Kitsao v Republic (Criminal Appeal E001 of 2024)
[2025] KECA 55 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 55 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E001 OF 2024

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JANUARY 24, 2025

BETWEEN

ERIC MASHA KITSAO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgement of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 26th October 2023) in Malindi Criminal Case No. 10 of 2019)

JUDGMENT

1. On 17th October 2023, Nyakundi, J. in exercise of his original criminal jurisdiction, convicted and sentenced Eric Masha Kitsao (the appellant) to 25 years imprisonment for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Aggrieved, the appellant is now before this Court challenging both his conviction and sentence on grounds which we shall consider hereafter. His now erstwhile co-accused Michael Ziro Nyanje, whom we shall refer to as 'former co-accused' or 'Ziro' where necessary, was acquitted of the offence under section 215 of the Criminal Procedure Code.

2. The information upon which the appellant and his former co- accused were charged read that they jointly committed the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the information were that, on 23rd March 2016 at around 10:00 hours at Mida Village of Gede Location within Kilifi County, the accused persons jointly murdered Karisa Khonde Karani (Deceased).

3. The prosecution called 8 witnesses. Korir, J. (as he then was), fully heard the prosecution's case. When Nyakundi, J. took over the proceedings, there was consensus that the hearing should proceed from where the previous judge had reached.

4. This being a first appeal, we are under a duty to re-analyse and re-evaluate the evidence adduced before the trial court and reach our own conclusion, always bearing in mind that we have not had the opportunity to see and hear the witnesses testify, which the trial court had, and for which we should give due allowance. (see Okeno vs. Republic (1972) EA 32).

5. Dr. Angure Gilbert (PW1), a medical doctor from Malindi Hospital, produced a post-mortem report dated 25th March 2016 on behalf of Dr. Nasra who conducted the post mortem on the deceased's body. He testified that the body had multiple cut wounds on the head, left hand, penetrating cut wound on the chest, multiple cut wounds on the skull and cut wounds of the face. The doctor's opinion was that the cause of death resulted from severe head injury secondary to assault with a sharp penetrating object.

6. Leah Karisa (PW2), the appellant's wife, testified that, on 23rd March 2016, she was at home while the appellant left for work at a nearby farm; that, when the appellant came back in the evening, he again left, stating that he was going to look for some allegedly stolen trees; that this was around 8.00 p.m.; that the appellant returned home at around 9.00 p.m.; that she noticed that his clothes had blood stains and had a cut on his finger; that he also had a panga; and that he then took a shower and slept. The following day on 24th March 2016, PW2 saw a group of people running while claiming that a person had been killed in the forest.

7. It was PW2's testimony that the appellant dug a hole and buried the clothes he wore the previous day, a t-shirt and a pair of shorts, and a panga at the back of their home. PW2 knew the deceased as Karisa, who was a shopkeeper. She stated that the appellant then told her that he wanted to go and report something to the police station. Later, the appellant's sister, one Fikiri Kitsao, went to their home. She saw her sister-in-law and her husband talking, but could not tell what they were talking about. PW2 testified that the appellant was arrested after two months; that police officers dug around their home and recovered clothes and a panga which the appellant had buried; and that she confirmed that the clothes belonged to the appellant.

8. In cross examination, PW2 reiterated and confirmed that she saw the appellant's clothes with blood, and that he had a panga when he returned home on the evening of the material date.

9. Bahati Baya (PW3), the appellant's mother, testified that all she knew is that her son was arrested and charged with the offence of murder.

10. Sarah Njeri Karani (PW4) testified that the deceased was her nephew, and that he was doing business in a retail shop; that, on 24th March 2016, she received a call from one Fatuma Kahindi, a tailor and a village elder, informing her that her nephew had been killed; and that she was not aware of any dispute between the deceased and the appellant.

11. PW5, Fatuma Kahindi, testified that she knew the deceased as they used to live together at Mida where she was a tailor; that, on the fateful night, she heard a knock at the door at around 8.00 p.m.; that she thought that the deceased was closing the door; that she called the deceased, but he could not be reached on the phone; that she then slept till morning; that, in the morning, she found that the deceased had not opened the shop; and that, she then heard people saying that he had been killed. It was her further testimony that she did not know the appellant; and that, in the morning, she saw blood at the deceased's house door.

12. PW6, CPL Erick Kathurima from the DCI in Watamu, was the arresting officer. It was his testimony that, on 14th May 2016 at around 4.00 a.m., together with the Deputy OCS, one Inspector Lebo, PC Mugambi and officers from Kizingo Patrol Base, headed to Mida to arrest some murder suspects; that they then split into two groups; that one group of officers went to the appellant's home while the other

group went to the home of the other suspect, one Safari; and that, on reaching the appellant's home, he hesitated to open the door, but that the police forced their way in.

13. PW6 testified that PW2 narrated to them what happened on the fateful day and showed them where her husband (the appellant) had dug and hidden clothes and a panga. They were able to recover the buried items, being a panga, greyish blood-stained shorts and a blue blood-stained t-shirt. PW2 confirmed that the clothes belonged to the appellant while the panga belonged to her mother-in-law. PW6 prepared a search certificate dated 14th May 2016, which was signed by PW2 and the appellant. PW6 further testified that they (police) presented the appellant before a magistrate, Hon. Khatambi at the Malindi Law Courts where he recorded the appellant's confession in the presence of his mother (PW3) and wife (PW2).

14. PW7, PC Pius Mugambi, was the investigating officer attached to the DCI, Watamu. He testified that, on 24th March 2016 at around 10:00 hours, he was informed by the OCS Watamu, Chief Inspector Rotich that there was a dead body at Mida in Gede Location; that he and the OCS rushed to the scene whereupon they found the deceased's body, a 23-year-old shop attendant in the area; and that, they moved the body to Malindi sub-county Hospital Mortuary where a post mortem was later conducted on 25th March 2016.

15. PW7 testified that his investigations narrowed down to two suspects, being the appellant and his former co-accused, whom he arrested in the company of other officers; that he drew a sketch map of the scene where the body of the deceased was found; that, on 17th May 2016, the appellant approached him with a request to call one of his relatives as he had something to say; that the appellant's sister and other relatives came to the station, and the appellant confessed to committing the murder; and that, he escorted the appellant before a magistrate (Hon. Yvonne Khatambi, SRM) at Malindi Law Courts where the confession dated 17th May 2016 was recorded in Case No. 83 of 2016.

16. Hon. Yvonne Khatambi (SRM) (PW8) testified that, on 17th May 2016, the appellant appeared before her in the presence of his family members, including his mother and wife to record a confession to murder; that she cautioned the appellant that the information he gave could be used against him; that the appellant told her that he was approached by one Safari who told him that he had a well-paying job for him; that the said Safari told him that he had murdered his father; that, on the material day at 8.00 p.m., Safari went to his (appellant's) home and called him outside; that Safari asked him to prepare a note in the Kiswahili language stating that 'people's wives were poison'; and that, Safari then directed him to pick a panga and call the deceased asking him to meet him at Mida ECO Camp.

17. PW8 testified that the appellant went on to confess that, upon reaching the area, Safari hid behind a tree and directed the appellant to go and meet up with the deceased; that, at this point, the panga was in Safari's possession; that the appellant, together with the deceased started walking towards the place where Safari had hidden himself; that the appellant stated that Safari attacked the deceased with the panga and killed him; that the appellant attempted to run away, but he was threatened by Safari that if he ran away, he would implicate him; that the appellant then returned to the scene whereupon Safari directed him to cut the deceased; that he then took the panga and slit the deceased's throat; that they then searched the deceased's pockets to see if they could get the keys to his shop, but they were unsuccessful; and that, Safari directed the appellant to go home and burn the clothes he was wearing on that day. PW8 produced the confession taken before her as P. exhibit 6.

18. At the close of the prosecution's case, the appellant and his co-accused were put on their defence. For the purposes of this appeal, Ziro having been acquitted, we shall only consider the appellant's defence before the trial court.

19. In his unsworn defence, the appellant denied committing the offence. He stated that Ziro found him at his homestead together with his friend, Karisa, the deceased herein; that the Ziro came with a request that his wife be allowed to sell fish in the deceased's premises; that the deceased accepted to meet Ziro for a discussion over the issue; that he met Ziro at the grazing field, and that, that is when he instructed him to inscribe on a piece of paper the words 'someone's wife is poison.'

20. The appellant's defence was that, Ziro confided in him that while he was in custody, his wife had an affair with someone; that he accompanied Ziro to his home; and that, while they were there, Ziro entered the house to change his clothes - he wore a trouser; that they then proceeded to meet the deceased at the agreed meeting point; that it is him who called the deceased from his shop; that Ziro went into the bush to answer to a call of nature, but that later, he followed them from behind; that upon reaching where they were, Ziro held the deceased by the neck, pushed him to the ground, took the panga he had fetched from his (the appellant) house and used it to slit the deceased's neck three times.

21. The appellant further stated that, Ziro warned him not to scream or raise alarm; and for fear, he did not scream; that he then asked him to also take the panga and cut the deceased; that because of fear, he also cut the deceased three times on the neck; that he then asked him to assist him drag the deceased's body into the forest, and that that is when his clothes got stained with the deceased's blood; that Ziro took the piece of paper that he had asked him to write on and he placed it on the deceased's back; that they walked back to the deceased's shop where they looked for his shop keys but they did not find them; and that, he instructed him to destroy his clothes and the panga by burning them, but, instead, he decided to preserve them.

22. The appellant stated that when he returned home, he informed his wife, PW2, and other people what had happened despite the warning by Ziro not to divulge the ordeal; that subsequently, Ziro kept visiting him to confirm if he had received any information on the incident; that he finally also disclosed to his elder sister and her husband who advised him to surrender himself to a police station; that he met Ziro again who told him that he wanted to kill his brother because of inheritance; and that, he was later arrested and charged accordingly.

23. The trial court found that the appellant was culpable for the deceased's death upon being satisfied that the prosecution had proved its case beyond reasonable doubt. Whilst considering the elements that the prosecution needed to discharge for proof of the offence of murder, the learned Judge (Nyakundi, J.) held that the death of the deceased was unlawfully occasioned; that in as much as PW2 did not witness the actual killing of the deceased, there were irrefutable circumstances which only pointed to the fact that the appellant was involved in the deceased's murder.

24. On the scope of the unlawfulness of the death, the trial court considered the post-mortem report by which the cause of death was opined to be severe head injury secondary to assault from a sharp penetrating object. The learned Judge held that the appellant did not controvert the unlawful fatal wounding of the deceased, and that, therefore, the prosecution discharged its burden on this limb beyond reasonable doubt.

25. On proof of malice aforethought, it was held that the manner in which the deceased was killed pointed to an intention to inflict great bodily injury, more so bearing in mind that the target was the vulnerable parts of the body; that the appellant's defence did not point to any provocation, excuse or mitigation that justified the commission of the offence; and that, therefore, the striking of the skull into pieces with a dangerous weapon which had a fatal consequence was proof of malice aforethought.

26. On the identification of the offender, the learned Judge was satisfied that the evidence of PW2 was sufficient. It was held that she had direct interactions with the appellant who was known to her as a spouse; and that, there was therefore no mistaken identification of the appellant.

27. Summing up his findings, Nyakundi, J. held that the appellant premeditated the commission of the offence against the deceased. In meting out the sentence, the Judge noted that he saw little demonstration of remorse by the appellant; and that, considering the way the deceased was killed, he imposed a sentence of 25 years' imprisonment which was to run from 30th May 2016.

28. Aggrieved, the appellant lodged the instant appeal, citing seven grounds of appeal in both his memorandum and amended grounds of appeal which we have condensed as follows:

    i. that the trial Judge erred in both law and facts by failing to appreciate that Sections 25, 26, 27 and 124 of the *Evidence Act*, Cap 80, were violated.

    ii. that the learned Judge erred in law by falling to consider that the prosecution's case did not establish or prove the offence of murder against the appellant to the required standard; and

    iii. that the learned trial Judge erred in law by failing to re-analyse and re-evaluate the entire evidence exhaustively.

29. We heard this appeal virtually on 8th October 2024. Learned counsel Mr. Aminga appeared for the appellant while Ms. Mutua, learned Senior Principal Prosecution Counsel appeared for the respondent. Both learned counsel relied on their submissions and asked us to consider them fully.

30. The appellant argued his appeal vide two sets of submissions, one set is home-made and undated, while the other set, titled 'supplementary submissions' is dated 26th September 2024 filed on his behalf by his counsel, Mr. Aminga. We have consolidated the arguments addressed in both submissions and considered them simultaneously.

31. The appellant argued that there was violation of sections 25, 26, 27 and 124 of the *Evidence Act*. The appellant stated that he was threatened and coerced into making the confession by his former co-accused while they were being held in the same police station; that even though he implicated himself in the confession made before PW8, he however exonerated himself by alluding to the circumstances under which he was coerced into inflicting harm upon the deceased.

32. It was urged by the appellant that the prosecution did not prove its case beyond reasonable doubt on the basis that the alleged murder weapon and the blood-stained clothes were not found in his direct possession, but from underground and with the assistance of another person; and that, in any case, the prosecution did not establish the motive which compelled him to commit the offence.

33. On the chain of events leading up to the circumstantial evidence, it was submitted that it was the appellant's confession that was used as the key evidence that founded the charge against him. We were invited to consider that the reasons given by the learned Judge that the appellant was the one who murdered the deceased was 'possession of a jembe and a panga and in the words of PW2 that the appellant returned home with a cut finger.'

34. The appellant questioned why, even after narrating that Ziro was implicated in the murder, he was still acquitted. It was submitted that the trial court failed to consider that crucial piece of evidence, and especially on the role of an accomplice; and that, for this reason, the investigations were not only shoddy, but also unreliable. The appellant cited the case of Ndwiga & 2 others vs. Republic (2017) KECA 443 (KLR) where this Court cited the decision of Antony Kinyanjui Kimani vs. Republic (2011) eKLR in explaining who an accomplice is. It was urged that the former co-accused fitted the

description of an accomplice whose evidence required corroboration. It was contended that, since the record of appeal did not contain the evidence of the appellant's co- accused, it was difficult to determine whether or not there was corroboration; and that for this reason, this gap ought to have been discharged in favour of the appellant.

35. According to the appellant, the circumstantial evidence, being the basis upon which he was convicted, did not meet the legal threshold as was laid down by the case of Sawe vs. Republic (2003) KLR, 364 which is that, the events of both acts and omissions by an accused person should point to the irresistible conclusion as to be incapable of no other inference than that of the guilt of the accused person; that, in other words, there should be no other hint or suggestion amounting to exculpatory circumstances compatible with the innocence of an accused person.

36. It was contended that the key circumstantial evidence that the prosecution relied on was the appellant's confession; that the confession implicated not only himself, but also Ziro who unfortunately was acquitted; and that, in the confession, the appellant endeavoured to absorb himself, averring that he acted under compulsion and fear of his life. It was argued that the issues raised in the confession were also highlighted in the appellant's defence; and that the learned Judge should have treated them as exculpatory evidence, and, thus, found that the prosecution had not discharged its burden to the required standard.

37. On whole, the appellant submitted that the prosecution did not discharge its burden beyond reasonable doubt, and he urged us to quash the conviction, set aside the sentence and set him at liberty.

38. The respondent's submissions are dated 1st October 2024. The respondent condensed the grounds of appeal raised by the appellant into three, the first being failure to prove the offence of murder. Under this ground, it was submitted that the prosecution was duty bound to prove the three elements of the offence of murder, being the fact of the death of the deceased and the cause of the death; that the death of the deceased was caused by an unlawful act by the accused person; and that, it was caused with malice aforethought. This Court's decision in *Barisa vs. Republic (Criminal Appeal No. 60 of 2022)* (2024) KECA 219 (KLR) (1st March 2024) was cited in highlighting the ingredients of the offence of murder.

39. On the fact of the death of the deceased and its cause, it was submitted that the deceased's body was identified by PW2 and PW7; and that the death was proved by the post mortem report produced by PW1, which opined that the death was caused by severe head injury secondary to assault from a sharp object.

40. On whether the death of the deceased was caused by an unlawful act of the appellant, it was submitted that the learned Judge extensively analysed the requirement for protection of life under *the Constitution* vis-a-vis the circumstantial evidence, and concluded that the deceased's death was unlawful.

41. As to whether the appellant possessed malice aforethought, while citing the definition of malice aforethought under section 206 of the Penal Code, counsel only submitted that the learned Judge properly considered the evidence adduced and concluded that the appellant had malice aforethought when he killed the deceased.

42. The second issue for consideration which the respondent isolated was whether the appellant was positively identified as the perpetrator. On this, it was submitted that PW2 testified that the appellant left their home without any farming tools, only to come back with blood-stained clothes, a panga and a cut on his finger; that it was the appellant who dug a hole and buried a t-shirt, a pair of shorts and a panga, which clothes she positively identified as being the ones the appellant was wearing when he left the house; that PW2's evidence was corroborated by PW6, who searched the appellant's homestead

and recovered the buried clothes and panga; and that, additionally, PW8 recorded the appellant's confession by which he admitted to being involved in the death of the deceased.

43. As regards the application of circumstantial evidence, the respondent referred to the cases of Sawe vs. Republic (supra) and R vs. Kipkering Arap Koske & Another (1949) 16 EACA 135 where it was held that, all evidence considered, the exculpatory facts must be incompatible with the innocence of an accused person and incapable of any other explanation upon any other reasonable hypothesis than that of the accused's guilt; and that, ultimately, in this case the circumstantial evidence was so cogent and it aided in the identification and eventual arrest of the appellant.

44. The last ground of appeal as identified by the respondent was that the learned trial Judge failed to re-analyse and re- evaluate the entire evidence exhaustively. It was submitted that this assertion was incorrect as the evidence presented before the trial court was ably considered by the learned Judge before he arrived at the verdict that the appellant was guilty.

45. We have carefully considered the record of appeal, the written submissions by both counsel and the law. We have isolated two main issues for our consideration, namely whether the trial court erred in both law and fact by failing to appreciate that sections 25, 26, 27 and 124 of the *Evidence Act* were violated; and whether the prosecution proved its case against the appellant beyond reasonable doubt.

46. On the first issue, the appellant contends that sections 25, 26, 27 and 124 of the *Evidence Act* were violated, and that the learned trial Judge failed to take cognizant of this fact. Sections 25, 26 and 27 of the *Evidence Act* provide the general principles to be considered before confessions are admitted in evidence. Pursuant to section 25 A (2) of the Act, the Evidence (Out of Court Confession) Rules, 2009, were enacted. The Rules in particular focus on the procedure and safeguards to be observed in recording confessions before the police. Those Rules will not be relevant in this appeal since the confession was solely made before the Magistrate.

47. Section 25 of the Act defines a confession as:

> " 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."

48. Section 25A of the Act introduced fundamental changes to the law on confessions and admissibility of information from an accused person. The mandatory provision therein is that, confessions are generally inadmissible unless made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police and a third party of the person's choice.

49. In addition to the foregoing, section 26 of the Act provides safeguards against a person who makes a confession which is presented as evidence in criminal proceedings. Confessions which are procured by inducement, threat or promise are generally inadmissible. It states:

> 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."

50. This Court in the case of Kanini Muli vs. Republic (2014) KECA 870 (KLR) emphasized the importance of having a confession made voluntarily by an accused person with a view to ultimately ensure that the confession is reliable as follows:

> " In our view, irrespective of whether the confession under section 25A was made to the police or in court before a judge or magistrate, the overriding duty of the trial court to satisfy itself that the confession was voluntary and was not procured by inducement, threat or promise still remains intact and as heavy as ever. The judge or magistrate before whom a confession is made under section 25A is not a conveyor belt for mechanically recording statements and disposing of the maker of the statement. It has consistently been stated by the courts in this country that it is the duty of every trial judge and magistrate to examine with the closest care and attention, all the circumstances in which a confession has been obtained to ensure that it was made voluntarily. The rationale for insisting that a confession should be voluntary is to ensure that it is ultimately reliable. A confession that is made due to torture, threats, promise, inducement, or similar conduct is not reliable since it could have been made with no regard to the truth but purely to avoid harmful consequences or to gain some advantage."

51. The predecessor of this Court in Rex vs. Kinguru S/O Kabuti (1934-1936) EA 60 emphasized that a magistrate must caution an accused person before taking a statement from him.

52. The appellant's contention is that he was threatened by his former co-accused to make the confession. The appellant further contented that the confession he made was one exonerating himself and that, therefore, it did not meet the threshold of a proper confession.

53. What is not disputed is that the appellant's confession was made before Hon. Khatambi, SRM. The learned Magistrate testified that the appellant appeared before her on 17th May 2016 in the presence of the prosecutor and some of his family members with the intention of confessing to a murder. Most importantly, she stated that:

> " before taking the confession I cautioned him that the information he would give to the court could be used against him."

54. We find it rather strange that this being the appellant's confession, his then defence counsel, Mr. Mwania did not deem it fit to cross examine the Magistrate on her testimony with regard to the confession made by the appellant. However, Mr. Obaga, counsel for the appellant's former co- accused, cross examined PW8 who stated that:

> " I asked the accused whether he had been threatened or enticed to make the confession and he said nobody had threatened or enticed him. I captured it in the proceedings."

55. The appellant's defence counsel did not object to the admission of the confession either. Probably, if he had, the trial court would have had an opportunity to interrogate the circumstances under which the confession was taken in a trial within a trial. In fact, it was not even a subject of consideration by the learned Judge in his judgement as it never arose as an issue before him. And we agree on this. There is sufficient evidence to demonstrate that the confession by the appellant was properly taken, and that it was not taken under duress of any kind. The appellant is the one who voluntarily offered to make the confession. The arguments he raises at this stage cannot exonerate him from the confession which he willingly gave.

56. Even in his unsworn evidence, the appellant reiterated what he recorded in his confession as his defence. He did not prefer a different set of facts apart from what he stated in his confession so as to infer that his intention was perhaps to depart from his confession. This only goes on to cement the fact that the confession was given voluntarily and without any coercion on him. Accordingly, we are satisfied that the appellant's confession was properly taken and admitted in evidence. Consequently, this ground of appeal fails.

57. Turning to section 124 of the *Evidence Act*, it relates to corroboration required in criminal matters. It states as follows:

> Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him::
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

58. Although it is not clear in the submissions why the appellant took issue with this section, we think that he is contesting the fact that, since he implicated Ziro in the murder, and his (Ziro) evidence (as 'an accomplice') is not on record, and the law requires it to be corroborated, was a big gap in the prosecution's case. It was his argument that this gap ought to have been discharged in his favour, consequent to which he should have been acquitted.

59. We agree with the provisions of section 124 -that indeed, subject to the set out exceptions, a prosecution witness' evidence should be corroborated to warrant a conviction against an accused person. In this case, it is clear that the star prosecution witness was PW2, the appellant's wife. We do not wish to restate her testimony. What is crucial to state is that her testimony was fully corroborated by the voluntary confession that the appellant gave. We have tested this confession and as observed herein above, the same was not only properly taken, but also met the requirements of sections 25, 25A and 26 of the *Evidence Act*. We accordingly find no merit in the assertion that section 124 of the Act was violated.

60. On proof of the offence charged, the prosecution has a singular task of proving the following three elements in order to secure a conviction; that the death of the deceased occurred, and its cause; that the death was caused by an unlawful act of commission or omission by the accused; and that the accused was motivated by malice aforethought in committing the said act. Whilst restating these ingredients, this Court in Abdi Kinyua Ngeera vs. Republic (2014) KECA 654 (KLR) stated:

> "For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought."

61. Turning to the first element, the fact of the death of the deceased and its cause, we agree with the trial court's finding that there was no dispute that the deceased was murdered. The post mortem report produced by PW1, Dr. Angure Gilbert, was conclusive that the cause of death was severe head injury secondary to assault from a sharp object. PW4, Sarah Njeri, an aunty to the deceased, confirmed that the

deceased died and positively identified his body. A death certificate was issued to that effect confirming that it is indeed the deceased who was dead.

62. As to whether it is the appellant who caused the death of the deceased, we hasten to state that the conviction of the appellant was premised on circumstantial evidence. We say so because there was no direct evidence that linked the appellant to the offence in that, there was no eye witness who saw the appellant murder the deceased.

63. It is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is acceptable evidence which courts are allowed to rely on if the inferences arising out of the evidence adduced points to the accused person or, as in this instance the appellant, as the person responsible for the commission of the crime which he is accused of. Indeed, circumstantial evidence is as good as direct evidence in so far as proof of a criminal offence is concerned. However, if by chance there are other co-existing circumstances which would weaken or destroy the inference of guilt, then an accused person is entitled to an acquittal.

64. This Court in Ahamad Abolfathi Mohammed & Sayed Mansour Mousavi vs. Republic (2018) KECA 743 (KLR) cited the conditions under which circumstantial evidence will be admitted in evidence as was set out in the unreported case of Abanga alias Onyango vs. Republic Cr. App No. 32 of 1990 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 no one else."

65. This position was amplified by this Court in Sawe vs. Republic (supra) thus:

> In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. 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 remain with the prosecution. It is a burden which never shift to the party accused."

66. PW2 is indeed the star witness, as she was described by the trial court. She was the appellant's wife. She testified in both her examination-in-chief and cross-examination that she saw the appellant come back home with a panga, blood-stained clothes and a cut finger. She stated that the appellant then proceeded to bury his clothes and the panga within the homestead.

67. Indeed, the appellant confirmed this in his evidence when he stated that, upon returning home:

> "I woke up my wife. I explained to my wife about the incident. My clothes were blood stained...I preserved the panga and the clothes."

68. Although the appellant stated that he was instructed to place on the deceased a piece of paper with words inscribed 'someone's wife is poison,' there was no evidence from the arresting and investigating officers that such a piece of paper was found around the vicinity where the deceased's body was found.

69. The common thread which runs through the evidence is that, without a doubt, the appellant killed the deceased. To our minds, the narration of PW2 was circumstantial evidence as she did not witness the appellant committing the crime. To further strengthen the truth of the testimony by PW2, the police officers who visited the appellant's homestead were able to recover the panga and the clothes which the appellant had buried.

70. Applying these principles to the circumstances at hand, it is apparent that the chain of evidence as recorded and proved, is so tight, so cogent and incapable of explanation on any other reasonable hypothesis except that it is the appellant who committed the unlawful act which caused the death of the deceased.

71. Lastly, we grapple with the issue as to whether the appellant had malice aforethought when he killed the deceased. Malice aforethought is provided for under section 206 of the Penal Code as follows:

> 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.

72. In Nzuki vs. Republic [1993] eKLR, the Court had the following to say with regard to malice aforethought:

> "Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder. See the case of Hyam v Director of Public Prosecutions, [1975] AC 55. In an appeal such as the present one, any one of the intentions set out above is a necessary constituent of the offence of murder contrary to section 204 of the Penal Code and the burden of proving any such intention is throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequence of which should be a certain result and no evidence or explanation is given, then the Court may, on a proper direction, find that the accused is guilty of doing the act with the necessary

> intent, but if on the totality of evidence there is room for more than one view as to the intent of the accused, the Court should direct itself that it is for the prosecution to prove the necessary intent to its satisfaction, and if, on a review of the whole evidence, it either thinks that that intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt. Thus, where on a charge of murder the evidence does not exclude the reasonable possibility that an accused person killed the deceased by an unlawful act but without the intent necessary to constitute legal malice requisite to the proof of that offence, that killing would only amount to manslaughter. See Rex v Steane, [1947] 1 KB 997; and Sharmpal Singh s/o Pritam Singh v R [1960] EA 762."

73. The evidence on record is that the appellant, upon arriving at home that evening, particularly looked for the murder weapon with the sole intention to kill the deceased. The appellant lured the deceased from his house and led him to the scene of crime. There is no doubt that the appellant had the intention to kill the deceased. The fact of using a sharp lethal weapon, coupled with aiming at a vital organ of the body, the neck, was a testament that the appellant knew that the assault would either cause grievous harm or the death of the deceased. He in fact confessed to striking the deceased thrice on his neck with a panga, after which he and Ziro dragged his body in a forest.

74. The learned Judge, in finding that the appellant was actuated by malice aforethought, a reasoning which we find no ground on which to depart held as follows:

> On this case the inference on malice aforethought flows on the testimony of PW1 and PW2 directed at the conduct of the 2nd accused and the great bodily injury inflicted with an objective to case death...the striking of the skull into pieces attended with dangerous weapons which had fatal consequences is proof of malice aforethought. Not only malice aforethought is present but there was actual design to kill and fatally injure the deceased."

75. Finally, the appellant contended that the learned Judge did not exhaustively re-analyse the evidence adduced before him. As a correction, a trial court's duty is to consider and evaluate the evidence tendered thereat. The re-evaluation and re- analysis of evidence is the obligation of an appellate court, as in this case. Re-evaluation of evidence entails a second or third look at the evidence at appellate level as tendered before the trial court, but of course within the mandate set out by law.

76. That said, in our view, nothing turns on this ground as our re-evaluation of the judgement of the learned trial Judge attests that he properly considered the evidence adduced in court, the respective submissions made and the law before finding the appellant guilty as charged.

77. In the end, having fully re-evaluated the evidence on record, considered the respective submissions and the law, we arrive at the inescapable conclusion that the prosecution proved beyond reasonable doubt that the appellant committed the offence of murder contrary to section 203 as read with section 204 of the Penal Code. We find the appeal to be unmeritorious and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

A. K MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR