Nyamongo v Republic (Criminal Appeal 37 of 2019) [2025] KECA 639 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KECA 639 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 37 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

APRIL 4, 2025

BETWEEN

DAVID NGASURA NYAMONGO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nyamira (Maina, J.) dated 12th October, 2018 in HCCRC No. 69 of 2015)

JUDGMENT

1. The appellant, David Ngasura Nyamongo, jointly with another, Thomas Aranga Nyandibi, were the accused persons in the trial before the High Court in Nyamira High Court, Criminal Case No. 69 of 2015. The appellant was the 1st accused while Thomas Aranga Nyandibi was the 2nd accused (hereinafter, co-accused). They were charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offence were that on 15th May, 2010, at Obwari location in Nyamira District within Nyanza Province, now Nyamira County, they murdered Hellen Nyamongo (deceased).

2. They both pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, they were convicted and sentenced to thirty (30) years imprisonment. However, the co-accused escaped prison custody between the conclusion of the case and the reading of the judgment. He is still at large with a warrant of arrest out against him.. Nonetheless, the judgment issued was against both the appellant and the co-accused. So was the sentence of thirty years imprisonment.

3. The appellant was aggrieved by the conviction and sentence and has lodged the present appeal. In his Memorandum of Appeal and Supplementary Memorandum of Appeal, the appellant raised numerous grounds of appeal which in summary are that:

1. The learned trial judge erred in law and fact by failing to observe that the burden of proof was not discharged to the required standard.

2. The learned trial judge erred in law and fact by failing to properly analyze the entire evidence adduced which was based on circumstantial evidence that was of the weakest kind and a confession which was not recorded in accordance with the law.

3. The learned trial judge erred in law and fact by failing to note the discrepancies in the testimonies of PW1, PW2 and PW3, that could have established the precise time of the deceased's departure from her place of residence and time of death.

4. The learned judge erred in law and fact, by relying on data evidence that was not provided by Safaricom Service and the relevant Safaricom Service expert.

5. The learned judge erred in law and fact by relying on conjecture and speculation which were based on mere suspicion.

6. The learned judge erred in law and fact by failing to consider the appellant's defense.

7. The learned judge erred in law and fact when she failed to take into account the period the appellant spent in remand during sentencing, pursuant to section 333(2) of the *Criminal Procedure Code*.

4. Consequently, the appellant prayed that the appeal be allowed, the conviction quashed and the sentence be set aside.

5. At the trial court, the prosecution called a total of eight (8) witnesses. The evidence that emerged from the trial was as follows.

6. PW1 was Charles Ombati Nyambega, the deceased's brother. He testified that the appellant and the deceased were married for over twenty years but prior to her death, the two had differed and had been separated for about seven years. Their union bore six children, four girls and two boys. PW1 informed the court that before their separation, the deceased and the appellant had quarreled and fought, and the deceased went to seek treatment in Nakuru where PW1 lived at the time. She had injuries and her body was swollen from the beatings by the appellant. Later, the appellant went to Nakuru and confirmed that he had indeed quarreled and fought with the deceased over family issues and stated that he no longer wanted to see the deceased in his home. Despite PW1's effort to reconcile the two, the appellant was adamant that he no longer wanted to see the deceased in his home. Upon her recovery, PW1 advised the deceased to go and live with their mother in the village and that is where she resided for over seven years, till she met her death.

7. PW1 recalled that on 15th May, 2010, he returned to the village for a church function and met the deceased at about 9.30am as he got home. She was on her way to church. They exchanged pleasantries and agreed to meet later in the day. Thereafter, he attended the church function and afterwards, joined mourners in a nearby home where a certain lady had died.

8. At round 6.00pm, he returned home but did not find the deceased. She called PW1 at about 7.00pm and told him that she had gone to Ekerenyo to see Sarah, the wife to appellant's eldest brother, and would not return home. The following day, which was on a Sunday, he called the deceased to find out what time she would return home but his call went unanswered. Despite several attempts, he was not able to get her on the phone again. Concerned, even as he travelled to Mombasa, he asked his brother-in-law, Meshack Orenge (Meshack), to establish the whereabouts of the deceased and find out whether she was still in Ekerenyo.

9. On Tuesday morning, Meshack called him with the news that an unidentified body of a female had been found by the police somewhere near Ekerenyo. At his request, Meshack went to the mortuary and returned with the grim news that the body was , indeed, that of the deceased.

10. During cross examination, PW1 stated that the deceased told him of the constant death threats issued by the appellant to her, PW1 and their mother, Pacifica Gesare (PW2). But he never reported the issue to the police because he hoped that the deceased and the appellant would reconcile.

11. PW2 was Pacifica Gesare, the deceased's mother. She testified that she lived with the deceased in the village when she separated from the appellant because of being assaulted. But sometime in April 2010, the appellant sent two visitors to her home who told her they wanted to see PW1 since he had gotten them jobs. She identified the 2nd accused as one of the said visitors. She informed the visitors that PW1 was not home. They then asked to see the deceased and said that they knew where PW1 was. PW2 was home with her granddaughter, Rudia (PW3), and she asked her to take the visitors to the shamba where the deceased was at the time. The following day, the deceased left home for church and thereafter she received a call to go to a place called Kiogi, but never returned. She later learnt that the appellant had killed her. She also told the court that the deceased informed her that the appellant used to threaten her and tell her that he did not want her in his home.

12. During cross examination, she stated that when the deceased received death threats from the appellant, she reported it to the area chief and she also told PW1.

13. PW3 was Rudia Nyamboga, the deceased's niece. She confirmed PW2's testimony regarding the two visitors at PW2's home.

    Similarly, she identified the 2nd accused as one of the visitors. She testified that when she took the visitors to the shamba at around 9.50am, the deceased said that she did not know them and even asked for their phone numbers. However, they told her that they wanted to see PW1 and give him a present because he had helped them get jobs; and asked for his phone number. They also requested the deceased to give them her phone number, which she did. PW3 told the court that the visitors spoke to the deceased for about three hours in her presence and then left.

14. PW3 further testified that the following week on Saturday after church service, she was sent to Kioge to buy tomatoes where she saw the deceased talking to someone on the phone.

15. Jackline Moraa Nyamongo, the deceased's daughter testified as PW4. She recalled that sometime in August 2008, years after her parents had separated, the appellant went to her marital home to collect dowry and told her that since PW1 was encouraging the deceased to stay at PW2's home, either PW1 or PW2 was going to be killed; and if not, then it is the deceased who would be killed. Thereafter, on 18th May, 2010, her sister called and informed her that the deceased had been killed. She travelled home and went to view the deceased at the mortuary whereby she saw that she had injuries around the neck, head and stomach.

16. Duke Arasa Nyamongo, the deceased's son, testified as PW5. He told the court that his parents separated after the appellant married a second wife and thereafter, their relationship was not good and the deceased moved to live in the village with PW2. He testified about the intense animosity that the appellant felt towards their mother to the extent that he once caned PW5 and his brother for visiting the deceased.

17. He recalled that on the morning of 15th May, 2010, while he was at PW2's home, he saw the deceased who wore a full dress and a headscarf. On the burial date, 1st June, 2010, when he viewed the deceased body whilst it was in the coffin, he noted that she was wearing the same headscarf she had on 15th May,

2010; and that was when it occurred to him that the appellant may have been involved in killing the deceased. He stated that the scarf was light blue in colour and had specific marks that could not be replicated on a new scarf.

18. Dr. Harrison Onguti of Nyamira District Hospital was PW6. He testified on behalf of his colleague, Dr. Njuguna Mwangi, who conducted the postmortem. He told the court that the examination revealed that the deceased's right lung had blood clots; the heart was pale with posterior surface clots; the head had a cut on the front parietal bone and a wound on the right side; and the cervical vertebrae had a cut that extended to the spinal cord along six vertebrae, from the left side. The conclusion was that the deceased died due to the cut on the neck which extended to the nervous system resulting in haemorrhage and injuring the spinal cord.

19. Sgt. Anderson Kimathi, was the investigator in this case. He testified as PW7. He told the court that on 17th May, 2010, he was summoned by the DCIO and informed about a case that had been reported involving a woman who had been murdered within Ibacho village. On 19th May, 2010, the appellant made a report at the police station that his wife went missing on 15th May, 2010, and he had received information that there was a woman whose body had been found in a river. The appellant also told them that when he went to Nyamira District Mortuary, she found that the body was that of his wife.

20. During his investigation, he found out that the deceased went missing from her parent's home on 15th May, 2010. He took the deceased's and the appellant's phone number and forwarded them to CID headquarters and to Safaricom (K) Ltd, for purposes of being supplied with their call data. The deceased phone number was 0720xxxxxx, whereas the appellant's phone number was 0714xxxxxx. He got feedback and upon analyzing their call data, he noted that there was a particular number, 0725xxxxxx, which had been used to communicate with the deceased on 14th May, 2010, at 12.59pm; and on 15th May, 2010, at 01.29pm, 5.56pm and 6.35pm. His conclusion was that the prior to her death, the deceased communicated with the owner of that said number who he suspected was involved in her death.

21. He then interrogated the appellant based on his analysis and he informed him that he had no differences with the deceased prior to her death. However, this information was contradicted by the deceased's family members. He questioned why the appellant made a report on 19th May, 2010, that his wife was missing yet he was not living with her at the time. Further investigations revealed that on 19th May, 2010, at around 7.40pm, the owner of phone number 0725xxxxxx, communicated with the appellant whose phone number was 0714xxxxxx; which led him to suspect that the appellant could have been involved in the murder of the deceased.

22. Sometime in October, the 2nd accused was arrested for being in possession of a homemade gun. He was interrogated and it turned out that he was the owner of phone number 0725xxxxxx, which phone number was being trailed by police. At that point, it was confirmed that he was the same person that the police had been trailing for the murder of the deceased. The phone numbers of the deceased, the appellant and the 2nd accused were compared and it was noted that prior to the disappearance of the deceased, the 2nd accused was in communication with both the deceased and the appellant. After sometime, the 2nd accused admitted to killing the deceased and said that he was hired by the appellant to kill her because of a family dispute between them. PW7 passed this information to the DCIO, Chief Inspector James Tali, who recorded his confession and handed it over to PW7. He informed the court that the 2nd accused called a relative who was present when the statement was being recorded and produced the confession as evidence. He also produced Safaricom data report dated 28th May, 2010; 3rd June 2010; and 29th June, 2010, as PW Exhibit 3, PW Exhibit 4, and PW Exhibit 2-24 respectively.

These data reports showed the communications between the numbers of the appellant; the deceased and the 2nd accused as the investigating officer had testified.

23. The last witness was Chief Inspector James Tali. He testified that he was the one who recorded the 2nd accused's confession and he followed all the guidelines under the law, which included informing the accused of his rights that: he was entitled to have a witness present during the recording of the confession; and he was not obliged to say anything unless he wanted to. He further testified that the 2nd accused confessed that he received a call from the appellant, via phone number 0724xxxxxx, who requested that they meet urgently. When they met, the appellant told him that he wanted him to kill the deceased at a price of Kshs. 50,000/=. The appellant also directed him on how he would get to the deceased and identify her. He then lured the deceased together with his accomplice one Peter, and afterwards called the appellant to the scene of crime. After killing the deceased, he was paid Kshs. 32,000/= and there was a further payment that was pending at the time he was arrested. He produced the 2nd accused's confession as Exhibit 5.

24. During cross examination, he stated that the 2nd accused did not wish to call anyone but he chose an independent witness by the name Rioba (who was in custody for the offence of robbery with violence), to be present during the recording of the confession.

25. When he was placed on his defence, the appellant gave unsworn testimony and called no witness. He denied the charge and said that he married the deceased in 1979 and lived with her for twenty years; and bore six children. However, in 2002 she became unfaithful and was caught in the act by one of their children named Judy Moraa. He spoke to her and she confirmed the incident. He caned her and thereafter she left with all the children to go and live at her parents' home where she stayed for nine years before she died.

26. On 18th October, 2010, his daughter called and informed him that the deceased was missing; and wanted to know if she had gone to see the appellant or if the appellant knew where she was. Afterwards, he received information from his son-in-law, Jonnes Mongare, that there was a body that had been found at KIA area and taken by the police to Nyamira Police Station. Consequently, he went to the police station and confirmed that the body was that of his wife, the deceased; and wrote a statement at CID Nyamira.

27. The deceased was buried at his home on 1st June, 2010. But on 16th October, 2010, he was summoned to Nyamira Police Station whereby he was questioned on the death of the deceased; and on 18th October, 2010, he was charged for her murder. He added that the 2nd accused was related to him and that in 2012, he was charged and convicted for the offence of murder.

28. The 2nd accused also gave unsworn testimony and called no witness. He told the court that he was arrested on 20th October, 2010, for the offence of being in possession of a firearm; whereby he pleaded guilty to the charge and was sentenced to 10 years imprisonment. As he was serving his sentence at Kisii Prison, he got transferred to Kodiaga Prison but was later taken to Nyamira where he was charged with the murder of the deceased. He denied recording the confession and argued that the confession was made on 13th October, 2010, whereas he was arrested on 20th October, 2010. He also stated that phone number 0725xxxxxx was not his number and in addition, the Safaricom data produced was not original data and it was not signed.

29. The appeal was argued by way of written submissions by both parties. During the virtual hearing, learned counsel, Mr. Nyakeriga, appeared for the appellant and learned counsel Mr. Mwangi appeared for the respondent.

30. Counsel for the appellant, Mr. Nyakeriga, summarized the issues of determination as follows:

1. Whether the prosecution established the guilt of the appellant to the required standard.
2. Whether the appellant and the two accused persons haboured malice aforethought.
3. Whether the phone data evidence was admissible and was properly admitted as evidence.
4. Whether the evidence of an accomplice is admissible.
5. Whether the confession recorded on 13th October, 2010 is admissible.
6. Whether the learned judge took into account the time spent by the appellant in remand in accordance with section 333(2) of the *Criminal Procedure Code*.

31. First, counsel argued that the prosecution did not tender evidence that pointed to the culpability of the appellant and the 2nd accused in the murder of the deceased. According to counsel, the trial court lowered the standard of proof as none of the prosecution evidence was convincing as to the guilt that the appellant indeed murdered the deceased. Rather, the evidence only sought to establish that the appellant and the 2nd accused were "the principal actors in the murder."

32. Second, counsel argued that the prosecution evidence failed to satisfy the most important principles of evidence for an investigator namely, relevance and weight. In this regard, he submitted that the prosecution evidence was riddled with inconsistencies, contradictions, extravagant lies and evidence that was filled with malice and bad faith against the appellant, which the trial court failed to appreciate. He also argued that the prosecution admitted that there was no direct evidence linking the appellant to the deceased's death and relied on the case of Christopher Kabuye & Another vs. Republic, Mombasa HCRA No. 416 of 2010, whereby the court made reference to the decision in Kariuki Karanja vs. Republic [1986] KLR 190, wherein it was held that in order to justify the inference of guilt, the prosecution evidence must point irresistibly to the accused and the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

33. Counsel submitted that the learned judge failed to appreciate the ambiguous and disjointed prosecution evidence; and that the circumstantial evidence was not sufficient since the appellant was not placed at the scene of crime.

34. Counsel further submitted that the allegation that the appellant assaulted the deceased and even threatened to kill her on several occasions was not enough to sustain a conviction because: PW1's evidence that the appellant beat the deceased and said that he no longer wanted her for a wife is too farfetched; and there was evidence that the deceased left her parent's home on 15th May, 2010.

35. On the issue of confession by the co-accused, counsel submitted that the alleged confession was not subjected to and/or analyzed according to the provisions of the law to test if it met the required standard. For this proposition, he relied on the case of Ogero Omurwa vs. Republic, Nairobi Criminal Appeal No. 14 of 1979 and argued that there was no evidence that force was not used on the 2nd accused; and that the internal logic of the motive for the killing in the confession was weak.

36. Turning to the evidence of the phone data, counsel contended that the evidence was neither reliable nor credible as they left more questions than answers as there was lack of consistency in the various sets of data. For example, the calls and SMSes purportedly made by one subscriber at a given time and appearing in that log for that subscriber when traced, does not follow the natural chronology; such that a call made at 7.00am would have the next call appear thereafter; but this was not the case. He alleged that the cell phone data evidence was cooked and violated the provision under section 78A of the *Evidence Act*.

37. Overall, counsel argued that the appellant was entitled to the benefit of doubt and relied on the case of Philip Muiruri Ndaruga vs. Republic, Nyeri Criminal Appeal No. 76 of 2012, wherein it was held that a single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused person is enough to give him the benefit of doubt.

38. On sentence, counsel argued that the learned judge failed to take into account the time spent by the appellant in remand when sentencing him, contrary to section 333(2) of the *Criminal Procedure Code*.

39. Opposing the appeal, the State submitted that the appeal raises four main issues of determination as follows:

    a. Whether it was established to the required standard that the appellant committed the unlawful act of murder of the deceased.

    b. Whether the standard of proof was beyond reasonable doubt.

    c. Whether the confession recorded on 13th October 2020 was admissible.

    d. Whether the phone data was admissible.

40. First, Mr. Mwangi submitted that the prosecution proved all the elements of murder as provided for under section 206 of the *Criminal Procedure Code* as: the death of the deceased is not in dispute and the post mortem report (Exhibit 1), which was not disputed, indicated the cause of death as exsanguination associated with hemiplegia; malice aforethought was established by the prosecution witnesses who testified that the appellant assaulted the deceased, chased her from her matrimonial home and threatened to kill her, and this evidence was corroborated by the appellant during defense when he admitted that he canned her and chased her from the matrimonial home; and the 2nd accused confessed that the motivation for him to kill the deceased was that he was informed that he would be paid Kshs. 50,000/= and at the time of his arrest, he had already been paid Kshs. 32,000/=.

41. In this regard, counsel submitted that the appellant procured the services of the 2nd accused to kill the deceased and as such, he can be treated as the principal offender under section 21 of the *Penal Code*.

42. Second, counsel submitted that the prosecution proved its case beyond reasonable doubt even though the evidence was mainly circumstantial. He relied on the case of Sawe vs. Republic [2003] KLR 364, wherein the court laid out three tests that must be satisfied in a case whose evidence rests entirely on circumstantial evidence, namely: the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

> and 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.

43. Counsel argued that the confession that was recorded and admitted as an exhibit gave a detailed account of what transpired from the perspective of the 2nd accused and the call data confirmed that there was communication between him and the appellant. He also argued that PW5 testified regarding the headscarf the deceased wore on 15th May, 2010, and the fact that the deceased was buried while wearing the same headscarf; which suggested that the appellant was in custody of the headscarf that was last seen on the head of the deceased as he was the one that processed the body for burial from the mortuary. Based on these evidence, counsel opined that it fell upon the appellant to explain the circumstances that placed him as a principal offender to the crime.

44. Regarding the confession, counsel refuted the allegation by the appellant that it was inadmissible; and argued that PW8, who was in the rank of Chief Inspector, testified on how he followed the laid out procedure under section 25A of the *Evidence Act*, when he recorded the confession by the 2nd accused. He also argued that PW8 was extensively cross examined and the confession was properly produced as an Exhibit and properly weighed by the trial court which found that it was relevant as it connected the appellant to the death of the deceased.

45. Counsel submitted that the phone data was admissible as its production adhered to the provisions of section 78A of the *Evidence Act*. He submitted that it was noteworthy that the call logs show that the 2nd accused called the deceased several times, until when it is believed she was killed. Thereafter, the call logs show the 2nd accused switched to communicating with the appellant; which communication was not explained by the appellant and it is not known whether the 2nd accused and the appellant had a prior relationship before the events that led that to the murder of the deceased.

46. This is a first appeal. Accordingly, the role of this Court is to re- evaluate evidence, assess it, weigh it as a whole and reach our own independent conclusions. In doing so, we are required to remember that we neither saw nor heard the witnesses, for which we must make allowance. This duty has been stated numerous times by this Court. For instance, in Alexander Ogasia & 8 others vs Republic (1993) eKLR, the Court stated:

> " It is now trite law that "it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld" - see for example Okeno v Republic [1972] EA 32."

47. We have carefully evaluated the evidence before the trial court. We have also considered the appeal before us, the rival submissions of the parties and the authorities cited in support of the opposing positions with this obligation in mind.

48. The question that we must determine on this first appeal is whether the ingredients of the offence of murder were established. Under section 203 of the *Penal Code*, for the offence of murder to be established, the prosecution must prove three main elements. First, that the death of the deceased occurred, second, that the death was caused by an unlawful act or omission on the part of the accused person and third, that the accused person had malice aforethought in causing the act or omission that caused the death.

49. In Joseph Githua Njuguna v R [2016] eKLR, this Court identified the elements of murder thus:

> [Section 204 states that] any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are:
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> i. The death of the deceased and the cause of the death;
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> ii. That the accused committed the unlawful act which caused the death of the deceased; and
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> iii. That the appellant had harboured malice aforethought.

50. In the present case, the fact of the deceased's death is not disputed. It was clearly established by the evidence of the witnesses; and both the appellant and respondent accede to the fact. PW1 (the brother of the deceased), PW2 (the mother of the deceased) and PW5(a child of the deceased) and Dr. Njuguna

Mwangi (the pathologist) and even the appellant himself were all categorical that the deceased died and they saw the body. The postmortem report indicates that the cause of death was loss of blood and paralysis of one side of the body due to cut wounds on the frontal-parietal bone, cervical vertebral extending to the spinal cord on the left and an incomplete cord transection at 6 running from the left side.

51. The real question on this appeal, then, is whether it was established that the deceased's death arose as a result of a direct consequence of an unlawful act or omission on the part of the appellant, and, if so, whether the appellant committed the unlawful act or omission with malice aforethought.

52. Both parties are agreed that there was no direct evidence incriminating the appellant This is how the learned Judge analyzed the evidence:

> "In his submissions after the close of the prosecution's case, counsel for the state conceded that there was no direct evidence linking the accused persons to the death of the deceased. He conceded that the evidence was circumstantial. To convict on circumstantial evidence, "it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the acused and incapable of explanation upon any other reasonable hypothesis than that of guilty" See Kariuki Karanja v Republic [1986] KLR 190
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> Having applied the aforegoing test to the case, I am satisfied that the evidence adduced points irresistibly to the accused persons and that the inculpatory facts are incompatible with their innocence and incapable of explanation upon any other reasonable hypothesis that their guilt."

53. To reach that conclusion, the learned Judge relied on three sets of evidence: the evidence from the family of the deceased that the appellant used to assault and had threatened to kill the deceased; the identification evidence of PW2 and PW3 of the appellant's co-accused when he went to their home apparently on a reconnaissance tour; the call log data connecting the appellant, the co-accused and the deceased; and, finally, the confession by the co-accused.

54. In Kenya, the Supreme Court has comprehensively restated the principles applicable in considering circumstantial evidence in criminal cases in Republic vs Ahmad Abdolfadhi Mohammed & Anor 2019 eKLR as follows:

> "55. The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is "indirect [or] oblique evidence ... that is not given by eyewitness testimony." It is "[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact." It is also said to be "[e]vidence of some collateral fact, from which the existence or non- existence of some fact in question may be inferred as a probable consequence...."
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> [........
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> 59. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative, but also, in the words of the Indian Supreme Court, "the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established...." As was stated in the case of Kipkering Arap Koskei

> & Another v. R (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the "…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, …"
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> 60. As was further stated in the case of Musili v. Republic CR A No.30 of 2013 (UR) "to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt." The chain must never be broken at any stage. In other words, there "must be no other co-existing circumstances weakening the chain of circumstances relied on" and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. "Suspicion however strong, cannot provide a basis for inferring guilt."

55. The principles to be gleaned from this decision, in short, are that for circumstantial evidence to justify the inference of guilt, the evidence must irresistibly and unerringly point to the accused as the person who committed the crime; the incriminating factors must be inconsistent with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt; and the chain of events must be so complete that it establishes the guilt of the accused and no one else.

56. The question in the present appeal is whether this threshold has been met in linking the appellant with the death of the deceased. We have concluded that it has, for the same reasons the learned Judge did. First, we note that there was sufficient evidence not only showing motive of the appellant but outright threats – some of which were previously actuated through assaults on the deceased by the appellant.

57. Second, we also find the identification evidence corroboratively useful when seen in the totality of circumstances. PW2 and PW3 testified that they identified the appellant's co-accused when he went to their home and asked to see the deceased. They clearly remembered him since he spent quite some time with the deceased and they even saw him exchange numbers with her. It is true that no identification parade was conducted and so the probative value of the identification is significantly lower if seen singly. However, as the learned Judge pointed out, this identification evidence corroborates the other available evidence linking the appellant and his co-accused with the murder. It is particularly noteworthy that the identification evidence is consistent with the confession by the co-accused and the call log data.

58. We are further persuaded that the call log data, in fact, links the appellant, his co-accused and the deceased. In doing so, we have considered carefully the invitation of the appellant's counsel for us to declare that the call log data was inadmissible and "cooked" as he put it. We have declined that invitation for two reasons. One, we have noted that the call log data was, in fact, admitted into evidence by consent and without the objection of the appellant. It is therefore too late for the appellant to object to it as produced evidence. Second, contrary to what the counsel for the appellant argued, the call log data, in fact, shows communication between the appellant and the co-accused including on the very day the deceased disappeared. The call log data also shows communication between the co-accused and the deceased – including the call that PW3 says she saw the deceased taking at the market. Finally, the call log data evidence corroborates the confession evidence by the appellant's co- accused. We, therefore, reach the conclusion that the call log data was not only admissible but had very high probative value.

59. We reach the same conclusion regarding the confession by the appellant's co-accused. Despite the gallant attempts by the appellant's counsel to tarnish the confession, like the learned Judge, we are satisfied that it was a proper confession. First of all, we must point out that the confession was admitted

into evidence without a challenge by the appellant's co-accused. It is really not in the appellant's place to challenge its authenticity. Even then, we agree with the analysis done under section 25A of the *Evidence Act* by the learned Judge. We reach the conclusion that the confession was properly admitted in evidence.

60. Further, we do not agree with the appellant that the confession was not internally logical as to invite suspicion of its truthfulness. On the contrary, the confession is detailed, even graphic about how the appellant contacted the co-accused, hired him for the job of killing the deceased – promising him Ksh. 50,000 of which he paid Kshs. 32,000 at the time of the killing; and how the co-accused went about luring the deceased to her death.

61. We only point out one harmless error: given that the confession in this context amount to accomplice evidence as against the appellant, the learned Judge ought to have treated it as such. As we will demonstrate shortly, however, this would not have changed the analysis at all.

62. As appellant's counsel correctly pointed out, the confession evidence was, in this case, accomplice evidence as against the appellant and ought to have been treated as such. As against the appellant, the confession ought to have been accepted and analysed only within the strictures and limitations imposed by our decisional law on the same.

63. The correct judicial treatment of accomplice evidence in criminal cases was best summarized in Waringa -V- Republic [1984] KLR 617 where this Court down the following three principles in considering accomplice evidence:

    a. When considering the evidence of an accomplice, the first duty of the court is to decide whether the accomplice is a credible witness.

    b. If the accomplice evidence is credible, the court should consider if there is corroborating evidence. This step only follows if the Court finds the accomplice is a credible witness. The corroboration which should be looked for when considering the evidence of an accomplice is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.

    c. The corroboration must be independent evidence which affects the Accused Person by connecting him or her or tending to connect him or her with the crime.

64. In a later case, Karanja & Another -V- Republic [1990] KLR, this Court, while affirming the principles laid down in Waringa (supra), suggested that there may be circumstances where corroboration may be unnecessary:

> Although there may be cases of an exceptional character in which an accomplice's evidence alone convinces the court of the facts required to be proved, the uncorroborated evidence of such a witness should generally be held to be untrustworthy for three reasons. The accomplice is likely to swear falsely in order to shift the guilt from himself. As a participator in the crime, he is an immoral person who is likely to disregard the sanctity of an oath. He gives his evidence either under a promise of a pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution ..... An accomplice is of course a competent witness but corroboration should be found for his evidence before a conviction can be based upon it."

65. Hence, the law and practice on accomplice evidence as it exists in Kenya today is that while an accomplice is a competent witness, accomplice evidence should be received with great caution, and where uncorroborated, should have little weight. As such, our decisional law has clarified that while

a witness's status as an accomplice does not render his or her evidence unreliable per se, a trial court must exercise appropriate caution in assessing his or her evidence. In particular, when weighing the probative value of accomplice evidence, the trial court is obligated to carefully consider the totality of the circumstances in which the evidence was tendered. In particular, consideration should be given to circumstances showing that accomplice witnesses may have motives or incentives to implicate the accused person or to lie. This judicial treatment of accomplice evidence is based on the fear that an accomplice may be motivated to falsify his testimony in the hope of securing leniency for himself or herself. However, the dangers associated with accomplice evidence are greatly reduced or eliminated where the key aspects of the accomplice evidence are corroborated. The dangers are also substantially mitigated where, as here, the accomplice evidence is not testimonial but in the form of a confession which has not been incentivized by the state.

66. In the present case, as we observed above, the confession was merely corroborative of other existing evidence namely the call log data; the identification evidence; and the antecedents of the appellants i.e. in issuing threats and assaulting the deceased. Taking all these into consideration, we, like the learned Judge at the High Court, are left in no doubt that the circumstantial evidence here irresistibly and unerringly points to the appellant as a participant in the murder of the deceased; and the incriminating factors are inconsistent with his innocence, and incapable of explanation upon any other reasonable hypothesis than that of his guilt; and the chain of events are so complete that it establishes his guilt and no one else.

67. If we turn our gaze to the element of malice aforethought, like the High Court, we easily find that it was established. In this case, the appellant not only had an actual intention to kill the deceased as he severally verbalized, but malice aforethought is demonstrable from the manner in which the killing happened. As the postmortem examination showed, the deceased was literally hacked to death. We agree with the learned Judge that the evidence shows that the injuries inflicted on the deceased were so severe that it was a permissible inference by dint of section 206 of the *Penal Code* for the learned Judge to conclude that malice aforethought had been established. The fact that the deceased's body had multiple cut wounds on the frontal-parietal bone, cervical vertebral extending all the way to the spinal cord and an incomplete cord transection running from the left side was proof that her death was not only unlawful, but was caused with malice aforethought because at the very least there was an intention to cause grievous harm. This settles the third ingredient.

68. We finally turn to the appeal against sentence. Principally, the appellant complains that in sentencing him, the learned Judge failed to comply with section 333(2) of the *Criminal Procedure Code*. We disagree. This is what the learned Judge said in sentencing:

> Whereas the accused is to be treated as a first offender, the circumstances of this offence call for a custodial sentence. The accused persons schemed and planned the murder of a woman who was so gullible that she fell into their trap. They should not be allowed to get away with it. The accused has been in custody since 2010 and taking that period into account, I sentence him to serve thirty (30) years imprisonment."

69. The learned Judge was explicit in stating that she had taken into consideration the period that the appellant was in custody in imposing a sentence of thirty (30) years. It is implicit that the learned Judge would have imposed a higher sentence but for the fact that the appellant had already been in custody during the pendency of the trial. Consequently, the appeal against sentence fails as well.

70. The upshot is that the appeal herein is wholly without merit and is dismissed in its entirety.

71. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF APRIL, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

....

JUDGE OF APPEAL

JOEL NGUGI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR