



REPUBLIC OF KENYA



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**Republic v Njire (Criminal Appeal 24A of 2012)
[2025] KECA 376 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KECA 376 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 24A OF 2012
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
FEBRUARY 28, 2025**

BETWEEN

REPUBLIC APPELLANT

AND

RAHAB WANJIRU NJIRE RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at
Nakuru (Ouko, J.) dated 5th June 2012 in HCCRC No. 54 of 2008)*

JUDGMENT

1. The respondent, Rahab Wanjiru Njire, faced two counts of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of count I were that on 12th April 2008 at Maraigushu Location in Naivasha District within Rift Valley Province, the respondent murdered Kinyanjui Chomba. The particulars of count II were that on the same day and in the same place, the respondent murdered Morgan Mbugua.
2. The respondent was arraigned before the trial court and pleaded not guilty to both counts. After a full trial, Ouko, J. (as he then was) acquitted the respondent on 5th June 2012 as follows:

“In considering the circumstantial evidence by the prosecution sight must not be lost of the accused person’s alibi defence. While there is no doubt that Chomba was married to the accused person’s sister, Minnie, there is no evidence of the circumstances of their separation; whether or not it was acrimonious. Chomba simply stated that she deserted to an unknown place. But Chomba himself confirmed that there was no bad blood between him and the accused. He only suspected the accused and his former wife to have been offended by the fact that he had remarried.



The only person said to have seen the two ladies on 10th April 2008 was Abigael. According to her, the two ladies were strangers and that they come (sic) to her house at about 5pm. But in her evidence, she has not described the accused person or her companion apart from saying that they only asked her if she knew Chomba's former wife. After she told them she did not know her, they went away.....I find that the conditions for identification parade were not conducive. That perhaps explains why it was necessary to conduct an identification parade. Although the parade officer told the court that she conducted the parade in accordance with Chapter 46 of the Force Standing Orders, a look at the parade form leaves no doubt that the instructions spelt out in these Force Standing Orders were not strictly followed.

Many essential areas in the form were left blank. For instance, it is apparent that the accused was not asked if she wanted a friend or lawyer to be present during the parade; whether she had any objection to the arrangements of the parade. The form does not also specify where the witness was accommodated before the parade. The date of the parade is not stated and the signature or the rank of the parade officer is not shown. There are erasures which are not counter-signed. For instance, the witness who was to identify a suspect in the parade is shown as Benson Mutua, but appears to have been cancelled and substituted by the name Nyambura Chomba.

The signatures purported to be those of the accused person on the form are even to any ordinary person, so markedly different as to raise doubt as to their authenticity. These are serious omissions in such a serious matter that cannot be ignored.

...Finally, the contents of the note and where it was recovered. The note read in Kiswahili thus...

... it was the evidence of Abigael and Njeri that the note was on the table. That immediately Abigael read it, she fainted.

The accused has denied ever seeing the note. But she admits that the known writing marked B1 to B4 were extracted from her exercise book and that she was caused to write specimen writings in C1 to C4. These were submitted to the document examiner to compare and ascertain whether or not they were written by the same hand. The examiner concluded that they were written by the same author.

Like all expert witnesses, the document examiner simply gave an opinion which this court is bound to consider along with the other evidence presented.

An expert witness must provide solutions to puzzles using technical methods which must be explained and which must make sense. That ought to be done both in the written report and explained in details in oral evidence. If the maker was not called and his professional colleague was asked to produce the report on his behalf, the latter would not have been able to see what he considered to arrive at his conclusion.

.... The report and the evidence, in my view, are in conclusive as to who authored the note, bearing in mind that it is not unusual for two writings by two different people to resemble.

For the reasons stated, it is apparent that the accused person was only arrested on suspicion, after Chomba's 10 year-old daughter, Cecilia, stated that she saw her mother and the accused person take away the deceased children on the day in question. Cecilia was not called and was said to have disappeared after recording a statement with the police. Without that nexus, I find no sufficient evidence that meets the threshold in a criminal trial.”



3. The appellant is aggrieved by those findings. It filed its notice of appeal dated 8th June 2012. Subsequently, the appellant filed its memorandum of appeal dated 19th August 2024 that raised four grounds disputing the findings of the learned judge as follows: the trial court erroneously acquitted the respondent in the face of overwhelming evidence pointing to her guilt; the trial court erred in its assessment of the identification parade evidence that established the identities of the persons last seen with the victims; furthermore, the witness that identified the respondent had recognized her having seen her on two occasions, the first time in broad daylight at 5:00 p.m.; and that the evidence of the identification parade was not controverted by the respondent.
4. In view of the foregoing, the appellant urged this Court to allow the appeal, quash the acquittal and substitute the same with an order for conviction and that the respondent be sentenced accordingly.
5. When the appeal was virtually heard on 21st January 2025, learned Counsel for the state Mr. Omutelema appeared for the appellant while learned Counsel Mr. Matoke was present for the respondent. Parties relied on their antithetical respective written submissions that were orally highlighted.
6. According to the appellant's written submissions, and fortified by its list of authorities, both dated 19th August 2024, the trial court was in error when it concluded that PW2, the person who identified the respondent as the last person seen with the victims alive, was unable to correctly identify the respondent yet they had met on two previous occasions and talked. This is because in those two occasions, the respondent was seen in broad daylight and as such, there was no iota of error in identifying and recognizing her. It further dissected her evidence so as to demonstrate that PW2 recognized the respondent and therefore, properly identified her at the identification parade on 17th April 2008; five days after the commission of the offence. It added that PW1 and PW3 were also able to demonstrate that PW2 had met the respondent together with others on previous occasions prior to that fateful day.
7. Looking at the report emanating from the identification parade, the appellant submitted that PW8 recorded that PW2 identified the respondent three times. In any event, the proceedings of that parade were not rebutted by the respondent. It continued that PW8 was able to explain that the witness was accommodated in the crime office before the parade making the exercise credible. The report further captured the name and rank of PW8 as the officer in charge, the date of the parade and that Benson Mutua was the investigating officer. Lastly, the appellant submitted that the respondent did not dispute the signatures embedded in the form. It is for these reasons that the appellant urged this Court to find that the identification parade properly identified the perpetrator of those heinous offences.
8. On the cause of death, as an ingredient to a charge of murder, the appellant submitted that according to PW6's report, the deceased (minors) died as a result of cardiorespiratory arrest due to aspiration of water in the lungs resulting into electrolyte imbalance due to too much water intake secondary to drowning. On whether the respondent caused the death of the deceased persons, the appellant argued that the respondent took advantage of PW2's absence to spirit the children away to a nearby dam where she and her accomplice murdered them.
9. Finally, the appellant contended that the respondent possessed malice aforethought within the meaning ascribed to the term under section 206 of the *Penal Code* as to make a finding that she had committed the offence of murder. This could be deduced from the fact that the children were whisked away from their parents without their consent. They were then assaulted before being drowned. The cumulative conduct of the respondent point to the inescapable conclusion that the result of her action was to cause the death or harm to the two minors.



10. In advancing that the respondent had the motive to murder the deceased persons, the appellant explained that PW1, the children's father, was previously married to the respondent's sister. Following their separation, the deceased persons were parentally supervised and left under the custody and care of PW1 and PW2, PW1's second wife. The meeting that took place on 10th April 2008, left the appellant with no shadow of a doubt that the respondent and her sister were not pleased with the PW1's subsequent marriage to another woman. It is for this reason that they accosted PW2 and two days later, murdered the children.
11. Finally, deconstructing the respondent's defence, the appellant made the following observations: the respondent glaringly failed to explain her whereabouts on 12th April 2008; the respondent lied that she did not know the deceased children when in fact she knew her sister's mother in law; she failed to explain her whereabouts after 5:00 p.m. on 10th April 2008; she, together with her accomplice, were the last person to be seen with the deceased children alive. For those reasons, it prayed that the appeal be allowed.
12. The respondent abridged the facts as she comprehended from the record of appeal in her written submissions, list and bundle of authorities both dated 22nd August 2024 to submit that the findings of the learned judge were bereft of fault. That although the death of the deceased persons and the act of causing the death as unlawful had been established, no direct or circumstantial evidence pointed, a finding of guilt to the direction of the respondent. In any event, a crucial witness named Cecilia was not called by the prosecution to adduce her evidence.
13. On the aspect of identification, the respondent challenged that it was visually impossible to establish the respondent's apparel and colors when PW2 only saw the respondent at 7:00 p.m. in the dark. Furthermore, the distance between PW2 and the visitors was not demonstrated. PW2 could not additionally expisit the physical attributes of these visitors.
14. Speaking to the identification parade, the respondent submitted that it was not with precision, described as to the circumstances leading up to the identification of the respondent as the perpetrator of the offence. That PW2 did not give a vivid description of the type and color of clothes during the parade and that is why the identification was cast in doubt.
15. The respondent then submitted that the trial court properly established that the identification parade was unreliable as it failed to comply with paragraph 6 (iv) (d) & (l) of the Force Standing Orders and failed to describe the offender ab initio before the parade was conducted. She raised issue with the fact that all persons in the identification parade, had no like general appearance to her and ought to have worn a black trouser, a yellow t-shirt and a red Marvin in order to yield an accurate outcome.
16. Further impugning the identification parade, the respondent submitted that the report left essential areas blank as to leave the whole identification parade incredible. This included an erasure of a name without countersigning it, failing to inform the respondent that she had the right to legal representation, no objections by the respondent were recorded, did not indicate whether the respondent was satisfied with the procedure and the officer in charge failed to assent to it.
17. Withal, the respondent submitted that her defence raised doubt in the evidence of the prosecution. That since this was a case of a single identifying witness, the trial court rightly considered it with circumspection and with the greatest degree of care.
18. On the note, the respondent challenged the expert evidence as he failed to record the percentage of similarities between the sample handwritings and those captured in the note, the instrument used to examine the characters, the movement of the pen, the pen lift, the pen pressure, pen speed, ink



distribution, character design, indifference and formation as well as general resemblance. For those reasons, that note could not link the respondent to the commission of the crime. Furthermore, it was not proved beyond reasonable doubt that the respondent held a grudge with PW1 and PW2. In her view, the evidence was purely based on suspicion and as such, as rightly found by the trial court, a conviction in the circumstances was unsafe. The respondent prayed that the appeal be dismissed.

19. The duty of this Court as a first appellate court was explained by its predecessor in *Okeno vs. Republic* [1972] EA 32 as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya versus Republic* [1957] EA36) and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (*Shantilal M. Ruwala versus Republic* [1957] EA 570). 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 findings, and conclusions. It must make its own finding 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 had the advantage of hearing and seeing the witnesses.”

20. The facts as established by the prosecution are as follows: PW1 Patrick Kiongi Chomba, the father of the deceased children, testified that as at the time of their death, the deceased persons Kinyanjui Chomba and Morgan Mbugua were four and two years old respectively. He was previously married to the respondent’s sister namely Miriam Wanjiku until 2007 and had three children with her.

21. The deceased children were sired by PW2 Abigael Nyambura Chomba, the deceased’s second wife. PW1 continued to live with the children from his first wife including his daughter Cecilia Njeri. The deceased children had moved into the home of PW1 three days before their death in 2008; the year he married PW2. It was his evidence that the respondent did not know his second wife, had never quarreled with PW1. He was informed that the respondent had visited his house within those three days.

22. On 12th April 2008, PW1 had reported to his place of business.

He closed the shop at 9:00 p.m. to head home. It was here that he was informed by his sister that PW2 had fainted and that the deceased children were missing. The children had been with PW2 before they disappeared.

23. On reaching home, PW1 was informed by his daughter Cecilia that the respondent, in the company of another female, had taken away the deceased children at around 7:30 p.m. Immediately, PW1 proceeded to report the incident to the chief. He was accompanied by his mother PW3 and a neighbor called Njoroge. It was at the chief’s office that PW1 read a letter retrieved by PW3 from the house saying:

“I am very sorry Chomba’s wife where you are living is not your home ... if you claim this is your home, then we shall see.”

24. Those words had been translated from the Swahili language and captured in English language. The note, produced in evidence, read in Swahili as follows:

“Kwako wewe mke chomba, pole sana ngojea maiti uzike uko si kwako na kama ni kwako tutaona by ni sisi wamanzi 4b nairobi.”



25. The chief advised PW1 that it was best to handle the complaint in the morning. Dissatisfied with his recommendations, PW1 went to MP Kihara's house where they were given a vehicle and reported the matter at Naivasha Police Station. Similarly, the police advised him that they would deal with the matter in the morning. PW1 went back home.
26. The following morning, PW1 was informed by his neighbor Sammy that the bodies of the deceased children had been found in a dam located 100 metres from his home. The bodies were retrieved and taken to Naivasha mortuary. During the exercise, PW1 observed that Kinyanjui Chomba had blood around his eyes.
27. PW1 recalled that he had been informed that at about 7:00 p.m. on that fateful day, PW2 went to fetch him at PW3's house leaving the two children at home alone briefly. This is because some two ladies had earlier sought to establish his whereabouts.
28. He added that when he recorded his statement at the police station, he indicated initially that he went to look for the children in his brother's house in a state of shock. When they were retrieved from the dam, the deceased persons had the apparel that they had worn. He maintained that he was not implicating the respondent. He was suspicious that following the separation from his jilted wife, the respondent and his ex-wife were likely offended that he married a second wife.
29. PW2 Abigail Nyambura Chomba recalled that on 10th April 2008, two females visited her asking if she knew PW1's first wife. She disclosed that she did not. The same women would then return on 12th April 2008 at 7:00 p.m. when it was slightly dark. There was a lit lamp next to her as she was cooking. The visitors sought to establish PW1's whereabouts upon which PW2 informed them that he was at his mother's house within the same farm.
30. Since the women refused to enter the house, PW2 went to look for PW1 at his mother's house. The deceased children, who had come over for a visit at the home, were in the house asleep. The other children belonging to PW1 had left to collect milk from PW3's house.
31. PW2 called PW1's sister Tabitha Muthoni informing her what had transpired. She also reminded her, that they were the same women who had visited her two days ago. PW1's sister informed PW3 and the three of them then proceeded to PW2's home. She remembered that she was in PW3's house for approximately 20 minutes.
32. On reaching their home, PW2 found that the house door was open. The children and the two ladies had disappeared. There was a note on the table. It was the same note that was read out by PW1 when he was testifying. PW2 screamed and fainted on realizing that her children were missing. She would later be informed the following morning that the children had been found lifeless in a nearby dam. She was not present when the bodies were being retrieved from the water body.
33. During the identification parade that took place on 17th April 2008, PW2 was able to positively identify one of the two women that had visited her on the two previous occasions prior to the commission of the offence; the respondent herein. She described that the respondent had worn a black trouser, yellow t-shirt and red Marvin at the identification parade; the same clothes that she had worn when she visited PW2 on 12th April 2008. She had never known of her before 10th April 2008.
34. PW2 recalled that on 9th March 2008, she moved in with PW1 as his wife. She maintained that the deceased children would not have gone to the dam to swim on their own volition as it was dangerous. That they had not drowned accidentally. She further denied that she killed her two children to save her marriage. She also added that she was not informed by Cecilia (PW3) that the respondent had taken the children away. She further denied that she was implicating the respondent.



35. PW3 Cecilia Njeri Mbugua recalled that on 12th April 2008 at around 7:00 p.m., PW2 informed her daughter that some two ladies had paid her a visit. She accompanied PW2 together with her daughter to PW2's home with a torch. However, on arrival, those two women had vanished. PW2's children were also not in the home. She recalled that PW2 read a note, screamed and fainted. They tried to look for the children but to no avail. PW3 and her daughter took PW2 to PW3's house. Thereafter, they went to the village elder who advised them to visit the police station. She testified that it was PW1 who reported the incident at the police station.
36. The following day, PW3 was accompanied by PW4 to look for the children. It was then that they noticed the children's clothes in the unfenced dam that was located 20 minutes away from her house. On taking a closer look, they observed that it was indeed the deceased children who would later be retrieved by the police. She recalled that PW1 married PW2 in 2008. That the deceased persons had only stayed with PW1 and PW2 for about 1 - 2 months. That the younger child was wearing red clothes. She recognized the respondent as the sister to PW1's ex-wife. She defended PW2 stating that she did not murder her children.
37. PW4 Lucy Nyambura's testimony was that she accompanied PW3 to assist in tracing the deceased children following their disappearance. While at the unfenced dam, PW4 noticed some clothes in the dam. On taking a closer look, she discovered that they were the deceased children. They were then retrieved by the police but she did not stay to witness the same. She estimated that the distance of the dam was ten minutes away from PW2's homestead.
38. PW5 Emmanuel Kenya an assistant commissioner of police and a document examiner testified that he received exhibits, accompanied by an exhibit memo, from PC Maina CID Naivasha on 11th June 2008 as follows: A – small more (Questioned document); C1- C4 – specimen writings of the respondent and B1 – B4 – known writing of the respondent. From his findings, PW5 obtained 7 individual characters namely K, G, T, N, S and A on the questioned writings – available in the standard of the known writings. They had a particular style and movement. He therefore formed the opinion that they were written by the same author. His report was produced in evidence.
39. PW6 Dr. Paris Wanjiku Njiri Maina performed the autopsy of Morgan Mbugua on 18th April 2008 at 3:10 p.m. He was identified by PW1 and Paul Mwangi. PW6 observed as follows: the deceased's chest cavity had water; his lungs were wet without oxygen; his stomach was full of water; and he had a fracture on the 1st and 2nd spinal column. She concluded that the deceased died as a result of cardiac arrest due to aspiration of water into the lungs resulting into poor perfusion and electrolyzing imbalance due to too much water intake secondary to drowning. The post mortem report was adduced in evidence.
40. PW7 Dr. Watiti Laura, a medical officer, testified that the post mortem of Peter Kinyanjui was done by Dr. Wainaina on 18th April 2008, a person well known to her. He was identified by PW1 and Paul Mwangi. His post mortem that was produced in evidence recorded the following observations: an injury to the right eye; wet lungs; stomach was full of water; and head bruise on the right side near the eyelid. The conclusion was that the deceased died as a result of cardiopulmonary arrest secondary to aspiration of water into the lungs resulting into electrolyzing imbalance due to too much water intake secondary to drowning.
41. PW8 CI Emily Ngariya testified that she conducted an identification parade. She explained its purpose to the respondent who raised no objection. That the investigating officer Benson Mutua was not in the vicinity. PW8 found eight women who were in similar appearance in height and complexion to the respondent in the police cells as well as externally. In the absence of the witness, that is PW2, who was accommodated in the crimes office, PW8 began to organize a parade by lining up the participants.



42. The respondent elected to stand between the 4th and 6th ladies.
- PW2 was then invited to select the perpetrator. She chose the respondent through touch. The parade was conducted again and in this instance, the respondent stood between the 1st and 3rd ladies. PW2 touched the respondent again. This exercise was repeated a third time and the respondent stood between the 6th and 8th ladies. PW2 selected the respondent a third time. The respondent was satisfied with the exercise and appended her signature in the identification parade report.
43. PW8 clarified that though the identification parades were done thrice, she only used one form to capture them. Since she only had those eight ladies, she did not change them and was therefore not in violation of rule 6 (d) of the Force Standing Orders. That although the respondent didn't object to the exercise, that information was not captured in the report. That the identification parade was paramount as PW2 did not know the respondent well.
44. PW8 then stated that PW2 did not describe the suspects but could remember seeing them on two occasions before the offence was committed. That PW1, though did not participate in the parade, named the suspects when recording his statement. She added that she erased the investigating officer's name from the report.
45. PW9 CPL Andrew Nyaga took over the investigation of this incident from PC Musyoka upon his death. He testified that evidence was collected and statements were recorded. The evidence was pieced out together to ultimately charge the respondent with the offence on two counts. He corroborated the evidence of the prosecution witnesses to conclude that indeed the charges preferred against the respondent were premised on factual grounds.
46. Regarding the evidence of Cecilia that she saw the respondent and another lady taking away the children, PW9 testified that though she recorded her statement at the police station, she had since gone under. Regarding the handwriting specimen, she was emphatic that the writings were recorded by the respondent herself. The respondent was arrested on 13th April 2008. However, PW1's former wife was still at large.
47. After considering the evidence of the prosecution, the trial judge formed the opinion that a prima facie case had been established as to place the respondent on her defence. She affirmed that indeed her sister Leah Wanjiru was previously married to PW1 and had three children. Upon their separation, the respondent's sister moved to Githunguri in November 2007. Regarding her marital status, she testified that she had separated from her husband and were blessed with two children in their union.
48. Her evidence was that on 10th April 2008, she had embarked on several business activities before spending time with her mother and children. She retreated back home at 5:00 p.m. where she met her landlord. It was her evidence that to her great dismay, police officers arrested her on 13th April 2008 and took away an exercise book and photographs she had taken with her sister. She was taken to the police station where she met PW1's mother. She was accused of the offences. She maintained that since her sister's marriage breakdown, she never returned to PW1's house. She confirmed that the exercise book that was collected formed part of the samples released to the document examiner. She added that the handwritings captured there were hers. She denied writing the note adduced in evidence and denied committing the offences that she had been charged with.
49. The issue before us for determination is whether the trial judge arrived at a correct finding in acquitting the respondent. Put differently, did the respondent murder the deceased persons? In order for a court to make a finding that an accused person committed the offence of murder, the prosecution must



establish the following conjunctive elements: the death of the deceased; the act or omission causing the death was unlawful; the act or omission was committed by the perpetrator and; malice aforethought.

50. On the death of the deceased, PW6 conducted the autopsy of Morgan Mbugua on 18th April 2008 at 3:10 p.m. She concluded that the deceased died as a result of cardiac arrest due to aspiration of water into the lungs, resulting in poor perfusion and electrolyzing imbalance due to too much water intake secondary to drowning.
51. PW7 adduced the findings of Dr. Wainaina regarding the post mortem of Peter Kinyanjui that took place on 18th April 2008. The conclusion was that the deceased died as a result of cardiopulmonary arrest secondary to aspiration of water into the lungs resulting into electrolyzing imbalance due to too much water intake secondary to drowning.
52. Taking those findings into account, we come to the inescapable conclusion that the cause of death of the deceased minors had been established beyond any shadow of a doubt.
53. On whether the cause of the death was caused by an unlawful act or omission, it is not gainsaid that the deceased minors were drowned in the dam that they were retrieved from. PW3 and PW4 were among the people that traced the bodies while PW1 witnessed the retrieval of the bodies. Our attention is further drawn to the post mortem reports. According to the autopsy of Morgan Mbugua, the deceased had a fracture on the 1st and 2nd spinal column. Regarding Peter Kinyanjui, the deceased suffered an injury to the right eye and a head bruise on the right side near the eyelid. This injury was also observed by PW1 when the bodies were removed from the dam.
54. Neither PW6 nor PW7 lay credence to the fact that those injuries were self-inflicting. We find that the deceased persons must have been forcibly drowned and in the process sustained the injuries manifest in their bodies. Had they drowned accidentally, we find that those other injuries would not have been apparent. Accordingly, we find that the deceased minors died as a result of an unlawful act/omission.
55. Central to this appeal and the issues raised at trial was whether the respondent was the perpetrator of the offences. In this case, the prosecution relied on circumstantial evidence to persuade the trial court to make an inference of a finding of guilt on the respondent based on the evidence adduced before the court. The trial court was not persuaded by the evidence of the prosecution and consequently acquitted the respondent.
56. The place of circumstantial evidence has been the subject of proceedings in various fora. In the case of *Ahamad Abolfathi Mohammed and Another vs. Republic* [2018] eKLR this Court held as follows:

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

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”



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 R 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 the guilt of the subject;
- (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.”

57. In *Abanga Alias Onyango vs. Republic, Cr. Appeal No. 32 of 1990 (UR)*, this Court held:

“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.”

58. That position was further buttressed by this Court in the case of *Sawe vs. Republic [2003] KLR 364* as follows:

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

59. PW2 was the sole witness that linked the respondent to the offence. Though PW1 and PW3 could recognize the respondent, they could not place her at the crime scene or in any way create a nexus between the disappearance of the children and their deaths. We bear in mind the provisions of section 124 of the *Evidence Act*, which remind us that an accused person shall not be convicted on the evidence



of a single identifying witness unless such evidence is corroborated by other material implicating this person. This was the holding of this Court in *Ogeto vs. Republic* [2004] KLR 19 that held as follows:

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”

60. The dangers of a court solely relying on the evidence of a single identifying witness were further ruminated by the Court of Appeal for East Africa in the case of *Roria vs. Republic* [1967] EA 583 that held as follows:

“A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”

61. It is instructive to note that all witnesses affirmed that PW1 was the former husband of the respondent's sister. They separated in 2007 paving the way for his marriage to PW2 in 2008.

62. The evidence of PW2 is that on 10th April 2008, two females visited her inquiring whether she knew PW1's first wife. The same women would return on 12th April 2008 at 7:00 p.m. next to PW2 was a lit lamp as she was cooking. The visitors sought for PW1's whereabouts upon which PW2 informed them that he was at his mother's house within the same farm.

63. Declining her offer to enter the house, PW2 left to search for PW1 at PW3's house. After an exchange of pleasantries and information regarding their previous visit, PW2, PW3 and PW3's daughter all proceeded back to the home of PW2 where she had left the two women. Her deceased children were also fast asleep in that house. All hell broke loose when on arrival, PW2 discovered that the house door was open; the children and the two women nowhere in sight.

64. Gathered from the above evidence, the prosecution advanced that the two women were the last persons seen with the deceased persons. Although PW1 testified that his daughter Cecilia informed him that one of the two women was the respondent and that she saw her collecting the children, that evidence amounted to hearsay since that witness was not called to the stand.

65. PW2's evidence was that one of the women was the respondent.

She saw her on 10th April 2008 and similarly on 12th April 2008 before her children had disappeared. She therefore deduced that since the respondent was one of the last person to be seen with the deceased minors, she was responsible for their deaths.

66. PW2, when called for an identification parade, touched the respondent on three occasions as to establish that it was the respondent who was last seen with the children. She described that the respondent had worn a black trouser, yellow t-shirt and red Marvin at the identification parade; the same clothes that she had worn when she visited her on 12th April 2008.

67. The trial court and the respondent in her submissions, weighed heavily on this stating that the identification parade was unreliable as it was marred with discrepancies. The law on identification parades is well settled. This Court, constituted differently in the case of *David Mwita Wanja & 2 others*



vs. Republic [2007] eKLR, emphasized on the importance of a properly conducted identification parade as follows:

“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See *R v Mwangi s/o Manaa* (1936) 3 EACA There are a myriad other decision on various aspects of identification parades since then and we need only cite for emphasis *Njihia vs. R* [1986] KLR 422 where the court stated at page 424:

It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”

68. The process, concept and structure of an identification parade are a very instrumental process in the criminal justice system. If done within the parameters of the law, it is a conduit for criminal justice and extremely fundamental to the extent that it could inherently persuade a trial court to either convict or acquit an accused person. Thus, it must be held with utmost care and regard must be made in compliance with due process and procedure. So sacrosanct is that process that if found to be in violation of the law, as to be so grave, then a conviction would not be rendered safe in the circumstances. Was the trial court correct in finding that the identification parade was unreliable?
69. Chapter 46 of the Force Standing Orders in force at that time (akin to the current Chapter 42 paragraph 4 subsection 7 of the National Police Service Standing Orders under the *National Police Service Act*) governed the mode and conduct of an identification parade. The question is whether the identification parade conducted in these proceedings aligned with those provisions of the law.
70. PW8 conducted the identification parade. She stated that she explained its purpose to the respondent who raised no objection. That the investigating officer Benson Mutua was not in the vicinity. PW8 found eight women who were in similar appearance in height and complexion to the respondent in the police cells as well as externally. In the absence of the witness, that is PW2 who was accommodated in the crimes office, PW8 began to organize a parade by lining up the participants.
71. The respondent elected to stand between the 4th and 6th ladies.
PW2 was then invited to select the perpetrator. She chose the respondent by means of touch. The parade was conducted again and in this instance, the respondent stood between the 1st and 3rd ladies. PW2 touched the respondent again. This exercise was repeated a third time and the respondent stood between the 6th and 8th ladies. PW2 selected the respondent a third time. The respondent was satisfied with the exercise and appended her signature in the identification parade report.



72. PW8 clarified that though the identification parades were done thrice, she only used one form to capture them. Since she only had those eight ladies, she did not change them and was therefore not in violation of rule 6 (d) of the Force Standing Orders. That although the respondent didn't object to the exercise, that information was not captured in the report. She added that she erased the investigating officer's name from the report.
73. From the above process, we find that the identification parade was within the dictates of the law as follows: the respondent was informed of the purpose of the parade and was not compelled to appear in the parade; she was agreeable to participating in the parade; she was informed of her right to have a counsellor or friend present but made no response to it. The fact that the no recordings were made as to her response did not vitiate the quality of this requirement. We also find that the respondent ably signed in that section in line with the requirements without any objections.
74. Furthermore, the police officer in charge of the case did not conduct the parade; the witness, namely PW2, did not see the accused person beforehand; the respondent was placed amongst at least eight persons of like general appearance and complexion; the respondent took any position of her choosing and was allowed to change her position during the subsequent identification parade exercise; PW2 identified the suspect by means of touch; and a careful note was made after PW2 left each parade that the respondent was identified by means of touch.
75. At its termination, PW8 asked the respondent whether she was satisfied with the conduct of the parade to which she responded in the affirmative and placed her signature on the report; the respondent raised no objection to the manner and conduct; and the parade was conducted with utmost fairness. We also find that PW8 completed all the relevant sections and was a complete document. If the reverse was the case, the respondent would have brought this up in trial and in her defence.
76. Regarding the erasure of Benson Mutua's name, PW8 explained that the same was removed because it had been entered in error. In addition, it is common ground that Benson Mutua was the investigating officer and his name and rank appears in the form as the investigating officer. We therefore arrive at the irresistible conclusion that the learned judge with profound respect erred in finding that the identification parade was unreliable. We find that the process was lawful and that PW2 positively identified the respondent as the suspect and perpetrator.
77. To our mind, the respondent was generally satisfied with the exercise. The respondent admitted that she indeed participated in the identification exercise and raised no issue/objection during the exercise or at any stage of the proceedings at trial. We must caution ourselves when stating this because in criminal matters, the burden of proof, never shifts to the accused person. We also find that contrary to the learned judge's findings, the date of the identification parade was captured in the report.
78. Regarding the presence and accommodation of the witness before the parade and the signature of the parade officer as being not revealed, it is our finding that their absence thereof did not go to the root of unreliability. In any event, the parade officer testified, relied on this document and confirmed in the affirmative concerning the witness's accommodation.
79. The trial court also raised issue with the signatures belonging to the respondent on the form stating that they were markedly different as to raise doubt on their authenticity. We however disagree with that analysis. It is generally accepted that a single person can have several signatures for several reasons. A plain view observation of a signature does not necessarily disqualify it as belonging to the same person when seen alongside a different signature on face value. Since those signatures were also not disputed or examined by a document examiner, we see no reason to find that they did not belong to the respondent.



We therefore conclude that the finding of the trial judge was not based on any evidence. We think that aspect was proved beyond any reasonable doubt by the prosecution.

80. The respondent acknowledged that she participated in the parade but did not raise any doubt as to its authenticity in her defence. We have carefully examined the record and note that the respondent never objected to the manner in which the parade was conducted. The parade was conducted three times and on each occasion the respondent shifted to a different position of her choice. On this issue, we find that the prosecution evidence remained unshakable.
81. PW2 further recalled that she recognized the respondent when she paid her a visit on 10th April 2008. She then remembered her when she visited her on 12th April 2008. Although darkness had ensued, PW2 left no room for error of recognition since she was able to see the respondent with the help of the lamp lit next to her. On 12th April 2008, she recognized her as the same lady who had visited her home on 10th April 2008.
82. When PW2 returned to the house, she spotted a note, read it and immediately fainted. That note was collected by PW3 and PW1 read it out during his evidence. It was suspected that the said note had been handwritten by the respondent before disappearing with PW2's children. It is for this reason that police officers collected that note, the respondent's handwritten book (as affirmed by the respondent herself) and other sample writings, compiled in an exhibit memo and taken to PW5 for document examination.
83. PW5 testified that he received the exhibits on 11th June 2008. From his findings, PW5 obtained 7 individual characters namely K, G, T, N, S and A on the questioned writings – available in the standard of the known writings. They had a particular style and movement. He therefore formed the opinion that they were written by the same author. His report was produced in evidence. This evidence was rejected by the trial court.
84. The role of a handwriting expert was succinctly explained by Lord Heward in the case of *Republic vs. Podmore (1930)* 46 T.L.R. 365 in which he stated:
- “ ... Let me say a word about handwriting experts. Let everyone be treated with proper respect, but the evidence of handwriting experts is sometimes misunderstood. A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is the person who, habituated to the examination of hand writing, practiced in the task of making minute examination of handwriting, directs the attention of others to things which he suggests are similarities. That and no more than that, is his legitimate province....”
85. This Court has similarly shared its views regarding the opinion of a handwriting expert and offered useful guidelines in the mode of approach in the case of *Silvanus Njuki Nguku vs. Republic [2015]* eKLR that held as follows:
- “Section 48 of our *Evidence Act* recognises the existence of handwriting experts, and expressly allows evidence to be given of their opinion “as to identity or genuines of handwriting.” It may be that if a positive opinion is given that a particular writing is in the hands of a particular person it should be received with caution, but it seems to us that at any rate under the law of this country, a handwriting expert must be allowed to give his opinion that two documents were written by the same hand. Otherwise it is not easy to see what sort of “opinion” an expert can give on any matter concerning handwriting. That is precisely what the document examiner did in this case and we can find no substance in the submission that he went outside the proper province of a handwriting expert.



With regard to the further submission that it is for the Court to make up its own mind whether a particular writing is to be assigned to the particular person, we respectfully agree, but we do not think that in this respect the evidence of a handwriting expert is to be regarded in any different way from the evidence of experts in other subjects. An expert witness should come to court prepared to justify his opinion by argument and demonstration, but he need not necessarily be called upon to do so. In many cases it is sufficient if the witness gives his opinion and the more eminent the expert the less the need for demonstration. A doctor may give his bare opinion as to the cause of death, and government analyst even in the rare cases where he is called as witness, may state without argument his conclusion (for example) that seminal stains were found on the clothing.

In every case the Court is entitled to accept or reject the opinion of the expert, and in that sense it must make up its own mind. The magistrate did so in this case.

There was no challenge to the competence of the document examiner, and his opinion was a confident one. In the context of the other evidence before her she accepted his opinion as correct. It might of course have been better if the witness had indicated either in his written report or in his evidence in court the grounds on which his opinion was based. We do not think this is a universal requirement and we note that of the cases relied on as suggesting that this must be done, neither *Wakeford vs Bishop of Lincoln* nor *R K Podmore* is mentioned in *Phipson on evidence* and in *Cross on evidence (Loc Cit)* the citation from the former case is prefaced by the words “strictly speaking.” In the instant case the magistrate had before her the disputed writing and the specimens, and also the confident opinion of the expert that they were in the same hand. We cannot say that she was in any way wrong in her approach to the evidence and conclusion which she drew from it.”

86. The evidence captured on record shows that the document examiner gave reasons and explained how he arrived at the conclusion that the samples were written by one and the same person. The respondent admitted that the exercise book bore her handwriting. When compared to the note that was retrieved from the house, the document examiner found that they were written by the same author.

87. While it is true that expert opinion does not bind a court to agree with its findings and has to be independently assessed and examined, there are also no hard and fast rules in the manner in the an outlay of an expert opinion. In this case, the qualifications of PW5 were not in dispute. PW5 further gave an outline of the method used to make its conclusion. Looking at his evidence in totality, we find that PW5 was being truthful and reliable. There were no indicative matrixes as to rule that the expert report was unreliable. In the case of *Wakeford vs. Lincoln (Bishop) (1921)*, 90 L.J.P.C. (174) Lord Birkenhead observed:

“...The expert called for the prosecution gave his evidence with great candour. It is not possible to say definitely that anybody wrote a particular thing. All you do is to point out the similarities and draw conclusions for them. This is the manner in which expert evidence on matters of this kind ought to be presented to the Court, who have to make up their minds, with such assistance as can be furnished to them by those who have made a study of such matters, whether a particular writing is to be assigned to a particular person...”

88. Having found that PW5’s evidence was credible and that the note adduced in evidence was authored by the respondent, we find that the said note was indicative of a threat to PW2. That note was first discovered after the disappearance of the deceased children and the respondent together with her companion. Taking all the above evidence into account, our conclusion is that it was indeed the



respondent that occasioned the death of the deceased persons. Consequently, we shall interfere with the findings of the learned judge, in respect of conviction.

89. Lastly, malice aforethought is another crucial ingredient in making an assessment as to whether the perpetrator was intent on murdering a deceased person. Section 206 of the *Penal Code* defines malice aforethought in the following terms:

- a. An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not;
- b. Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.
- c. An intent to commit a felony.
- d. An intention to facilitate the escape from custody of a person who has committed a felony.”

90. According to PW1 and PW2, the respondent must have murdered the deceased persons because she was bitter with PW1’s marital union to PW2. A look at the note retrieved by PW3 revealed damning thoughts about PW2 in the respondent’s view; corroborating PW1 and PW2’s theory. Those words cannot be taken lightly. Furthermore, the manner in which the deceased persons were murdered sufficiently demonstrated that the respondent had the superlative desire to end their lives. We are guided by the findings of this Court in *Daniel Muthee vs. Rep.* CA NO. 218 OF 2005 (UR) where the Court held:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the *Penal Code*.”

91. Before penning down, we have taken note that there were several discrepancies between the evidence adduced as per the record before us and the pronouncements of the learned judge with due respect. For instance, he stated that the rank of the parade officer and date of the identification parade were not captured when they actually were. He also stated that PW1’s former wife was called Minnie but the respondent stated in her evidence that she was known as Leah Wanjiru. The court also recorded that Chomba simply stated that she deserted to an unknown place. However, this piece of evidence was not captured in the record.

Finally, the learned judge stated that the respondent was only arrested on the basis of Cecilia’s utterances. However, we have also seen that PW2 played a momentous role in the apprehension of the respondent that was captured in the record.

92. We are persuaded to hold that the respondent, with all motive and intent, kidnapped the deceased children in order to hit back at PW1 and PW2. She then took them to the nearby dam and murdered the deceased children. Certainly so, we have no doubt in our mind that the respondent committed two counts of murder as she had been charged.

93. Accordingly, it is our finding that the learned judge erred in acquitting the respondent for the reasons preferred above. The acquittal was not based on the evidence tendered by the trial court. Had the trial court addressed his judicial mind to the sound and reliable evidence tendered before it, he would



have arrived at the same decision like us. Unfortunately, we must interfere with the acquittal. The appeal herein must succeed. We hereby quash the trial court's findings in favor of the respondent and substitute the same with an order of conviction. The respondent shall immediately be apprehended and arraigned before another judge in the criminal division of the Nakuru High Court for mitigation and sentencing.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF FEBRUARY 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

