Ngala & 2 others v Republic (Criminal Appeal E117 of 2023)
[2025] KECA 660 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KECA 660 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E117 OF 2023

KI LAIBUTA, FA OCHIENG & GWN MACHARIA, JJA

APRIL 11, 2025

BETWEEN

KATANA CHOME NGALA ..... 1ST APPELLANT

SERA CHOME NGALA ..... 2ND APPELLANT

NENO KARISA KATANA ALIAS NTHENGE ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 4th July 2023 in HCCR Case No. 2 of 2017)

JUDGMENT

1. This is a first appeal from the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 4th July 2023 in High Court Criminal Case No. 2 of 2017 in which the appellants (Katana Chome Ngala, Sera Chome Ngala and Neno Karisa Katana alias Nthenge) were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that, between the night of 28th and 29th December 2016 in Majenjeni Village of Mambrui in Magarini Sub-County within Kilifi County, jointly with others, the appellants murdered Karisa Chome Ngala (the deceased).

2. The trial belatedly began on 10th February 2020 with the prosecution calling 9 witnesses, including the deceased's wife, Agnes Kahazo (PW1), as its first witness. PW1 testified that, on 28th December 2016 at about 10pm, she was at home and in bed with the deceased; that they heard someone call out the deceased's name; that the deceased got up and went to the door; that the people who he found at the door ordered him to sit at the door; that the persons who called at their door were comprised of a police officer and young village men; that the deceased was immediately escorted out of the house, and that

she instinctively followed them; that she saw and recognised the 1st and the 2nd appellant among those who took the deceased away; and that the deceased managed to relay a message to her that he was with the police, and that she should not worry but return home.

3. PW1 further testified that, in the morning of 29th December 2016, she was awaken by screams; and that she immediately run towards the commotion, only to find the deceased's lifeless body. PW1 concluded her testimony by telling the court that she was able to see the 1st and the 2nd appellants under the moonlight; that she was at close proximity to them at the material night; and that there was a land dispute between the deceased and the 1st appellant.

4. The deceased's son, Karisa Bahati (PW2), testified and gave a similar account as did PW1, only adding that, on the material night, he saw all the appellants at their door; that the 1st appellant is his step uncle; that the 2nd appellant is his step aunty; and that there was a land dispute between the 1st appellant and the deceased.

5. PW3, Fredrick Kenga, a brother to the deceased, testified that, while at this home on the material night, the appellants came in the company of a fourth person who wore a "kind of mask" and informed him that the deceased had been picked up by police officers attached to Marereni Police station; that he asked the 1st appellant for more details, but he was not forthcoming; that he only learnt of the deceased's killing the very next morning after visiting the scene; that he did not witness the incident; and that there was a land dispute between the deceased and the 1st and 2nd appellants.

6. PW4, Sifa Mwambegu, a nephew to the 1st appellant, stated that he worked as a mason in Nairobi between 2013 and 2014; that he gave the 1st appellant some money to construct a house for him; that, when he came back in 2015, the house was still incomplete; that he was not satisfied with the account given on the expenses; that they held a meeting regarding the apparent misuse of money; that his deceased father promised to deal with the issue; that the deceased was threatened for getting involved with the matter and demanding payment on PW4's behalf; that the deceased informed him that he had resolved to report the matter to the police; that he immediately decided to travel back home and that, while on his way home, he was called and informed of the murder incident.

7. PW5, CPL Norman Maroni, attached to the DCIO Malindi as an investigator, testified that he was informed of the incident by the Officer Commanding Station (the OCS) Marereni on the material night; that the OCS had moved the deceased's body to Star Mortuary; that, during his investigations, he visited the scene and also spoke to the deceased's neighbours, who alluded to a land dispute concerning the deceased; that, on 31st January 2016, he received information regarding an attempted public lynching of an individual alleged to have murdered the deceased; and that he managed to arrest the individual before he was lynched. The investigating officer concluded his testimony after producing the deceased's post mortem report as exhibit before the court.

8. When put to his defense, the 1st appellant gave an unsworn statement and stated that, on 29th December 2016 at about 7am, he heard screams coming from the direction of the deceased's home; that he rushed to the scene and discovered the deceased's body; that he later recorded a statement with the police; that he did not commit the offence, and that the allegations against him were a fabrication.

9. Likewise, the 2nd appellant gave an unsworn statement and stated that she slept in her house on the material night; that she only learnt of the incident the next morning when she visited the scene; that she was requested to accompany the police to the station where PW3 accused her of being involved in the murder; and that she did not commit the offence.

10. The 3rd appellant also elected to give an unsworn statement and stated that he was at home on 28th December 2016 and only left for work at Mambrui the next day; that he first heard about the murder

on his way back home from work; that he was accosted by a big crowd led by PW3, who accused him of killing the deceased; that he managed to escape, but was eventually arrested and taken to his house where a search was conducted.

11. In its considered judgment, the trial court held that the identification of the appellants at the scene by PW1 and PW2 was never controverted by the defence; and that, from the evidence of PW1 to PW3, the appellants premeditated and formed an intention of committing the crime of murder against the deceased, which occurred immediately after forcibly taking him out of his house under the pretext that he was required at the police station. The court was satisfied that the prosecution had proved its case beyond reasonable doubt and, accordingly, convicted the appellants and sentenced each of them to 15 years imprisonment.

12. Aggrieved by the conviction and sentence, the appellants moved to this Court on appeal on 4 substantive grounds set out in their undated Memorandum of Appeal. According to them, the learned trial Judge erred in law by: failing to appreciate that malice aforethought was never established; failing to consider the contradictions and inconsistencies in the prosecution's witnesses; failing to consider that the exhibits admitted violated sections 77, 33 and 48 of the *Evidence Act*; and by failing to consider that the investigations were not conducted as stipulated in Section 35 of the *National Police Service Act*.

13. The appellants subsequently filed undated Supplementary Grounds of Appeal. According to them, the learned Judge erred by: failing to consider that the identification evidence of PW1 to PW3 was uncorroborated and unsafe to secure a conviction; failing to consider that the evidence from the post-mortem report coupled with the evidence that the deceased was burnt was contradictory, and that the circumstantial evidence that the appellants caused the injuries could not be the basis for the conviction; failing to appreciate that malice aforethought was never established; and by failing to consider that the prosecution did not discharge the evidential burden of proof of the offence beyond reasonable doubt against the appellants.

14. In support of their appeal, learned counsel for the appellants, Mr. Ruttoh, filed undated written submissions citing 3 judicial authorities, namely: Ngala Chirongo Mwamee v Republic [2018] KECA 384 (KLR) where this Court explained the dangers of attempting to rely on the uncorroborated evidence of a prosecution witness. The other two judicial authorities cited in their submissions do not appear to be reported in any law report. On the basis of their submissions, the appellants urged us to allow their appeal.

15. We hasten to observe that the appellants appear to have abandoned their initial four grounds of appeal having only submitted on the three grounds advanced in their supplementary grounds of appeal. Be that as it may, and in so far as the two sets are interrelated, we purpose to pronounce ourselves thereon.

16. Opposing the appeal, the Principal Prosecution Counsel, Ms. Vallerie Ongeti, filed written submissions and list of authorities dated 8th November 2024 citing 3 judicial authorities, namely: Anthony Ndegwa Ngari v Republic [2014] eKLR, highlighting the elements of the offence of murder; Republic v Boniface Isawa Makodi [2016] eKLR on the principle that every homicide is presumed to be unlawful except where circumstances make it excusable, or where it is authorised by law; and Daniel Muthee v R [2007] KECA 419 (KLR), highlighting the manner in which malice aforethought is established. She urged us to dismiss the appeal in its entirety.

17. We have considered the record of appeal, the grounds on which it is anchored, the applicable law, the rival submissions of the appellants and of learned prosecution counsel. We also take to mind our mandate on a first appeal as stipulated in rule 31(1) (a) of the Rules of this Court, namely to reappraise the evidence and draw our own conclusions.

18. In principle, a first appeal takes the form of a rehearing (see Ogaro v Republic [1981] eKLR). This being a first appeal, it is by way of a retrial. As the first appellate court, the Court has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions thereon. However, the Court should bear in mind that it did not see the witnesses as they testified and give due allowance for that (see Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123).

19. With regard to the cardinal duty to re-evaluate, re-analyze and re-consider the evidence on record, this Court in Makube v Nyamiro [1983] eKLR set down the ground rule stating thus:

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

20. In the same vein, the predecessor to this Court, the Court of Appeal for Eastern Africa pronounced itself on the cautious approach to be employed in discharge of its mandate on a first appeal and stated thus in Peters v Sunday Post Limited [1958] EA 424:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

21. It must be borne in mind, though, that scrutiny without more is not sufficient. The Court is mandated to undertake a fresh and exhaustive examination and reach its own decision on the evidence on record. In this regard, the Court in Okeno v Republic [1972] EA 32 set out the duty of a first appellate court in the following words:

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

22. This cautious approach has deep roots in comparative common law jurisdictions as demonstrated in the decision of the Supreme Court of India in Ganpat v State of Haryana (2010) 12 SCC 59. 4. where the Court set out the principles to be borne in mind by a first appellate court while dealing with appeals and stated thus:

> " a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
>
> b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.

c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.

d. When the trial Court has breached provisions of *the constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question."

23. Having carefully considered the record of appeal, the grounds on which it is anchored, the respective written and oral submissions and the law, we form the view that the appellants' appeal stands or falls on our finding on the following five main issues, namely: (i) whether the prosecution evidence was sufficient to prove the charge against the appellants beyond reasonable doubt; (ii) whether the appellants were positively identified as the perpetrators of the offence with which they were charged; (iii) whether the appellants were convicted on the basis of contradictory and inconsistent evidence; (iv) whether the production of evidence at the trial violated sections 77, 33 and 48 of the *Evidence Act*; and (v) whether the murder was investigated in violation of section 35 of the *National Police Service Act*, 2011.

24. On the 1st issue as to whether the prosecution proved its case against the appellants beyond reasonable doubt, it is imperative to begin by defining what constitutes murder. Simply put, murder may be defined as the unlawful killing of another human without justification or valid excuse committed with the necessary intention as defined by law. Depending on the jurisdiction, this state of mind may distinguish murder from other forms of unlawful homicide, such as manslaughter. On the other hand, manslaughter is a common law term which may be defined as the crime of killing a human being without malice aforethought, or in circumstances that do not amount to murder and, therefore, considered by law as less culpable than murder.

25. This Court enunciated what constitutes murder in Joseph Kimani Njau v R (2014) eKLR thus:

> " Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;
>
> i. The intention to cause death;
>
> ii. The intention to cause grievous bodily harm;
>
> iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.
>
> It does not matter in such circumstances whether the accused desires those consequences to ensue or not..."

26. The requisite element of "intention" constitutes the ingredient of "malice aforethought", which is defined in section 206 of the *Penal Code* 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.

27. With regard to the offence of murder and proof of malice aforethought, the Eastern Africa Court of Appeal observed as follows in Rex v Tubere s/o Ochen (1945) 1Z EACA 63:

> " In determining the existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured."

28. In the same vein, the court in Hyam v DPP (1975) AC 55 held, inter alia, that the intent to do grievous bodily harm was sufficient to convict for murder. In the court's view:

> " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."

29. In our considered view, the nature of the injuries inflicted on the deceased show that the appellants acted with malice aforethought. Their conduct in picking the deceased from his house in the pretext that he was to be presented at a police station, the subsequent unlawful assault leading to his death without justification or valid excuse and committed with the necessary intention as defined by law, leads to only one firmly founded conclusion: that, by their conduct, the appellants had malice aforethought, and that they were therefore guilty of murder.

30. We form this view cognisant of the evidence disclosed in the post-mortem report prepared by Dr. Gayo of Star Hospital, Malindi, dated 3rd January 2017 and produced in evidence by PW5. The report disclosed three deep cuts to the head. According to the report, the 1st cut was inflicted on the deceased's left temporal region thereby dissecting the left ear; the 2nd cut to the right temporal - parietal region with underlying skull bone fracture exposing brain tissue; and a 3rd cut to the frontal bone exposing brain tissue with fracture to the underlying frontal bone, all leading to intracranial haemorrhage and rigor mortis. In conclusion, the doctor found that the cause of death was severe head injury secondary to head trauma inflicted with a sharp cutting object.

31. To our mind, the use of the sharp object(s), the parts of the body on which the fatal injuries were inflicted, and the multiplicity of such injuries, all pointed to the fact that the appellants knew that their act would result in death or serious bodily harm. Accordingly, their contention that malice aforethought was not proved does not hold, and, consequently, their ground of appeal in that regard fails.

32. Turning to the 2nd issue as to their positive identification, the appellants' case was that the evidence of their identification by PW1, PW2 and PW3 was uncorroborated and therefore unsafe to secure a conviction. It is instructive that the appellants, the deceased, PW1, PW2 and PW3 were neighbours who were well known to one another. The deceased was father to PW4, who had engaged the services of the 1st appellant to build him a house in respect of which he (the appellant) failed to account for

moneys entrusted to him for the project. In any event, PW1 PW2, and PW3 were at home with the deceased when the appellants came in the company of a fourth assailant and took the deceased away under their restraint. PW1, PW2 and PW3 saw, recognised and spoke to the appellants, followed them for a distance, then returned home on the deceased's assurance to PW1 that he was with the police (presumably with reference to the fourth assailant who was masked), and that she (PW1) had no cause to worry.

33. With regard to evidence of recognition, Madan, JA. in Anjononi and Others v The Republic [1980] KLR 59 had this to say:

> " ... This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

34. In the same vein, this Court in Peter Musau Mwanza v Republic [2008] eKLR expressed itself thus:

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

35. Likewise, the High Court of Kenya at Voi in AHM v Republic [2022] KEHC 12773 (KLR) correctly observed that:

> " ... the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before."

36. We take to mind the indisputable fact that the appellants were not strangers to PW1, PW2 and PW3, neighbours with whom they spoke before forcibly leading the deceased away in the pretext that they were taking him to the police. Moreover, the fact that they were neighbours well known to one another was not contested. Accordingly, we find no fault in the trial Judge's finding that the appellants were positively identified by recognition by PW1, PW2 and PW3. Consequently, their contention that they were not positively identified as the perpetrators of the offence with which they were charged does not hold.

37. On the 3rd and closely related issue as to whether the trial court was at fault in allegedly failing to consider the perceived contradictions and inconsistencies in the prosecution evidence, the appellants contended that "... the evidence from the post- mortem report coupled with the evidence that the deceased was burnt was contradictory, and that the circumstantial evidence that the appellants caused the injuries could not be the basis for [their] conviction" and that, consequently, their conviction was unsafe. Counsel for the appellants further cited the case of Ngala Chirongo Mwamee v Republic [2018] KECA 384 (KLR) where this Court explained the dangers of reliance on uncorroborated evidence of a prosecution witness.

38. This Court in Eric Onyango Odeng' v Republic [2014] eKLR cited with approval the Uganda Court of Appeal's decision in the case of Twehangane Alfred v Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 where it was held as follows:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

39. The principal role of this Court on first appeal is to step into the shoes of the superior Court and re-assess and re- evaluate the evidence adduced at the trial, and determine whether any alleged contradictions, discrepancies or inconsistencies exist and, if they do, whether they are prejudicial to the Appellant(s).

40. According to Black's Law Dictionary (2nd Edition), in practice, contradiction means "to disprove" or to "prove a fact contrary to what has been asserted by a witness". For instance, the evidence of a witness is said to be contradictory or inconsistent with that of another witness if its effect is to disprove or negate the veracity of that other's evidence.

41. In this regard, the Court of Appeal of Nigeria in the case of David Ojeabuo v Federal Republic of Nigeria {2014} LPELR-22555(CA) (Adamu, Ngolika, Orji-Abadua, & Abiru, JJ.A.) put it more succinctly and stated as follows:

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

42. The prosecution evidence adduced in proof of the fatal injuries inflicted on the deceased remained uncontradicted. Whether or not the deceased's body had also been burnt or had evidence of burns in addition to the fatal injuries inflicted with a sharp object may be viewed as minor discrepancies that do not displace the prosecution evidence on the main fact that the deceased was killed, the kind of weapon used, and the actual cause of death as disclosed in the post-mortem report.

43. Likewise, the circumstantial evidence that the appellants were responsible for the deceased's death in light of the fact that they took him away from his house in full view and in the presence of PW1, PW2 and PW3, and the fact that his lifeless body was found soon thereafter with injuries that led to his death, dislodges their unsubstantiated alibi defences. The appellants gave no evidence in support of their respective claims that they learnt of the deceased's death the following day, or that they had nothing to do with it. Accordingly, and as the trial court rightly concluded, their defences do not hold.

44. In addition to the foregoing, we need to point out the fact that, even though the onus of proof in criminal cases always rests squarely on the prosecution, the 'Last Seen' doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his death.

45. Explaining the application of the "last seen with" doctrine in Kamau v Republic [2024] KECA 1193 (KLR), this Court cited with approval the decision of the Supreme Court of Nigeria in the case of

Haruna v AG of Federation (2012) LPELR-SC.72/2010, (Pp.30-31, paras. F-B) where the Court explained that the doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus, where an accused person was the last person to be seen in the company of the deceased and the circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met his or her death in such circumstances. In the absence of a satisfactory explanation, a trial court as well as an appellate court will be justified in drawing the inference that the accused person killed the deceased.

46. In the same vein, this Court in the case of Kimani v Republic (Criminal Appeal 41 of 2022) [2023] KECA 1390 (KLR) held that:

> " The doctrine of 'last seen alive' is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before their death was responsible for his or her death and the accused is expected to provide an explanation as to what happened."

47. In Moingo & Another v Republic [2022] KECA 6 (KLR), this Court reiterated that:

> " The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased." See also Ngeno v Republic [2024] KECA 757 (KLR).

48. The record as put to us is unequivocal that the appellants were the last persons to be seen with the deceased under their restraint a few hours before his death. It is also noteworthy that, after they left the deceased's house in the pretext that they were taking him to a police station, there was no evidence of any report having been made or his having been presented and booked at any local or other police station. Being the last persons seen with him alive, the circumstantial evidence pointed inextricably to the appellants to extricate themselves from blame. In the circumstances, and by virtue of section 111 of the *Evidence Act*, the burden rested upon the appellants to explain what fate befell the deceased or how he met his death.

    Their hollow alibi defences that they learnt of the deceased's death the following day remain just that, failed hollow defences.

49. On the 4th issue as to the admissibility of the exhibits admitted in evidence, particularly the post-mortem report, the appellants' case is that the admission thereof violated sections 77, 33 and 48 of the *Evidence Act*. Section 77 of the Act provides, inter alia, that any report by a government analyst may be used in evidence in criminal proceedings and that the analyst may be summoned and examined on the subject matter of his report.

50. Section 33 of the Act relates to the admissibility of statements made by a person "whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable."

51. On the other hand, section 48 of the Act relates to the admissibility of opinions made by experts - "specially skilled" in law, science or art.

52. The appellants take issue with the admission of the post- mortem report in evidence even though learned counsel Mr. Ruttoh did not object to its production by PW5 at the trial. Neither did he cross-examine the witness. Their objection is raised for the first time on appeal to this Court. We find nothing on the record as put to us to suggest anything untoward with regard to its production, and no application was made to have the doctor who prepared it called for cross-examination.

53. This Court in Robert Onchiri Ogeto v Republic [2004]eKLR, while finding that a postmortem report was properly admitted in circumstances similar to those in this appeal, expressed itself thus:

> "The postmortem on the body of the deceased was done by Dr. Ondigo Steven. The postmortem report was produced as exhibit at the trial by corporal Ambani under section 77 of the *Evidence Act*. One of the grounds of appeal is that the trial court erred in receiving the postmortem report which was inadmissible...Section 77 (1) of the *Evidence Act* allows such document under the hand of a medical practitioner to be used in evidence. By section 77 (2) of the *Evidence Act*, the Court is allowed to presume that the signature to any such document is genuine and the person signing it held the office and qualification which he professes to hold at the time he signed it. The appellant was represented by counsel at the trial who did not object to the production of the post-mortem report under section 77(1) of the *Evidence Act* and the Court did not see it fit to summon Dr. Ondigo Steven for examination. Nor did the appellant's counsel ask for the calling of the doctor for cross-examination. In our view the postmortem report was properly admitted as evidence in accordance with the law."

54. To our mind, and on the authority of Robert Onchiri Ogeto v Republic (ibid), we find that this objection comes too late in the day and, consequently, this ground of appeal also fails.

55. Finally, the appellants fault the trial court for failing to consider that the investigations against them were not conducted as stipulated in Section 35 of the *National Police Service Act*, 2011. Section 35 of the Act outlines the functions of the Directorate of Criminal Investigations, namely to undertake investigations, apprehend offenders, maintain criminal records, detect and prevent crime. We hasten to observe that nothing turns on this 5th and final issue in the absence of any or any substantive submissions in that regard.

56. Having examined the evidence on record, the rival submissions, the cited authorities and the law, we form the considered view that the prosecution proved its case against the appellants beyond reasonable doubt.

57. In reaching this conclusion, we take to mind the decision of the High Court of South Africa in S v Sithole and Others 1999 (1) SACR 585 (W) at 590 where the court had this to say on the standard of proof in criminal cases:

> "There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus, in order for there to be a reasonable possibility that an innocent explanation which has been proffered

by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken."

58. In the same vein, Lord Denning in Miller v Ministry of Pensions, [1947] 2 ALL ER 372 had this to say:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

59. Having considered the record of appeal, the grounds on which it is anchored, the impugned judgment, the rival submissions, the cited authorities and the law, we reach the inescapable conclusion that the appeal has no merit and is hereby dismissed in its entirety. Consequently, the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 4th July 2023 in Criminal Case No. 2 of 2017 is hereby upheld on both conviction and sentence. Those are our orders. Dated and Delivered at Malindi this 11th day of April, 2025

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR