was then stationed, in the presence of his court clerk, Morris Kinoti, and Purity Makena, the 2nd appellant's sister. The statement was taken in the Kimeru language. He testified further that he followed ***section 27*** of the Evidence Act regarding confessions. The 2nd appellant was in good physical condition with no injuries. There were no police officers in PW6's chambers, only the court orderly outside with the door closed. He made sure the 2nd appellant understood that his statements could be used in court. He was confident that it was the appellant's choice to confess.

15. He proceeded to record the statement in his handwriting and read it to the 2nd appellant in Meru language, informing him of his right to modify it. The 2nd appellant raised no objections and thumb-printed every page, along with Purity Makena, who also accepted it. PW6 signed the statement.

16. **Dr. Belinda Adda Namisi, PW7,** testified that the post-mortem for Alice Nkatha was conducted at Meru Hospital on 7th September, 2012, by Dr. Grace Maginyo, who was not available. On observation of Alice, she testified that the deceased was a 41-year-old overweight female, who was found without clothing and had been embalmed.

Externally, there were multiple bruises on the neck and head, including a 6cm bruise on the back of the neck and old blood in the right ear.

Internally, there was a fracture at the base of the skull, but no other significant findings.

The cause of death was severe head injury due to blunt trauma.

On John Mbae, the deceased was a 44-year-old male African, well-nourished and embalmed.

Externally, there were deep scalp cuts, multiple fractures in the occipital and left parietal areas, a 3cm wound from a sharp object, and bruises on the right neck.

Internally, no skull fractures were noted, but there was haemorrhage in the left parietal area. The cause of death was head injury with suffocation.

17. **CIP Patrick Gikunda, PW8,** testified that on 10th September 2012, while on leave in Meru South Imenti, he was called by the DCIO Imenti Central to record a confession from a murder suspect. The 1st appellant was taken to the Kariene Police Station by the Investigating Officer, CIP G. Wambua. While alone in the office, he informed the 1st appellant of his rights, and the appellant chose his sister, Mary Karungi, to be present. He introduced himself and read the particulars of the charge. He made sure the 1st appellant understood that his statements could be used in court, and he was not obliged to speak, and that anything said could

be recorded as evidence. He then

proceeded to record the statement and prepared a certificate affirming it was made without force. The sister of the 1st appellant counter-signed the statement by writing her name, while the 1st appellant thumb-printed it.

18. He further testified that in the statement, the 1st appellant confessed to murdering his stepbrother and the wife, alongside the 2nd appellant. Afterwards, they returned to their respective homes. He went to Katheri, while the 2nd appellant went to Githongo. Later, they met with other family members to prepare for the funeral. The motive for the murder, as explained by the 1st appellant, was that the deceased had caused them suffering by cultivating the entire property.

19. **CIP Rembam Gambu, PW9,** testified that on 1st September 2012, at about 8:00 a.m., while at Gaitu Police Station, he received a call about a double murder at Muuti Village, Nduruma. He informed the crime scene personnel and proceeded to the scene with PC Muteti, PC Wambua, and driver Muli. They discovered the bodies of a man and a woman, John Mbae Mugiira and his wife Alice Nkatha, about 20 meters apart. The man was facing down and had multiple facial injuries, while the woman, who faced up, had head injuries. Photographs were taken, and the bodies were moved to Meru Level Five Hospital. PW9 later visited the scene four times to interview witnesses.

20. On 6th September 2012, he and PC Maina joined the family

members, Samson Kinyua and Angethio Kirimi, for the postmortem at the hospital before burial on 7th September

2012. He also attended the burial ceremony because, in the initial investigations, suspects were mentioned adversely. He arrested several suspects: David Mwiti Mugiira, Silvana Mboroki, Mercy Kaimenyi, Purity Makena, Stanley Kaai Raibuni and Peter Kirimi M'Bundi. They were placed in cells at Gaitu Police Station.

21. He testified further that Purity Makena was interrogated at Gaitu Police Station at 9:00 pm. She informed PW9 that a suspect (her brother) who missed the burial was hiding at Katheri. Along with Cpl. Koome led them to 1st appellant's house, where a suspected stolen phone, a Tecno B51 with a black and red cover, S/No. 861710016412282, was recovered.

22. He further informed the court that on the day of the murder report, PW9 searched the deceased's home and found an ID card holder belonging to the 3rd appellant. Additionally, the 2nd appellant had a phone belonging to Alice Nkatha with the deceased's name scribbled on it. He further stated that he learnt that the motive for the murder was a land dispute.

23. The trial court, having found the appellants had a case to answer, placed them on their defence. The 1st appellant, **DW1,** gave a sworn testimony and denied the offence. He recounted that on 31st August 2012, while at his hotel in Katheri, he received a call from PW5 informing him of his brother and wife's deaths. It was a Saturday around 10:00 but he could not recall the exact date. He was unable to

leave the place because the

individual who had leased the hotel to him was away, but his wife went.

24. He was arrested at 11:00 p.m. on a Friday night in Katheri. He recounted hearing a knock on the door. As he stood to open it, the door was pushed open, and he was arrested by the Officer in Charge (OCS), Kaguma Police Station, accompanied by Katheri police officers and his sister. He had never seen the items presented in court before. He claimed to have heard the OCS mention that the phone produced in court belonged to Kinyua, but he never heard the OCS state that Kinyua was involved in the murder.

25. Upon his arrest, he was taken to Kaguma Police Station, where he encountered several other people arrested, including Mary Kariungi, Purity Makena, Stanley Kaai, David Mwiti, Silas Kirimi, Rose Kaimuri, Isaiah Kimathi, Silvana Karimi, Kinoti, Maingi, and Peter Karimi. His fingerprints were taken, and he was subsequently taken to court and charged.

26. He testified further that on the day of the murder, he was selling mandazi with Kimathi, not with the 2nd or 3rd appellant. He later met them at Kaguma Police Station, where his thumbprint was taken, though he didn't know what he was thumb printing against, due to his inability to read. Mary Kariungi also thumbprinted at the same time.

    He had no grudge against his deceased brother, who acted as a father figure.

27. The 2nd appellant, **DW2,** denied the charge and testified that on 21st August 2012, while working at Githongo, his aunt Agnes sent her son Gituma to relay that information regarding his brother and his wife. He learned about the incident on Saturday and told his employer, who allowed him to go the following day. He learnt that the killings occurred on Friday night, but he never heard who was responsible and saw no police investigation when he arrived at the scene two days later, as the bodies had already been removed.

28. He testified that the burial was organised by the clan. He was arrested at the burial along with five others: Mercy Kariungi, Purity Makena, Stanley Kaai, Silvana Karimi, and Kirimi (his brother-in-law), and taken to Kaguma Police Station, where he stayed for ten days. He was then taken to Nkubu to record a confession. He appended his thumbprints on papers without knowing their content, while with Purity Makena. He further stated that he had never spoken to the police and had no connection to a phone related to the case. He maintained that he had no grudge against his brother, had never mentioned a land dispute to the police, and had neither complained to the chief.

29. The 3rd appellant, **DW3,** testified that on 31st August 2012, he helped someone harvest cotton near his home in Ntharakweni. He met the deceased that morning and returned home at 5:00
p.m. He had a good relationship with the deceased, who was his cousin, and the deceased's wife was his friend. Their

home

was 200 meters away from his. On the morning of 1st September 2012, he heard screams from the deceased's home. He went there and found a crowd around the deceased's body behind the house. His wife was missing at that time. Around 7:00 am, two people went to report to the chief while he stayed at the scene. Later, Alice's body was discovered behind the fence. He could not recall who first saw her. They waited until around 12:00 pm when the OCS arrived with officers and took photographs of the scene. He was present throughout and helped carry the bodies to the vehicles. While at the vehicle, the OCS asked for his name while holding a document. The OCS also held an ID holder and asked him if he knew it. He did not know where the OCS found it. It was his testimony that he had given the ID holder to the deceased some time ago, as he had bought a larger one. The police asked to search his house and found nothing but his ID. He was then taken to the Gaitu Police Station as a suspect in the murder. He was held for a week before being released without explanation. When he returned to collect his ID, he was arrested again. He maintained that he was not involved in the murder.

30. **Mary Kariungi DW4,** a sister to the 1st and 2nd appellants, testified that on the night of 31st August 2012 and 1st September 2012, she was at her home in Giantune when she learned that her brother had been killed. She went to their home in Muuti, arriving at 11:00 am. She saw the brother’s body lying on his stomach outside. An uncle suggested

calling the police, who

arrived at 11:00 pm and took the bodies to the hospital. She noticed injuries on the mouths of the deceased persons.

31. She further testified that the 1st appellant lived in Katheri, while the 2nd appellant worked at Karugwa, which was far from home. She called her sister and asked her to contact the 1st and 2nd appellants. They arrived on 3rd September 2012, to prepare for the funeral and retrieve the bodies from the mortuary. She and her husband, Mwiti, along with the 1st appellant, Purity Makena, her husband, and Esther (her mother) were arrested and taken to the police station in Kaguma. They did not participate in the burial.

32. She testified further that the following Monday, they were brought papers to sign. The rest were returned to the cells, and she was left at the OCS's office with Purity Makena. When shown the statement, she denied that the signature on it was hers and alleged that she had written her name. She denied telling the police about problems at home or implicating the appellants in the murders, stating that she neither witnessed the murders nor knew what transpired before the murders took place. She also denied being present when Samwel Mwendia recorded his statement, stating she was only at Kaguma Police Station.

33. She further informed the court that after being detained at Kaguma Police Station, they were later charged but not informed of the specific charges. They spent 14 days at Kaguma Police Station before returning to court. Before

alighting the

lorry, the OCS told them that some of them would be left in the lorry at the court. The OCS handcuffed some appellants before allowing the others to go home.

34. It was also her testimony that when the police retrieved the deceased's bodies, they took two phones from the home, but she did not know to whom they belonged or how the individuals were killed. One phone was on the seat, and one was connected to a charger. She did not sign any statement at DCIO Kariene, though she was with Mwendia at the police station when he gave his statement. When she wrote her name, Mwendia was not present.

35. Purity Makena, **DW5,** informed the court that the 1st and 2nd appellants are her brothers while the 3rd appellant was a cousin. She testified that on the night of 31st August 2012 and 1st September 2012, she was at her mother's house in Chaaria. She went to Alice Nkatha's house when the deceased told her she would advertise her (the witness's) business in buying and selling peas to the clan, after which she went home. She said she had seen John at her mother's earlier and that there were no problems. The next morning at around 7 a.m., as she went to use John's toilet as her mother's had a problem, she discovered John's body behind the house. She screamed, prompting others, who were coming from a meeting to respond.

The police were called to the house. Alice's body was found behind the kitchen. The door to the house was locked with a

padlock. The OCS later opened it.

36. DW5 further testified that her mother lived at Mwendia's house, but Mwendia was at her home that day, while the 1st and 2nd appellants were at different locations. She also testified that she had heard the previous night that there were land issues between them and their uncles, but there were no disputes between them and the deceased. By the time the police arrived, the appellants were not at the scene. The police did not take anything from the house. They transported the bodies to the mortuary, and burial preparations began soon after. Mary and Kinyua were sent by the police to look for money, as Alice was the Secretary, while a search revealed John's phone on a seat and another one charging.

37. She further testified that the cousins of Johana, Kinyua and Murithi opened the deceased's house on Sunday. They found two phones, Kshs. 35,000 under a timber, along with a broken flask containing Kshs. 500 and Kshs. 300, which Kinyua also took. The 1st appellant did not attend the burial, but his wife did; the 2nd appellant was present. After the bodies were brought home, DW5 and others were taken to Kaguma Police Station. The OCS asked DW5 to take him to the 1st appellant's rented room, where they arrived at 8:40 p.m. with additional officers. The police asked the 1st appellant to dress up, took his ID, and they left for the police station, where the OCS took his ID and placed him in a cell. On Monday, they were given papers for fingerprints. She was asked to stay behind with DW4. She put her thumbprint on a

blank paper as she could not sign. They were taken to court on Monday, told to return in two

weeks, and upon return, some were released while the appellants remained. She did not know who murdered her brother and his wife, and claimed she was never in a room where David gave his statement, and where she thumbprinted. Neither did the OCS call her and Mwiti into a room for any conversation.

38. In its determination, the court was satisfied that the circumstantial evidence placed before it all pointed to the appellants as the perpetrators of the offence. Having found that the charge had been proved beyond reasonable doubt, the trial Judge convicted the appellants, as charged, and they were sentenced to suffer death.

39. The appeal was heard on the Court's virtual platform, where learned counsel for the appellants and the respondent briefly highlighted their written submissions.

    Learned counsel for the appellants filed submissions and a list of authorities, both dated 16th March 2025. He consolidated the grounds of the appeal into three issues namely; that the learned Judge erred in law and fact; by failing to note that the prosecution witnesses gave inconsistent and contradictory testimonies; by failing to note that there was no eyewitness to the said act; and by rejecting the appellants' defence without cogent reasons.

40. On the first and second grounds, counsel submitted that the evidentiary burden for circumstantial evidence was not met as

there were no eyewitnesses who placed the appellants at the scene of the crime. He urged that even if the assumption was made that the confessions made were proper, it is on record that the 1st appellant, in his confession, admitted not knowing who between the 2nd and 3rd appellants murdered the deceased. In support, counsel referred to ***Joan Chebichii Sawe vs. Republic [2003] eKLR,*** where the Court held that to justify an inference of guilt based on circumstantial evidence, the inculpatory facts must be incompatible with the accused's innocence and must not allow for any reasonable alternative hypothesis other than of guilt. Moreover, there must not be any co-existing circumstances that weaken the chain of circumstances upon which the prosecution relies. The burden of proof required to draw this inference—with the exclusion of any other reasonable hypothesis of innocence—lies solely with the prosecution and never shifts to the accused.

41. Counsel additionally argued that the prosecution did not call any eyewitnesses to corroborate its case against the appellants. There was no evidence placing the appellants at the crime scene at the time of the offense. Furthermore, the exact cause of the deceased's death remains unclear. The postmortem report indicates that death was caused by a sharp object, yet the prosecution claims stones were used to commit the offence. In support, he referred to ***Daniel Katana vs. Republic (Criminal Appeal 48 of 2021) [2024] KECA 463 (KLR) (12 April 2024) (Judgment).***

42. Counsel further submitted that even if it were assumed that the weapons used were stones, there is no evidence linking the appellants to these alleged weapons. This remains a suspicion, which he urges this Court to rule out as unsafe to sustain a conviction. Counsel contended that the appellants successfully impeached the allegation of a land dispute between them and the deceased, thus establishing that malice aforethought was absent, which is necessary to uphold a murder conviction, as held in ***Gerald Mwiti Ndatho & 3 Others vs. Republic [2019] eKLR, Criminal Appeal No. 24 & 70 of 2019.***

43. Furthermore, learned counsel argues that the trial court erred by failing to address the issue of malice aforethought, which was never proven. Whether there was an intention to cause death remains speculative and does not provide sufficient evidence to find the appellants guilty of murder. He referred to ***Nzuki vs. Republic [1993] eKLR,*** where this Court held that murder can only be sustained where the act is aimed at a specific individual and committed with either the intention to cause death or to inflict grievous bodily harm. The court further stated that if the evidence suggests a reasonable possibility that the accused killed the deceased through an unlawful act but without the intent necessary to establish legal malice, then such killing would amount only to manslaughter.

44. On the third ground, learned counsel argued that the appellants testified that the confessions obtained were not

legally compliant. As they were coerced into making the confessions

and that their thumbprints were not affixed to the statements voluntarily, yet the trial court disregarded this evidence. He submitted further that it is well-established that once a confession is challenged by the defence, the trial court must conduct a thorough inquiry by hearing evidence from both sides, including assessing whether the confession was obtained through improper means. Counsel cited ***Imbindi vs. Republic [1983] KECA 63 (KLR),*** where this Court held that where accused persons challenge the admissibility of statements, a separate trial within a trial should be held for each impugned statement and each challenge deserves individual consideration.

45. Counsel further argued that the confessions made by the appellants were unsafe and ought to have been submitted to a trial within a trial before the court found its basis for a conviction on murder. He urges, however, that should the conviction be upheld, the Court should vary the sentence in light of the Supreme Court's decision in ***Francis Kariakor Muruatetu vs Republic [2017] eKLR,*** in exercising its discretion.

46. In opposing the appeal, the respondent's learned counsel filed submissions dated 8th April 2025. On essential ingredients of the offence of murder, counsel submitted that there was circumstantial evidence pointing irresistibly to the appellants as having participated in the commission of the offence to the exclusion of any other reasonable hypothesis of innocence as

held in ***Dorcas Jebet Ketter & Another vs. Republic [2013] eKLR,*** which relied on the principle set by its predecessor in *Kipkering Arap koske vs. Republic [1949] 16 EACA 135.*

47. Regarding malice aforethought, counsel contended that there is overwhelming evidence from the confessions recorded by both PW6 and PW5, as well as the testimony of the investigating officer. This evidence suggests that there was animosity stemming from a land dispute, with the appellants harbouring a grudge against their step-brother (the deceased) over claims that he was occupying a larger portion of land than they were.

48. We have carefully considered the record of appeal, submissions by counsel and the law. The grounds of appeal can be collapsed into two, namely, whether the prosecution proved the ingredients of the offence of murder beyond any reasonable doubt against the appellants and whether the sentence was lawful.

49. It is old hat that the prosecution in a charge of murder has a singular task of proving the following three ingredients in order to secure a conviction: that death occurred; the death was caused by the unlawful act of commission or omission by the accused; and that the accused had malice aforethought as he committed the said act. See ***Nyambura & Others vs. Republic [2001] KLR 355.***

50. There is no dispute that the two deceased persons, who were a wife and a husband were brutally murdered between the night

of 31st August and 1st September 2012. Their bodies were discovered the next morning at about 7 a.m. The postmortem reports produced in evidence by PW8 corroborated the testimony of injuries sustained as testified by several witnesses. The issue for determination, therefore, is whether there is either direct or circumstantial evidence implicating the appellants to the required standard; whether malice aforethought was established to sustain the charge of murder, and, should the appellants be found culpable, what sentence is appropriate for the offence.

51. What is not in dispute is that there was no eyewitness of the brutal murder of the deceased persons. The prosecution relied entirely on circumstantial evidence to mount its case against the appellants.

In ***Abanga alias Onyango vs. Republic, Cr. App No. 32 of 1990,*** this Court set out the conditions to be considered in cases where the evidence placed before the court is circumstantial. The court stated 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 and none else."

Equally, in ***Sawe vs. Republic (Criminal Appeal 2 of 2002) [2003] KECA 182 (KLR) (6 June 2003),*** a case based on circumstantial evidence this Court stated as follows; -

> ***"In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge. 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. We disagree with the learned judge's view that the prosecution had proved its case against the appellant beyond any reasonable doubt.*** (Emphasis added)

52. As against the 1st and 2nd appellants, PW1, related to the appellants, testified that on the 31st of August 2012, while

travelling from Meru to Chaaria in the company of her husband and grandchildren, they boarded the same vehicle with the 1st

and 2nd appellants. On arrival at Chaaria at about 5 p.m., the witness and her family proceeded home and the two appellants were left at Chaaria. There is also evidence that Alice's phone was found in the 2nd appellant's house, whereas the 1st appellant's was found with PW2's phone that had been left charging at the deceased's house. What draws further attention is the 1st appellant's failure to attend the funeral of the deceased persons. Then there is the retracted confession of the 1st and 2nd appellants.

53. PW5 informed the court that she sent her sister to inform the 1st and 2nd appellants of the death in the family. The 2nd appellant, who worked far from home, made an effort to attend the funeral. The 1st appellant did not attend, though his wife did. His explanation was that he had no one to leave at his new hotel and therefore opted not to attend the funeral. This, coupled with other factors, informed the trial court's inference of guilt on the 1st appellant. Death is taken very seriously amongst Kenyans, so the explanation that the appellant could not leave his business flies flat on his face. PW9 testified *inter alia* that DW4 took officers to the 1st appellant's house, a search was done and a phone suspected to have been stolen from the deceased's house was recovered. The deceased used to charge phones for a fee. PW2 the owner's phone, informed the court that he had taken the phone to the deceased to charge, he produced a receipt for the phone which he claimed had been stolen from the deceased's house.

54. PW5, the investigating officer, testified that they searched the 2nd appellant's house, recovered several items, including Alice's (deceased) phone, a Nokia, which had her name inscribed on it. The 2nd appellant categorically denied that the phone was in his house. We, however, do not see the reason PW5 would have falsely implicated him.

55. Then there were confessions that implicated the appellants. They were produced in court as part of the evidence without any opposition from the defence. The retraction was made at the defence hearing. The Evidence Act, Chapter 80 of the Laws of Kenya and the Evidence (Out of Court Confessions) Rule 2009 speak to confessions and how the same ought to be managed:

Section 25 to 26 of the Evidence Act states:

> ***25. A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.***
>
> ***26. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused***

person grounds which would appear to him reasonable for supposing that by

making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. (Emphasis added)

56. Under the Evidence (Out of Court Confessions) Rules the recording officer is required to:

> ***(a) Caution the accused person that anything he says may be taken in evidence and the accused has an option of keeping quiet.***
>
> ***(b) Record in writing or electronically the statement. If it is in writing the accused is to be given an option to write or have it recorded for him.***
>
> ***(c) The accused must at the end be given an opportunity to clarify the statement or make additions.***
>
> ***(d) Be recorded in the presence of a third party nominated by the accused. The particulars of third party and relation to the accused recorded.***
>
> ***(e) A certificate of confession shall be signed by the recording officer.***

57. We find that the necessary conditions for recording confessions were adhered to the letter. We are aware as already stated that the confessions statements though not objected to when introduced in evidence were retracted, and as a rule of practice or prudence, we need to be cautious in relying on the same and ought to be satisfied that, in the circumstances of the case the same have been corroborated

by other evidence and depict the

truth. As was held by the predecessor of this Court in the case of ***Tuwamoi vs. Uganda* (1967) E.A.:**

> ***"We would summarize the position thus- a trial court should accept any confession which has been retracted or repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."***

58. Similarly, in ***Kanini Muli vs. Republic* [2014] KECA 870 (KLR),** this Court stated; -

> ***"We need only add that the onus of proving that a statement by an accused person is voluntarily made and not obtained by improper or unlawful methods is upon the prosecution and where there is doubt as to whether the confession was voluntary, the prosecution has not discharged the onus upon it.*** *(See NJUGUNA S/O KIMANI & OTHERS VS REGINA (supra), EDONG S/O ETAT VS REGINA (1954) EA 338 and EZEKIA VS REPUBLIC (supra).*
>
> ***The trial court is obliged to treat a retracted confession with utmost caution and should convict on it only if it is fully satisfied after***

considering all the material points and surrounding circumstances that the confession cannot but be true or if the confession is

corroborated in some material particulars by independent evidence. *(See TUWAMOI VS UGANDA (supra) at page 91, ONYANGO OTOLITO VS R (supra) and WAMBUNYA VS R (supra).*”

59. As regards the confessions, firstly, what strikes us is the similarity in the two statements taken down by two different people at two different locations and from two different persons. For example, both the 1st and 2nd appellants allude to the long suffering they underwent in the hands of their deceased stepbrother after the death of their father; they both complained of their brother who died as a result of the same land dispute at the behest of John the deceased herein; though one gives the date of the attack as 30th August another says it was 31st August; both agree it was a Friday; both the statement indicate that after the incident they went and slept in a lodging leaving Chaaria at 6 a.m.; both mentioned their two uncles, Isaiah Kimathi and Silas Kirimi, and one Rose Kaimuri as having assisted in their mission to kill their stepbrother and his wife. In our view the similarities in the two statements made to different people at different times could not just be a coincidence. It is quite obvious that PW6, a Senior Resident Magistrate, was approached to take the confession in the course of his work; he had no interest in the matter and could not possibly have been part of a plot to fix the 2nd appellant. Similarly, PW8, who at the time was Deputy DCIO, Kasarani, and was on leave in Meru when he was requested to record the confession, had no interest in the matter.

60. We also find that the confessions were materially corroborated by the evidence of PW1, who saw the appellants the evening before the incident within the locality, and other witnesses who alluded to the existence of the land dispute referred to by the appellants. The appellants also alluded to stoning the deceased to death, which was corroborated by the evidence of PW8, as the post-mortem report alluded to injuries that were sustained by the deceased. Deep cut wound, on the head for John, and fractures of the skull for Alice, among other injuries.

61. We agree with the finding of the trial court that the confessions were voluntarily recorded and the defence was but as an afterthought.

62. As relates to the 3rd appellant, he is implicated in the retracted statements. Secondly, his 1D wallet was found in the house of the deceased. His explanation does not sway the inference of guilt. He said that he had given the same to the deceased some years back to secure his license, yet no license was found in it. The presence of the said wallet corroborates the information in both statements that he was amongst the killers.

63. Counsel for the appellants submitted that malice aforethought was not proven. ***Section 206*** of the Penal Code states 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 the 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;

(d) ***an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony***.

64. Evidence on record of the injuries inflicted upon the deceased is evidence enough of the malice harboured by the appellants as they embarked on their mission to kill. In ***Onyancha & 2 Others vs. Republic (Criminal Appeal 92 of 2019) [2025] KECA 1903 (KLR),*** this Court stated:

> ***"The court in Nzuki v Republic [1993] KLR 171 stated that malice aforethought can be inferred from the nature and extent of injuries suffered by the deceased, the weapons used, and the conduct of the accused before, during and after the incident. Besides Section 206 of the Penal Code defines malice aforethought and gives various scenarios that justifies inference of malice aforethought. In this case, the***

deceased was unarmed and attempting to flee, yet he was pursued by the appellants and fatally assaulted. The coordinated and repeated blows inflicted

with crude weapons by the appellants on the vulnerable part of the deceased's body being the head and abdomen could only have intended to cause the death of the deceased or at the very least inflict grievous harm."

65. In addition, the confession statements are very clear that the appellants went on a mission to kill the deceased persons so that they could once and for all remove a problem they had encountered for a long time and to bring an end to the long-standing land dispute.

66. We did not see any inconsistencies or contradictions in the prosecution evidence alluded to by the appellants, and we take note that this line of argument was not seriously pursued. The 3rd appellant was implicated by his accomplices, and in his case before us, or even in the court below, he did not mount a serious defence.

67. With the above analysis, we do not fault the conviction of all three appellants by the trial court; we find the conviction was safe and uphold the same.

68. As for the sentence, the appellants' counsel urged the Court, in the event it agreed with conviction, to vary the death sentence based on the recent jurisprudence emerging from the case of ***Francis Kariokor Muruatetu vs. Republic [2017] eKLR (Muruatetu).*** The prosecution remained mum on the issue. We have noted that the trial court's judgment was delivered on 19th June 2017, just before the Supreme Court's decision in

Muratetu. We take cognizance of the emerging jurisprudence and the trend by this Court and other courts post ***Muratetu.***

69. In the end the appeal on conviction fails and is dismissed. The appeal on sentence succeeds to the extent that we set aside the death sentence and, in its place, sentence the appellants to 30 years' imprisonment each from the date of taking plea.

Dated and delivered at Nyeri this 25th day of March, 2026.

S. ole KANTAI

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF

APPEAL ALI-

ARONI

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR