



REPUBLIC OF KENYA



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**Mwambao v Republic (Criminal Appeal E004 of 2023)
[2025] KECA 292 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 292 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL E004 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 21, 2025**

BETWEEN

PETER MWAVITA MWAMBAO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Conviction and Sentence of the High Court of Kenya at Mombasa (Ong'injo, J.) delivered on 28th October 2021 in Criminal Case No. 42 of 2018)

JUDGMENT

1. On 20th July 2018, a gruesome discovery of a badly decomposed body, which was later identified to be of Beatrice Furaha John (the deceased), was discovered in River Bogolo in Makata Village, Kilifi County. Investigations ensued and led to the arrest of Peter Mwavita Mwamba (the appellant), who was subsequently arraigned before the High Court of Mombasa to answer to the charge of murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The particulars of the offence were that, on 8th July 2018 at Makata Village, Ziani Location of Kilifi South sub-county within Kilifi County, the appellant murdered the deceased.
3. In a judgment delivered on 26th January 2023, the appellant was found guilty, convicted accordingly and sentenced to 20 years imprisonment before Mombasa High Court (Ong'injo, J).
4. The evidence of PW1, Benard Ngowa Mwaringa, lays down the bulk of the background to the prosecution's case. It is that, on 2nd July 2018, he called his mother, the deceased, to assist with bursary forms for his younger sister, Nellie Rehema, who was a student at St. Thomas Girls', albeit that, it is not stated whether it is a secondary or primary school. The deceased picked the forms on 3rd July 2018 and took them to the Member of the County Assembly's (MCA) offices at Kilifi, Sokoni Ward for



processing; and that, on the same day, PW1 sent his mother bus fare via the money mobile transfer services known as 'MPESA' to enable her travel back to her home.

5. PW1 and the deceased did not meet thereafter. However, on 8th July 2018, he received a text message from the deceased enquiring on how he was doing with his colleagues. The deceased further instructed PW1 that he should let Nellie to go to her father, the appellant, to get school fees. The deceased added that Nellie's father is not one Kilunga. The deceased also mentioned that she was on her way to upcountry.
6. Thereafter, PW1 received a call from his uncle, Price John Tegeni (PW3), asking him if he had received a message from the deceased. Disturbed by the message, PW1 instinctively called the deceased on her mobile phone, but the call was not going through. He then decided to travel to pick Nellie and, together with PW3, they travelled to Makata village where his mother lived with the appellant as husband and wife for about two years.
7. Upon reaching Makata village, the appellant told PW1 and PW3 that the deceased left home on 2nd July 2018, and that he had not seen her since; that, the following day, PW1 and PW3 went to the village elder and reported the disappearance of the deceased; that they also made a further report at Kilifi Police Station, which was recorded under OB No. 24 of 10/07/2018; that, at some point, PW1 enquired from the appellant why he did not take any initiative to report the deceased's disappearance; that PW1 and the appellant were advised by the Officer Commanding Station (OCS) Kilifi Police Station to make the report to Kijipwa Police Station; and that the second report was made vide OB No. 2 of 14/07/2018 where the DCI officers asked for the appellant and the deceased's phone numbers.
8. According to PW1, on 20th July 2018, he was called by PW3, who informed him that he had received news of a body which was retrieved from River Bogolo; that they both went to the scene, but could not identify the body since the face was decomposed; that, at the mortuary, PW1's aunty, one Riziki, was able to identify the deceased from the hairstyle since she is the one who had last plaited her hair; that Riziki was also able to identify the deceased from one of her clothes, a 'leso', which was identified with a 'women chama' of which they were both members; and that the post mortem report showed that the deceased was cut at the back of her neck, and that her hands had been tied together at the waist using the leso.
9. It was PW1's further evidence that he was called by the police to take them to the house where the deceased resided with the appellant at Makata village; that, from the house, police recovered the deceased's grey handbag which she had the last time she was in Kilifi; that, from the handbag, police recovered another leso, bursary forms which the deceased had collected from Kilifi, and a dress tailored by the deceased from the same material from which Nellie also made a dress; that the text messages from his deceased mother seemed unusual in that the deceased used to space her words but the message he received from the deceased was not spaced; that he became suspicious of its source; and that he could not tell of the nature of the relationship the deceased had with the appellant.
10. Dr. Collins Jefwa (PW2) of Kilifi County Referral Hospital produced the report of the post mortem, which was conducted by Dr. Noor Mohamed at the same hospital. He testified that, as at the date when the post mortem was conducted, the deceased's body was badly decomposed, which hindered a thorough examination; that external examination showed a swelling of the subcutaneous tissues, but no sign of head injury or cervical fracture; that the body was tied with a green and black mosquito net on both hands, and the legs with an orange cloth; and that, it was concluded that the cause of death of the deceased was asphyxia secondary to drowning. PW2 added that it was impossible to do an internal examination of the body due to its state of decomposition.
11. PW3, Price John Tegeni, the deceased's sister and PW1's uncle, corroborated the evidence of PW1.



12. PW4, CIP Victoria Kalondu Mutuku, the OCS Kijipwa Police Station, recalled that, on 19th July 2018 at around 6.00 p.m., she received a call from the area chief, one Omar Ngala of Takaungu Location, informing her that there was a body of a person that had been seen in River Bogolo; that, on arrival with other police officers, they found a body which did not have clothes on its lower part, and which was floating on the river; that, with the assistance of members of the public, the body that in a state of decomposition was retrieved; that it was tied up with 3 lesos and, on the chest, there was a sky blue mosquito net; that she learnt from the area chief that there was a report of a missing person that had earlier been made; that the body was moved to the mortuary for a post mortem examination; that the appellant was arrested on 23rd July 2018 as the main suspect behind the deceased's murder; and that the matter was later taken over by the CID office in Mtwapa for further investigations.
13. PW5, CIP Klen Kulitha in charge of Scenes of Crime in Mombasa, was requested by DCI Mtwapa to process photographic images. The images were contained in a compact disc (CD), which was inside a sealed packet labelled No. CR 312/122/2018, and was forwarded to him under the hand of P.C. Kiptoo of DCI Mtwapa; that he was specifically asked to prepare photographic prints from the CD; that he produced the photographic prints in nearly the exact reproduction of the CD without any interference; and that, he also produced a certificate of production alongside the prints as exhibits in court.
14. PW6, IP Tito Kiptoo Kisorio of DCI, Nairobi, was the investigating officer. He summed up the evidence of the prosecution witnesses. In addition, he testified that the appellant was arrested because he did not report that the deceased had gone missing, yet he was privy to the fact that she had not returned home as expected since she left for Kilifi; that the appellant's mobile phone was seized for forensic investigations; that it was established that the messages in the appellant's phone had similarities in writing to the ones sent from the deceased's phone to her brother, one Bernard (PW1); and that the police were unable to recover the deceased's phone.
15. PW6 only identified the exhibit memo form that forwarded the appellant's phone to cybercrime officers for investigations and as exhibits, the appellant's phone and two sim cards. It suffices to note that nothing much was said about what investigations were carried out on the appellant's phone or the outcome of those investigations.
16. In cross-examination, PW6 stated that, although the deceased's body had decomposed, her son (PW1) and her aunt were able to identify it.
17. At the close of the prosecution's case, the trial court ruled that the prosecution has established a prima facie case and accordingly put the appellant on his defence. He gave a sworn statement of defence, but called no witness in its support.
18. The appellant admitted that the deceased was his wife, having been married for 5 years; that they lived together in Makata; that, on 26th June 2018, the deceased left for Kilifi for a 5-day crusade; that he called the deceased the following Monday which fell on July 2018, and she told him that she was at the Chief's place looking for bursary; that his phone got lost prior to his wife leaving, and that he borrowed a phone to call the deceased; that, on 8th July 2018, some 3 people, one of whom identified himself as the deceased's brother went to Makata looking for the deceased; that he requested them to let him accompany them to Kilifi; and that they instead told him to ask the deceased to call them when and if she turned up.
19. The appellant went on to testify that, the following day, he went to church in Kilifi where the pastor told him that the deceased left after the crusade; that he went to the deceased parents' home in Kilifi, but did not find her there; that he then went to report to Kilifi Police station where he learnt that a report



- had already been made by PW1; that the OCS advised them to make a report at Kijipwa Police Station, which was within the jurisdiction of where the deceased resided; and that he then made a report to Kijipwa Police Station not only of his missing wife, but also of his lost phone, solar and maize.
20. The appellant stated that he later heard that there was a body found in River Bogolo but which could not be identified; that he went back to Kijipwa Police Station to follow up and get all the information about the body that had been recovered; that the OCS interrogated him as to why he took long to report that his deceased wife was missing; that his response was that he was not aware that his wife had died; that the last time he saw her was when she left for a crusade; and that, he did not know that the deceased had two children from a previous marriage.
 21. The appellant denied that the recovered handbag belonged to the deceased; that when the purse was being removed from the house, he was not present; that he did not hear PW6 state that he (the appellant) used the deceased's phone to write messages; and that, he did not write the messages found in the deceased's mobile phone.
 22. After summing up the prosecution and the defence cases, the learned Judge Ong'injo, J. isolated the issues for determination to be: whether the deceased died; whether the death was caused unlawfully; whether there was malice aforethought, and whether the appellant directly or indirectly participated in the commission of the offence charged. The learned Judge found that the deceased indeed died since the body found in River Bogolo was positively identified to be hers; that there was no eye witness to the murder of the deceased but that, when the body was discovered, it was tied up; that there was no possibility that the deceased tied herself up and threw herself in the river save for an intervention from another person; that the sole purpose of throwing her into the river was to kill her; and that, as such, her death was found to be unlawful.
 23. As to whether the ingredient of malice aforethought was established, the learned Judge held that, given the state in which the body was recovered, having been tied at the hands, legs and torso, coupled with throwing it into a river, was clear that the intention was to kill the deceased; and that the murderer wanted the deceased to die from drowning. The learned Judge accordingly concluded that malice aforethought was proved beyond reasonable doubt.
 24. As to whether the appellant was culpable, the learned Judge held that the conduct of the appellant left no doubt that he murdered the deceased.
 25. The appellant was accordingly found guilty as charged.
 26. On sentence, and after considering the appellant's mitigation as proffered by his learned counsel Ms. Ogejo, the learned Judge sentenced the appellant to 20 years imprisonment which were to commence from 1st October 2018.
 27. Aggrieved, the appellant is before this Court on appeal. He raises only one ground of appeal, namely that "The learned Judge erred both in law and in fact in convicting the appellant."
 28. We heard the appeal virtually on 22nd October 2024. In attendance were learned counsel Mr. Oluga for the appellant and learned counsel Mr. Mwangi, Senior Prosecution Counsel for the respondent.
 29. Mr. Oluga highlighted the appellant's written submissions dated 4th October 2024. He submitted that it was doubtful if the body recovered from the river belonged to the deceased since it was already decomposed and nobody could identify it; that even the prosecution itself relied on photographs produced by PW5 who is not the one who took them at the scene of crime, to identify the deceased; that the deceased's son admitted that he could not identify the deceased's body; that the people who were allegedly able to identify the body as that of the deceased, namely Damaris Kilunga and her aunt,



- one Riziki, were not called as prosecution witnesses; and that the trial court thus erred by concluding that Damaris Kilunga and Riziki positively identified the body, yet they did not testify.
30. Further casting doubt on the identification of the deceased's body, it was submitted that the evidence of PW2 contradicted that of PW4; that, whereas PW2 testified that the body was found with a black blouse and a white skirt, PW4 testified that, when the body was recovered, it did not have clothes on its lower part. To the appellant's counsel therefore, the body that was recovered was of an unknown person and was not that of the deceased.
 31. On the cause of the deceased's death, it was contended that the post mortem report indicated that the deceased died of asphyxia secondary to drowning, as a clear indication that the appellant did not murder the deceased; that the body having been recovered from the river was a corroboration of the medical evidence that the deceased died by drowning; that, furthermore, no murder weapon was produced in evidence by the prosecution that would otherwise have demonstrated that the deceased was murdered; and that, in addition, there were no physical injuries visible on the body of the deceased. The appellant thus, submitted that the circumstantial evidence relied upon by the prosecution did not establish the culpability of the appellant; and that, therefore, there was no correlation between the cause of her death and the appellant's culpability.
 32. Counsel submitted that the existence of malice aforethought on the part of the appellant was not proved; that none of the prosecution witnesses testified that there was a conflict between the deceased and the appellant, who had lived together for 2 years; that none of the witnesses saw the deceased with the appellant prior to her death; that the appellant being concerned about the deceased's death made a report of her disappearance to the police when she failed to return home after she left for a crusade; and that the items found in the appellant's house, namely a handbag and a lesa do not necessarily infer guilt on his part; and that, in any event, the handbag was only marked for identification but not produced as an exhibit, consequent to which the court could not rely on its recovery to link the appellant to the death of the deceased.
 33. In conclusion, counsel relied on the case of Anthony Ndegwa Ngari vs. Republic (2014) eKLR, pointing out what ingredients for the offence of murder the prosecution required to prove, but which burden of proof they did not discharge. He urged us to quash the conviction, set aside the sentence and forthwith set the appellant at liberty.
 34. On his part, Mr. Mwangi relied on submissions dated 15th October 2024. It was his submission that the prosecution proved all the ingredients of the offence of murder. As to whether the deceased died, he contended that it was misleading for the appellant's counsel to assert that the deceased's body was not positively identified; that the fact was that PW1 and his aunt are the ones who identified the body for purposes of the post mortem exercise; that the post mortem form adduced by PW2 was not challenged and, as such, the claim by the appellant that the deceased could be alive was unsubstantiated and does not make any sense.
 35. As to whether the deceased's death was caused by an unlawful act on the part of the appellant, counsel submitted that the fact that the deceased's personal items were found in the appellant's house lent credence to the fact that she (deceased) could only have died at the hands of the appellant; that, furthermore, the appellant did not give any explanation as how and why those items were in his house; that the body was found tied up with lesos, as a testament that the appellant intended to kill the deceased; that the post mortem report corroborated the fact that the deceased died of asphyxia secondary to drowning; and that all these circumstances demonstrated malice aforethought on the part of the appellant.
 36. We were urged to uphold both the conviction and sentence.



37. This is a first appellate court whose duty is to re-evaluate and re-analyse the evidence adduced before the trial court. In so doing, we are obligated to bear in mind that we neither saw nor heard the witnesses testify for which we should give due allowance. This mandate was explained in *Okeno vs. Republic* (1972) E.A. 32 where it was stated:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*SHANTITLAL MRUWALA V R*, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts’ findings and conclusions; it must make its own findings and draw its own conclusion only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness.”

38. We have considered the record of appeal, the respective rival submissions and the law. The appellant has challenged the decision of the trial court from two main angles. Firstly, he contends that it is doubtful that the body that was retrieved from the river was that of the deceased. Secondly, he contends that the circumstantial evidence relied upon to convict him was insufficient since there was no evidence to demonstrate that he was the last person seen with the deceased.

39. For a conviction of the offence of murder to be sustained, it is paramount that the prosecution proves the following: the fact of the death of the deceased; the cause of the death of the deceased; that the death of the deceased was caused by the accused person; and that the death of the deceased was caused by an unlawful act of commission or omission of the accused, meaning that the accused had malice aforethought when he/she killed the deceased. See *Abdi Kinyua Ngeera vs. Republic* (2014) KECA 654 (KLR).

40. From the outset, we start by noting that the appellant was convicted purely on circumstantial evidence; circumstantial evidence in the sense that no one saw the appellant killing the deceased. The sequence of the timelines of the deceased’s movements prior to her death is crucial as this lays the basis as to the last time she was seen and with whom, and whether this sequence of events in any way links the appellant to her death.

41. It is not in contention by either the prosecution or the defence that, at one point, the deceased left Makata village for Kilifi to look for bursary forms for her daughter, Nellie. The day which the deceased left Kilifi was on 3rd July 2018 when PW1 sent her fare to return to Makata village.

42. In his defence, the appellant testified that the deceased left Makata Village on 26th June 2018 to go to Kilifi for a 5-days’ crusade. He stated that, the following Monday of July 2018, he called her on the mobile phone, and she told him that she was at the Chief’s office looking for bursary for her child. A computation of 5 days from 26th June 2018 when the appellant alleged that the deceased left for the crusade to the Monday of July 2018 leads to 2nd July 2018. Therefore, the common ground is that, as at 2nd July 2018, the deceased was alive and in Kilifi. The appellant himself confirmed that, when he called the deceased, she stated that she was at the Chief’s office looking for bursary for her daughter, Nellie.

43. The appellant only became concerned about the deceased’s whereabouts on 8th July 2018 when PW1 and PW3 went to look for her at Makata village, his home, where he was cohabiting with her. There is a time lapse between 2nd July 2018 and 8th July 2018 which the appellant did not explain where his wife might have been, yet he expected her back after days of the crusade. He told PW1 and PW3 that the deceased had gone for a crusade which is not factual anyway since the deceased had gone to the crusade in the last week of June.



44. Furthermore, PW1 and PW3 testified to the fact that, on 8th July 2018, they received a message from the deceased informing them that she had gone upcountry but there was no mention of whom she was going to visit. PW1 testified that the supposed text message from the deceased seemed odd to him since it was not spaced out in the manner that the deceased used to write text messages. The village elder, although not called as a witness, is said to have told PW1 that the deceased was last seen walking from the bus stage to her house on 6th July 2018. The appellant did not mention the church where the deceased went to the crusade, nor did he even call the supposed pastor of the church he had gone to ask of his wife's whereabouts as a witness.
45. As best as can be discerned from the evidence of PW1 and PW3, it points clearly that in the period between 3rd July 2018 and 8th July 2018, the deceased was not in any crusade but around Makata village.
46. It is trite that a court can draw an inference of guilt of an accused person from circumstantial evidence so long as the inculpatory facts that lead irresistibly to that conclusion, are incompatible with the innocence of the accused, and there are no co-existing factors that can weaken the inference of guilt. See *Joan Chebichii Sawe vs Republic (2003) eKLR*.
47. In *Ahamad Abolfathi Mohammed & Sayed Mansour Mousavi vs. Republic (2018) KECA 743 (KLR)*, this Court 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.”
48. 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.”
49. We particularly find the appellant's nonchalant attitude when his wife was missing between 3rd July 2018 and 8th July 2018 disturbing. The least the appellant could have done is to make a formal report of a missing person to either the police or the village leadership, or to her relatives. The excuse that he lost his phone even before his wife left the village as the reason he could not report her disappearance is neither here nor there since he testified that, when he communicated with his wife on 2nd July 2018, he borrowed a phone. It begs the question why he could not have used the same means to try and communicate with his wife whom he had not heard from for over one week.



50. The deceased may be said to have been the closest person to the appellant then, yet she went missing and he (the appellant) makes no effort of looking for her. This is quite unusual. To us, the assertion that he had lost his phone was purely intended to throw off balance the investigators who were closing in on him as the prime suspect. So that it appeared that he was not making up the report of the loss of the phone, he added to the list the loss of solar (we guess solar panels) and maize. Interestingly, though, there was no iota of evidence of the correlation of the lost items and the disappearance of the deceased. The explanation required of him is basically why he did not report that he had not seen his wife for a week.
51. Then there was the twist that the deceased's personal belongings were found in the appellant's home, namely a handbag and a leso which can only be attributed to the fact that they lived together as husband and wife. The message that was allegedly sent by the deceased from her phone, as rightly observed by the learned Judge, contained information which only a close member of the deceased's family would know.
52. We also find that the manner in which the deceased's body was found tied up quite telling. The evidence of PW4 was that the deceased was tied at the neck using a blue mosquito net. The post mortem report told of the body being tied with a green and black mosquito net. Ordinarily, a mosquito net is used in a bedroom set up. The conclusion is that the deceased must have been tied up with the mosquito net and transported in the middle of the night from her matrimonial home for purposes of disposing of her body, and it cannot be by a person other than the person she live with, the appellant.
53. On this issue, we concur with the learned Judge who had the following to say:
- “A Village Elder in Makata Village however told him (PW1) that the deceased had been seen in the village on 6.7.2018. The police however found the ashy grey handbag in the house of the accused person. This discounted the accused person's defence that he last saw the deceased on 26th July 2018. The inference that can be drawn is that the deceased went to Makata Village when she left Kilifi town on 4.7.2018. The accused also demonstrated a casual attitude to the disappearance of the deceased and PW1 had to push him to go and report a missing person's report. The message written from the deceased's phone indicated that the accused was the father to Nellie and there was need for her to get school fees from him. This points to the fact that the sender of the message was well known to the deceased otherwise the name of the ex-husband would not have mentioned....the surrounding circumstances herein it is the accused person who carried out the murder. I find that this element was proved to the required standard.”
54. The substantial and compelling circumstantial evidence points to the appellant as the person who murdered the deceased. The chain of events and his conduct leaves no doubt that he is the only person who can be held culpable for the murder of the deceased.
55. The above chronology of events answers three questions that fall for our determination, namely: the fact that the deceased died; the cause of her death as attested by PW2 being asphyxia secondary to drowning; and that it is the appellant who was responsible for her death.
56. We now grapple with the question as to whether the recovered body belonged to the deceased. The answer to this question will further cement our findings in the foregoing dispositions. Although PW1 testified that the deceased's body was decomposed, he was present when his aunt, one Riziki, identified it from the hairstyle since she is the person who last plaited her hair and the leso on her body, which belonged to a 'chama' of which they were members. Critical is that PW1 attended the post mortem exercise at Kilifi District Hospital. The appellant did not challenge the post mortem report. Notably



too, is that the post mortem was conducted on the basis that a body was recovered from a river, and this is body whose description by way of physical appearance matched that of the deceased. We can only emphasise that we are satisfied that the deceased died and that the body recovered from River Bogolo belonged to her. We discount the assertion by the appellant that it is likely that it belonged to somebody else.

57. Did the appellant have malice aforethought when he killed the deceased? Section 206 of the [Penal Code](#) defines malice aforethought 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.”

58. In *Nzuki vs. Republic* [1993] eKLR, this 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.”

59. We begin from the point that the deceased’s body was said to have been badly decomposed; and the conclusion of the post mortem report is that the deceased’s death was caused by asphyxia secondary to drowning. Even assuming that the deceased died purely by drowning as the appellant wants us to believe, the manner in which the body was found tied up is a testament that it was an act of a third party determined to ensure that the deceased died. Therefore, whether or not she was killed before being thrown into the river, or that she was tied up and then thrown into the river, one factor is constant, the fact of being tied up in a manner that she could not rescue herself from the bondage. The intention being that, when she is in the river, she would not come out alive. There is indeed no remote possibility that the deceased tied and drowned herself. We accordingly conclude that the prosecution proved beyond all doubts that the appellant had malice aforethought when he killed the deceased.
60. For the foregoing reasons, and having re-appraised ourselves with the evidence adduced before the trial court, we are satisfied that the conclusion reached by the learned trial Judge that substantial and compelling circumstances pointed to the appellant as being responsible for the deceased’s death cannot be faulted. There is no basis upon which this Court would be justified in interfering with the conviction and the sentence meted out. Accordingly, we uphold the Judgment of the High Court at Mombasa (Ong’ino, J.) delivered on 28th November 2022. The appeal is hereby dismissed in its entirety.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2025.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

