

**IN THE COURT OF
APPEAL AT
ELDORET
(CORAM: MATIVO, GACHOKA & KORIR,
JJ.A.) CRIMINAL APPEAL NO. E104 OF
2021**

BETWEEN

ENOCK KEBWAGE ONSASE.....APPELLANT

AND

REPUBLIC

RESPONDENT

in

HCCRC No. 31 of 2017)

JUDGMENT OF THE COURT

1. The appellant, **Enock Kebwage Onsase**, faced three counts of murder contrary to section 203 as read with section 204 of the Penal Code in the Eldoret High Court, ***HCCRC No. 31 of 2017***. The particulars were that on 13th May 2017, at Moi's Bridge, Eldoret West sub county within Uasin Gishu County, jointly with others not before court, the appellant murdered **Cliffort Nyambane Onsase, Tanny Nyamweya Onsase** and **Glen**

Ongaki Onsanse.

2. The appellant was arraigned before the trial court to take plea on those three counts. He entered a plea of 'not guilty'. After a full

trial, the appellant was convicted on all counts as charged. He was sentenced to death on each of the convicted counts. The court further ordered that two of the sentences be held in abeyance.

3. The appellant is aggrieved by those findings. He filed his notice of appeal dated 21st December 2021. He also filed his memorandum of appeal dated 28th December 2021 that raised a prolix 20 grounds disputing the findings of the learned judge. We have taken the liberty to summarize those grounds as follows: that the learned judge erroneously relied on the circumstantial evidence adduced by the prosecution but the evidence was marred with discrepancies and inconsistencies; that the circumstantial evidence did not establish a complete chain that pointed to the guilt of the appellant and no one else; that the learned judge was biased; that the prosecution failed to discharge its burden of proof to the required standard; that the electronic evidence adduced failed to comply with section 104 (4) (d) of the Evidence Act; that the investigations were incomplete; that his defence and mitigation were not considered; and that the trial court sentenced him to death on the pretext that it was the only penalty available for the said offence. In view of the foregoing, the appellant prayed that the appeal be allowed, the conviction be quashed and the sentence be set aside.
4. This appeal was virtually heard based on the parties' written submissions on 16th February 2026. The appellant, who was present virtually, was represented by learned counsel Mr. Kemboi. The respondent was represented by Senior Prosecution Counsel

Mr. Mugun.

5. The appellant filed written submissions, a list of authorities and a case digest, all dated 10th February 2026 to argue that the trial judge erroneously relied on the circumstantial evidence, which was based on suspicion and speculation. Thus, an inference of guilt could not be drawn. Several authorities were cited buttressing that argument. He stated that the evidence of **PW6**, **PW8** and **PW13** cast doubt on whether he committed the offence as charged. Further, the mobile phone that was central to the murder was never recovered and no evidence of a grudge between the families was established. He prayed that the appeal be allowed.
6. The respondent opposed the appeal. It filed written submissions, a case digest and a list of authorities all dated 21st June 2024. Senior Prosecution Counsel Mr. Mugun submitted that all the ingredients of the offence of murder were proved beyond reasonable doubt. On sentence, it was submitted that there were aggravating circumstances as to justify the death penalty. For those reasons, he prayed that the appeal be dismissed.
7. This is a first appeal. Our duty as a first appellate court has now been settled. In **Mark Oiruri Mose vs. Republic** [2013] KECA 67 (KLR), this Court held as follows:

“It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the

***witnesses and hearing them give evidence and
to give allowance***

for that. The well-known case of Okeno vs Republic (1977) EA 32 which sets out that principle has been referred to in several decisions of this Court and of the High Court. In our view, it does not appear that the learned Judge was alive to those legal requirements or if he was, then he did not apparently put them into practice.”

8. The prosecution marshalled 13 witnesses in a bid to prove that the appellant committed the offence that he was charged with. **PW1** Edwin Olibe testified that on the morning of 17th May 2017, he saw the appellant, a person who he had known for six years, walking with three children at Chepkoilel stage. They were walking in the same direction as himself. The children were aged between 4 and 6 years. The appellant was holding the hand of the smallest one. They parted ways as he proceeded to his place of work. A few days later, he learnt that those children, belonging to Nyambane, the appellant’s brother, were missing. He stated that he held no grudge against the appellant and recorded his statement at the police station after he was informed that bodies were found near Matunda river. In cross examination he was categorical that he saw the appellant walking with three children but did not know them.
9. 9-year-old **PW2**, Irine Kemunto Onsase testified that on 13th May 2017, she was at home being prepared for church by her mother, Ruth Chebet Kemboi, **PW7**, together with her two sisters. Their father, **PW3** James Ratemo Onsase alias Nyambane, asked them to pick their brothers, Grey Cliff, Tanny and Glen from another

house. On reaching there, they discovered that they had not had breakfast.

Their mother, Ebby Isaji Inziani, **PW4**, was not there. She however met her at the gate as she was leaving with one of her brothers, Cliff, to church. She asked **PW2** to leave him so that he could take tea with his brothers before going to church.

10. On their way to church, **PW2** recalled meeting the appellant, who was her uncle, at a stony place. She recalled that he was pacing and looking at his phone. They exchanged pleasantries as she proceeded to church with her sisters. Later, **PW7** asked her whether she had sight of her brothers in church. She was also interrogated by the police on another day as to where and how they saw the appellant. She learnt that the bodies of her brothers were discovered in River Nzoia.
11. **PW3**, the father of the deceased children, testified that he was involved in town politics on 13th May 2017. He received a call from his eldest wife **PW4** inquiring whether he was with their deceased children, Clifford Nyambane, Tanny Nyamweya and Glen Ongaki. Later, he called his younger wife **PW7** inquiring whether she had seen the children. She informed him that she had not seen the children in church but were seen together with his younger brother, the appellant. Growing wary, **PW3** decided to head home asking **PW7** to inform **PW4**.
12. **PW3** tried to call the appellant but his phone was off. He would try again at 7:00 p.m. where he had a conversation with the appellant. The appellant informed **PW3** that he was not with the children. **PW3** asked him to go to his house where he was

with his other

children, two wives, their house help and his nephew **PW6** John Nyamweya Zakayo. While all were there, **PW3** asked **PW4** about the children who informed him that she had handed them over to their employee Joshua, to escort them to church. He was also called and informed that Joshua met **PW6** and handed the children over to him.

13. **PW6** told **PW3** that he met the appellant who asked him whether he was going to church with the children, to which his response was 'no'. At that point, the appellant told him to leave the children with him and run to church. When **PW3** asked the appellant, he stated that **PW6** was not accompanied by any children. **PW3** asked the appellant thus to return to his home the following day and help him look for his children as he was the last person seen with them.
14. It was his recollection that the following day, the appellant and **PW6** returned to **PW3**'s house. Before commencing the search exercise, **PW3**, the appellant and **PW6** all proceeded to Kapsoya Police Station where they were questioned. On conclusion of that interrogation process, the appellant was detained by the police as a suspect. In an effort to trace his children, **PW3** informed the media, the church congregation and friends. Come 18th May 2017, he received reports from **PW4** that his deceased children were found floating in a river near Moi's Bridge. He could not gather the courage to go to the scene.

15. The following day, **PW3** talked to his uncles Christopher Nyamweya and Benjamin Onsase, who confirmed that the bodies were his deceased children. The bodies were later transferred to Eldoret Teaching and Referral Hospital. He identified the three bodies as his children that he last saw on the morning of 13th May 2017.
16. Recalling the relationship he had with the appellant, his younger brother, **PW3** testified that he lived with him for sometime before he moved out. However, the relationship with his wife **PW4**, got strained after the appellant impregnated their maid. He added that on occasion, the appellant sent threatening messages through their mentally ill sister's phone between 2016 and 2017. She is called Gladys. One time, the appellant texted **PW3** to inform him that his wife, **PW4**, told another woman, that she was going to poison him. **PW3** informed their uncle about his brother's behaviour and only held a meeting after the deceased persons died.
17. **PW3** testified that on one occasion, while in prison, the appellant called him asking for forgiveness as he was involved in the crime. He acknowledged that he had wronged **PW3** and knew that it was hard for **PW3** to understand. The appellant once again pleaded for forgiveness after the children were buried.
18. **PW4**'s evidence was that on the morning of 13th May 2017, she woke up to prepare the deceased persons, who were her children, for church. She by passed the appellant heading to Kapsoya when she was buying bread. She did not greet him as they were not in good terms. On return at the gate, she met **PW7**'s children with

one

- of her children, Cliff Nyambane. She asked him to remain at home so he could have breakfast before going to church.
19. Once ready, **PW4** asked their employee Joshua to take them to church. She followed 20 minutes later. On arrival at the church premises, **PW4** did not see the children. After leaving church, **PW4** asked Joshua about the children. He told her that he handed them over to **PW6** to take them to church. She inquired from **PW6** who narrated that on reaching the stone area, the appellant asked him if he was the one who used to take the children to church. Responding affirmatively, he was asked by the appellant to rush to church and leave the children with him. He saw the children walking away with the appellant.
 20. **PW4** immediately informed the church elders. She was advised to first call him. Though calls from the church elder were going through, the appellant did not pick up his phone and eventually switched it off. Efforts to trace her children that day were futile. She thus elected to write him a message.
 21. At this juncture, the trial court noted that the witness was emotional, breaking down. Given the fact that she was expectant, the trial court saw it wise to adjourn her evidence taking to another date. When recalled back to the stand, **PW4** testified that the text message was delivered at 7:50 p.m. as they continued their search for the children. Together with **PW7**, they filed a 'missing persons' report at Kapsoya Police Station. They recorded their statements. On their return back home, **PW4** found the appellant at their home

and pleaded with him to give the whereabouts of their children. His response however was that he had not seen them but saw **PW6**.

22. **PW4** testified that as they continued to search for their children, **PW3** took the appellant to the police station where he was detained. She was later informed by the church elders that the bodies of the deceased persons were found in Moi's Bridge. She identified the bodies at Moi Teaching and Referral Hospital. She saw that Cliff Nyambane had a head injury.
23. **PW4**'s evidence was that the only time she differed with the appellant was when he got her house help Fanice Frienda pregnant. **PW4** used to work at the hospital that the house help delivered from. After following up, she assisted with her discharge from the hospital. She saw the appellant in the hospital and gave him the discharge papers. However, the appellant ignored her.
24. Later, the appellant texted her telling her that she was a stupid woman and had no business undertaking a role that was not hers. That he sent three threatening messages using his sister's phone number. She also recalled that in 2014 or 2015, the appellant accused her of stating that she would kill her husband. After that, their relationship was no longer blissful.
25. **PW5** Fanice Andeso Ikhota testified that she worked for **PW4** as her house help in March 2014. She was living together with **PW3** and their deceased children. She stopped working there after the appellant impregnated her. He was a regular visitor at that home and they developed a romantic relationship. Later, the appellant called her and asked her to live in a rented house that he paid for

- since she had moved back to her aunt's home. After giving birth at Eldoret Teaching and Referral Hospital, **PW4** assisted her to get discharged. When **PW4** tried to give the appellant the discharge papers, he ignored her.
26. **PW5**'s further evidence was that she had an on and off relationship with appellant. One day, the appellant went to her house armed with a machete and threatened to kill her, her children and **PW4**'s family if she didn't stop talking to **PW4**. She never spoke to him again.
27. On 13th May 2017, the appellant called her. She received the call but he did not speak. He called again on 16th May 2017 and informed her that he was at the police station. He told her that he was there because of **PW4**. On inquiring from her, **PW5** learned that **PW4**'s children had passed on.
28. 12-year-old **PW6**, testified that he was at home on the morning of 13th May 2017 preparing for church. He decided to pass by his uncle's house, **PW3**, to take his children, the deceased persons, to church. On reaching the gate, **PW6** met Joshua with the children. They were all wearing black jean trousers and shoes. **PW6** proceeded with the children until they met the appellant, his mother's brother, at the Kapsoya junction near a huge stone. His mother is called Gladys.
29. **PW6** testified that the appellant, **PW3** and their home were all close to each other. They were neighbours. The appellant inquired from him if he was taking the children to church to which he responded 'yes'. The appellant then asked **PW6** to run to church and leave the

children with him. He left the appellant with the children under the pretext that he would take them to church. He was holding the hand of Tanny Nyamweya and Glen Ongaki. Clifford Nyambane was slightly ahead playing.

30. **PW6** recalled that at 10:00 a.m., **PW4** inquired from him about the whereabouts of the children. He informed her that he had left the children with the appellant. She searched for them and an announcement was made in church about their disappearance. He recalled seeing the preacher calling the appellant who did not pick the calls. Later, his phone went off.
31. Later that evening, **PW6** told **PW3** what had transpired when he went to his home. The appellant was also present. However, when quizzed, the appellant denied that **PW6** left him with the children. The following day, the appellant was taken to Kapsoya Police Station. **PW6** later learned in the news that the children were found dead. **PW6** recorded his statement and led the police to where he handed over the children to the appellant.
32. **PW7**'s evidence was that on 13th May 2017, she awoke to prepare her children to go to church. **PW3** then sent their eldest daughter, **PW2** to collect her step brothers from **PW4**'s house. They all had a propensity to go to church together. **PW7** stayed at home to prepare and 30 minutes later, **PW4** came to pick her up. She however remained in the house to prepare tea on the request of their husband as visitors were coming.
33. **PW7** later joined **PW4** in church whom she found outside the church crying in the company of **PW6**. **PW4** told her that **PW6**, the

son to Gladys, **PW3**'s sister, told her that he left the kids with the appellant on their way to church and never made it to the church. That **PW6** did as he was told by his uncle. They tried to call the appellant but their efforts went unanswered.

34. **PW7**, together with her children, left the church with **PW4**, to assist her trace the children and establish if they were home. They looked for them all day. At 8:00 p.m., **PW3** called the appellant to their house. When inquired, he denied taking the children. The appellant was taken to Kapsoya Police Station where he was arrested.
35. On 18th May 2017, reports about the missing children indicated that they were found in Kitale. The following day, she was informed by **PW3** that they had passed on. **PW7** recalled that the bodies were identified from Moi Teaching and Referral Hospital. She recalled that though she never quarreled with the appellant, he never used to greet her. That the appellant lived with their parents until they moved to the USA. The appellant was currently living with his sisters and brothers.
36. **PW8**, Dr. Kibet Keitai, a pathologist working at Moi Teaching and Referral Hospital, testified that he conducted the post mortem on the deceased persons on 25th May 2017. Speaking about 4 - 6-year- old Clifford Nyambane Onsase, he confirmed that the body was identified by **PW3** and Benjamine Onsase. Decomposition had commenced. He estimated the time of death to time of autopsy at 5
- 10 days. Externally, the body had extensive loss of soft tissues on the head and abdomen.

37. He continued that the body was in water previously. Internally, he had swelling of the airway and a fracture of one of the bones in the airway. The neck muscles had old bleeding. Both lungs had collapsed. There were no features of drowning. He thus formed the opinion that the cause of death was asphyxiation due to lack of oxygen caused by strangulation. He sent samples for toxicology to rule out poisoning. He produced the post mortem report that he filled in evidence.
38. Regarding 5-year-old Tanny Nyamweya, the body was identified by **PW3** and Benjamin Onsase. Decomposition had commenced. There was extensive loss of soft tissues. Face, eyes and scalp were extortive of scalp bone. There were no bone fractures. Internally, there was swelling of the trachea with an old spotting hemorrhage. Both lungs had collapsed. There were no features of drowning. He formed the opinion that the cause of death was lack of oxygen due to strangulation. He sent samples for toxicology to exclude poisoning. He produced the post mortem report that he filled in evidence.
39. Turning to 3-5-year-old Glen Onsanse, he confirmed that the body was identified by **PW3** and Benjamin Onsase. There was evidence of decomposition. He estimated that it had been 3 - 5 days since his death. The face had extensive loss of soft tissue skin, muscles, upper body and legs. He had no eyes. The scalp was exposed. There was no broken bone. He observed that there was deep neck hemorrhage and swelling of the airways. Both lungs had collapsed with no features of drowning. He made the opinion that the cause of

death was asphyxia due to strangulation. He got specimen to rule out poisoning. He produced the post mortem report that he filled in evidence.

40. **PW8** added that given the nature of the decomposition, it was impossible to tell the nature of the strangulation. That the failure to breath by drowning could not cause a fracture. He clarified that a drowning person could not sustain fractures by hit from objects. Finally, it was possible to distinguish drowning from asphyxia.
41. **PW9**, PC Robert Too, received a report of the body of a young boy found at River Nzoia. He proceeded to the scene together with CPL Edna Kiptoo where they found the assistant chief. They found a partly decomposed body that they retrieved with the assistance of members of the public. The body was transferred to Kitale county mortuary. Thereafter, he recorded his statement.
42. **PW10**, Sergeant David Ongwenyi recalled that he visited a murder scene at Moi's Bridge on 24th May 2017 along river Nzoia. He went alongside CPL Kigoi. He was shown where the bodies had been retrieved and took photographs of the scene. He also took photographs of the deceased persons before and after the post mortem was conducted. He additionally took photographs of where the appellant was spotted by several witnesses. On 29th May 2017, the appellant accompanied them and showed them where he had thrown the bodies. The photographs and the exhibit report were adduced in evidence.
43. Analyst **PW11**, Davimus Kibet Kisage, produced a report prepared by his colleague Richard Langat. He testified that on 26th May 2017,

under the escort of PC Peter Omondi, they received stomach contents, liver and kidney of the three deceased persons. Mr. Langat then proceeded with extraction using chemical and instrumental methods in all three stomach contents. All samples were found to have diazinon, an organophosphate insecticide, consumed orally. Mr. Langat prepared a report dated 21st June 2017 that was adduce in evidence.

44. **PW12**, Constable Victor Omondi, the investigating officer, received instructions to investigate the matter on 23rd May 2017 regarding a missing people's report. There were also signal reports made on 12th May 2017 and 19th May 2017 of drowning incidents and one on 16th May 2017 of a drowning incident. The first signal report stated that police officers from Matunda received a phone call from the area chief that an unknown body was recovered from Sinoko location in River Nzoia. The latest signal report revealed that three juveniles were recovered in different parts of Nzoia River. He conducted investigations, interrogated witnesses and recorded their witness statements.
45. **PW12** also reconstructed the crime scene and was shown where the bodies were retrieved. He was assisted by other police officers and crime personnel. This assisted him to draw sketch plans that were produced in evidence. **PW12** also witnessed the post mortems done on the deceased persons on 25th May 2017. He also received the samples taken from the deceased bodies and escorted them to the government chemist. He adduced the exhibit memo form in evidence.

46. **PW12** also applied for mobile data on 22nd May 2017 relating to mobile number 0724293442 belonging to the appellant. Upon receipt of the data, **PW12** interrogated the appellant. He testified that the appellant accepted the offence on his statement under inquiry. He then led them to scene on 29th March 2017. **PW12** drew a sketch plan.
47. From the mobile data, **PW12** testified that the appellant was on 13th May 2017 at 8:07 a.m. at Kapsoya Estate. At 10:21 a.m. on the same day, he received a call at Eldoret Baharini and switched off his phone till 1927 hours. He received an SMS from 0702692800 while at Moi's Bridge. At 7:28 p.m., he was at Tongoni area and in Matunda at 7:31 p.m. He was at Nagonri at 7:52 p.m. and Eldoret Matamayu area at 8:37 p.m. At 8:50 p.m., the appellant was Eldoret District Hospital area and at 9:00 p.m., he was at Eldoret Kapsoya Hill area. After gathering all the evidence, **PW12** formed the opinion that the appellant committed the offence that he was charged with.
48. **PW13**, James Wonkabi, a law enforcement liaison officer at Safaricom Limited testified that on 22nd May 2017, they received a request letter from the CID Uasin Gishu County requesting his employer to furnish incoming and outgoing data calls on mobile phone numbers 0724293442, registered in the name of the appellant, and 0702692800 for the period 1st April 2017 to 22nd May 2017.
49. **PW13** processed the data record regarding the number registered in the appellant's name. The data collected the service type, call time, location tonner that received the signal B.T.S and

ID/registered

name of the SIM card holder. He testified that on 13th May 2017, the appellant called 079692898 at Eldoret Kapsoya estate at 8:07 a.m. At 8:13 a.m., he was called by 0726382890 where he was in Airtel EATAC. He was later called at 10:21 by 0795704422. At 11:15 a.m., 0722188188 could not reach the appellant as his phone was off and remained inactive until it was back on or had proper network.

50. At 1923hours on the same day, the mobile number received a call while at Moi's Bridge and at Tongoni at 1928hours. At 1931hours, the phone received a call in Matunda and at Nangili at 1952hours. At 2037hours, it was called at Eldoret Mutawaiyu and at Eldoret Timsales at 2045hours. At 2049hours, he was at Eldoret District Hospital and at Eldoret Kapsoya Hill at 2100hours and at 2330hours. He produced the report and certificate in evidence.
51. After the close of the prosecution's case, the trial court formed the opinion that a *prima facie* case had been established against the appellant as to place him on his defence. His evidence was that on 13th May 2017, he woke up at home where he was living with his siblings as well as **PW6**, his nephew and son to his sister Gladys. He asked his siblings to prepare for church. While some went, others decided to remain in the house. The appellant thus went to buy milk and bread.
52. On his way back, the appellant passed through the rear side of **PW3**'s house where he found **PW2** and her siblings. He confirmed that **PW3** is his brother and **PW2** is his niece. He told **PW2** and her siblings to go to church while standing on a big rock. He had conversations with his other siblings, had porridge and slept

until

1:00 p.m. He had lunch with his siblings and watched the television until 7:30 p.m. when **PW3** called for him. The appellant went inside **PW7**'s house and found **PW3**, **PW4** and **PW7**. He was asked about the deceased children. He denied seeing anyone but **PW2**.

53. The appellant then suggested that they ought to commence the search for the children but his request was deferred to the next morning. On the morning of 14th May 2017, he proceeded with **PW3**, **PW6** and Emmanuel to the police station to report about the missing children. After being interrogated, he was arrested alongside **PW6**. He raised bribery claims alleging that **PW3** gave the police Kshs. 20,000.00 to have **PW6** released. He was later charged with the offence on the three counts which he denied committing. The appellant denied that **PW1** saw him on 13th May 2017. In fact, he did not know him. He denied the evidence of all witnesses stating that they gave falsified information.
54. In order for a conviction to sustain in a charge for murder, the prosecution must establish the following essential conjunctive ingredients: the death of the deceased and the cause of the deceased; that the death of the deceased was caused by an unlawful act or omission; that the said act or omission was caused by the accused person; and malice aforethought.
55. On the death of the deceased persons and the cause of death, evidence was led by **PW8** as to confirm that the deceased persons Clifford Nyambane Onsase, Tanny Nyamweya and Glen Onsase died as a result of asphyxiation due to lack of oxygen

caused by strangulation. That was not controverted. Those post mortem

reports were adduced in evidence establishing the death of the deceased persons and the cause of their death.

56. The next ingredient we are called to establish is whether the appellant committed an unlawful act or omission leading to the death of the deceased minors. In a quest to establish that it was the appellant that caused the death of the deceased children, the prosecution adduced circumstantial evidence to pit the appellant as the architect of the offence. The rule on circumstantial evidence is well settled in our jurisdiction. This Court in **Ahamad Abolfathi Mohammed & another vs. Republic** [2018] KECA 743 (KLR) set out the parameters in the following words:

“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 undesigned coincidence is capable of proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that is circumstantial.”

(See also Musili Tulo v. Republic Cr. App. No. 30 of 2013).

Before circumstantial evidence can form the

basis of a conviction, however, it must satisfy several

conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v Republic, Cr. App No. 32 of 1990 this Court set out the conditions 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.”

(See also Sawe v. Republic (supra) and GMI v. Republic, Cr. Ap. No. 308 of 2011.

In addition, the prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt.

(See Teper v. R. [1952] All ER 480 and Musoke v. R. [1958] EA 715). In Dhalay Singh v Republic, Cr App. No. 10 of 1997, this Court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”

57. From the evidence on record, on 13th May 2017, the appellant met **PW6** together with the deceased persons on their way to church.

PW6 had gone to collect them from **PW4**'s house. Earlier on, **PW2** had been sent by **PW7** to collect the children. However, **PW4** met her and asked her to allow the children to have breakfast before they could retreat to church. **PW6** bumped into the appellant in a stony area. The appellant asked him whether he had a propensity to go with the children to church to which **PW6** responded in the affirmative. The appellant asked **PW6** to leave him with the children and rush to church. A few days later, that is 18th May 2017 and 19th May 2017, the witnesses would learn of the deceased children's lifelessness after having been found missing for a few days. They were retrieved from River Nzoia at Moi's Bridge.

58. Furthermore, according to **PW13**, the appellant's mobile phone number, placed the appellant suspiciously at the crime scene on 13th May 2017. Though he stated that it belonged to his sister, that did not cast doubt that the appellant was the registered owner of that mobile phone number.
59. It was testified that his mobile phone number, as long as it was operative and with available network, could determine its location. Of particular interest is that on 13th May 2017 at 8:07 a.m., the location of the phone was at Kapsoya Estate. At 10:21 a.m. on the same day, the appellant received a call at Eldoret Baharini and switched off his phone till 1923hrs, when the mobile number received a call while at Moi's Bridge and at Tongoni at 1928hours. At 1931hours, the phone received a call in Matunda and at Nangili at 1952hours. At 2037hours, it was called at Eldoret Mutawaiyu and at Eldoret Timsales at 2045hours. At

2049hours, he was at

Eldoret District Hospital and at Eldoret Kapsoya Hill at 2100hours and at 2330hours.

60. The prosecution was at this juncture relying on the doctrine of last seen as to tie the appellant to the offence since the deceased children were last seen alive in the appellant's company. This Court in **Nderitu vs. Republic** [2026] KECA 339 (KLR) had this to say on the doctrine:

“Given the circumstances, Section 111(1) of the Evidence Act places the burden upon an accused person to explain any fact that lies peculiarly within his knowledge. In the context of murder, where an accused is proved to have been the last person seen with the deceased before death, he bears a duty to offer a reasonable and satisfactory explanation as to how the deceased met his death. Failure to do so allows a court to draw an adverse inference. The Supreme Court of Nigeria in the case of Haruna vs Attorney General of the Federation [2012] LPELR-SC.72/2010 succinctly articulated the rule, holding that:

“Where a person is last seen with the deceased and the circumstantial evidence points irresistibly to no other conclusion, the presumption arises that he bears responsibility for the death. In such cases, it becomes incumbent upon the accused to explain the fate of the deceased; in the absence of such explanation, both the trial and appellate courts are justified in inferring guilt.”

This principle has also been consistently

invoked by this Court. In the case of Kimani vs Republic

(Criminal Appeal No. 41 of 2022) [2023] KECA 1390 (KLR), the Court reaffirmed that the “last seen alive” doctrine operates where the deceased was last seen in the company of the accused before death, thereby creating a strong presumption of responsibility which the accused must rebut by providing a plausible account. Similarly, in Dida Ali Mohammed vs Republic, Nakuru Criminal Appeal No. 178 of 2000 (UR), the Court emphasized that the accused alone was in a position to explain what transpired after he was last seen with the deceased. His failure to do so, coupled with other surrounding circumstances, led the Court to the inescapable conclusion that he was the perpetrator.

In the case of Moingo & Another vs Republic [2022] KECA 6 (KLR), this Court reiterated that, while the burden of proof in criminal cases remains squarely on the prosecution, the “last seen” doctrine imposes a duty of explanation upon the accused in homicide prosecutions. Where such an explanation is lacking, and the circumstantial evidence is consistent and unbroken, the court is justified in inferring that the accused was responsible for the death. The same principle was recently affirmed in the cases of Ngeno vs Republic (Criminal Appeal No. 24 of 2016) [2024] KECA 757 (KLR); and Kamau vs Republic [2024] KECA 1193 (KLR).”

61. Having laid a basis that the appellant was the last person seen with the deceased persons before their death, it was incumbent on the appellant to establish that the evidence of the prosecution

ought to be cast in doubt. What was the appellant's navigation of the facts

set out by the prosecution? The appellant testified that he was at home the whole day and had no sight of the deceased children. He also confirmed that he was interrogated by **PW3** to establish the whereabouts of the children.

62. Though the appellant attempted to distance himself from ownership of the mobile phone, that traced his locations at different times, that defence did not explain any fact that lies peculiarly within his knowledge. In our view, we are satisfied that the appellant was in possession of the mobile number and was therefore present in the locations as recorded by **PW13**.
63. In our view, we find that the evidence of the prosecution as believable. We do not see any reason to cast doubt on the evidence. The witnesses were deliberate with the truth and even in their cross examination, they remained committed to the altruism of truth.
64. We also note the evidence of **PW6**, who remained unshaken in his testimony as the last person to see the children with the appellant alive. On the fateful day, **PW1** saw the appellant walking with the children and was holding the hand of the youngest. He knew the appellant well. Just like the trial judge, we are satisfied that evidence of the prosecution was unwavering and unshaken as to only point to one conclusion: the appellant committed unlawful acts that led to the death of the deceased children on 13th May 2017. The evidence forms a chain of events that clearly show that the death of the young children could not have been caused by any other person other than the appellant. We will therefore not interfere with those findings.

65. The last ingredient that we must establish is that of malice aforethought. It is defined as follows under section 206 of the Penal Code:

“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.”

66. From the evidence of the prosecution, the deceased persons were strangled to death. Furthermore, according to **PW11**, the deceased persons had taken a toxic substance that was indicative that they had orally taken poison. We have reason to believe that it was the appellant who had them take it. He then proceeded to dump their bodies in River Nzoia. The appellant then concealed this act by denying that he was with the children. It was only later

that he led police officers to the crime scene and showed them where he had

deposited the bodies. This led to significant body decomposition of the deceased minors ranging from 5 - 10 days. Even if one was to discount the evidence of the strained relationship between the appellant and **PW4**, the cruel manner in which the appellant inflicted the death leave no doubt that he wanted them dead. This is consistent with the ingredient of malice aforethought as from the evidence, the appellant had every intention to cause the death of the deceased persons.

67. On sentence, the appellant was condemned to the death penalty. In sentencing the appellant, the trial court held as follows:

“A family lost all its three children in the hands of the accused person. The convict visited his late brother and anger against the three innocent children. Nothing can offer mitigation for such crimes to sway the court from the death sentence for each of the offence committed. I therefore sentence the convict to death on each of the 3 offences. However, in execution of the sentences, two of the sentences will be held in abeyance.”

68. We are alive to the fact that the mandatory nature of the death penalty for the offence of murder was declared unconstitutional by the Supreme Court. This is because it fettered the discretion of the judge in sentencing, where the circumstances justified a different sentence. However, the Supreme Court did not disqualify certain convicted persons from suffering the said sentence of death, as long as the circumstances dictate so.
69. In the present case, the appellant murdered innocent children and concealed that fact for a number of days. He strangled and

poisoned

them; as a show of the commission of a heinous crime. They were innocent children that bore no grudge against the appellant and who were on their way to church. These were in our view aggravating circumstances as to justify the sentence of death. We are therefore in agreement with the reasoning and conclusion of the trial judge and are not inclined to interfere with the sentence. Indeed, if there is a case where the death penalty is deserved, this is one of them.

70. Accordingly, we come to the conclusion that the present appeal lacks merit and dismiss it in its entirety. We uphold the conviction and affirm the sentence.

Dated and Delivered at Eldoret this 10th day of April, 2026.

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR