Sinteya v Republic (Criminal Appeal 9 of 2020)
[2025] KECA 845 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 845 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 9 OF 2020

JM MATIVO, PM GACHOKA & GV ODUNGA, JJA

MAY 9, 2025

BETWEEN

HELLEN WAMBUI SINTEYA ..... RESPONDENT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against judgment and sentence in High Court of Kenya at Narok (Bwonwonga, J) delivered on 28th January 2019 in HCCR Case No. 7 of 2017)

JUDGMENT

1. The appellant, Hellen Wambui Sinteya, was charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on 20th day of January 2015, at Ngoringori Area in Narok West Sub- County within Narok County, the appellant murdered Roy Abraham (the deceased).

2. The prosecution's case was: that on 20th January 2015 at about 9.30pm, PW1, Gutej Singh, a farm manager in Simba Estate Limited, heard gun shots; that since the deceased usually came home drunk and would shoot in the air warning "this is my firearm, mind your business", he did not pay too much attention to the gun shots; that even on the material day, the deceased had shot in the air; that shortly after hearing the gun shots, the appellant, a frequent visitor to the deceased, went to his house and told him that the deceased had assaulted her in the house; that he noticed that the appellant had blood on her face and chest; that in the company of a security guard, he accompanied the appellant to the house of the deceased and upon arrival in that house, saw the deceased in his bedroom with blood oozing from his chest and his clothes bloodstained; and that by the side of the deceased was a gun.

3. It was PW1's evidence: that the appellant then collected her belongings and stuffed them in a bag and attempted to leave the camp but was forced back into the camp by people, who were outside the deceased's house; that the appellant did not explain what happened to the deceased and nobody asked

her what took place; that he directed the guards to switch on the generator and called the residents of the camp as he tried to seek help; that he then drove to Ngoringori Police Station and returned to the scene with police officers who upon arrival pronounced the deceased dead; and that he relayed the information to the owner of the farm, PW3, who eventually identified the body for the purposes of post mortem examination.

4. PW4, James Ole Mayo, who was a security guard at Simba Estate Ltd camp, stated: that he was on duty at 6.00pm when the deceased arrived with the appellant and proceeded to the deceased's house; that they had instructions to switch off the generator at 9.00 pm; that at about 9.30pm he saw the appellant, who was drunk, coming out of the deceased's house in a trouser and blood stained T-shirt and proceeding to PW1's house; that soon thereafter, PW1 asked him to join him to the deceased's house where they found the body of the deceased on the floor leaning on the wall with a gun some metres away; that the deceased used to carry a firearm; and that the deceased and the appellant used to quarrel and that even that night there was a loud quarrels before the gunshots.

5. PW2, Fredrick Ochieng Otieno, a cook at Simba Estate Ngoringori, testified: that on that day, he worked for the deceased who left him preparing food together with PW5; that the deceased returned drunk and in the company of the appellant, his girlfriend; that both of them were taking hard drinks; that the appellant had not become tipsy but was also drunk; that they prepared the food and placed it on the table; that by the time of leaving the deceased's house at 8.50pm, for their residences within the camp, the deceased was in the sitting room though he was not aware where the appellant was; that although the generator used to be switched off at 9.00pm, on this night, at 9.30 pm, the generator came on and he heard a lot of noise; that PW1 called the workers out saying that the deceased was dead; that in the company of PW5, he proceeded to the deceased's house where they found the deceased in a sitting position leaning against the wall in a pool of blood with his firearm by the bed and on the bed was a knife; that present were other co-workers as well as the appellant who was crying and had injuries; and that the gun belonged to the deceased and he was using it for security in the camp.

6. PW5, Jane Minayo's evidence was similar to that of PW2 save: that as they were leaving, she heard the deceased order: "Leave that place, what are you doing there?" but she was not aware where the appellant, his girlfriend, was; that ten minutes later she heard a bang and when she went out of the house, PW1 informed them that the deceased was dead; that when she entered the deceased's house, his body was leaning against the wall; that the appellant was a frequent visitor to the deceased and would spend the night with the deceased; and that she did not notice the gun that night because she was in a state of shock.

7. Sgt Kipkemoi Kimambai, (PW 7), the first police officer to respond to the call from Simba Estate farm stated: that upon arrival there, he found more than twenty workers surrounding the house; that in the sitting room were broken bottles and the appellant's face and her clothes were blood stained and she informed PW7 that the deceased had killed himself; that on top of the bed was a gun and the body of the deceased was on the floor next to the wall in a sitting position with blood oozing from the left chest; and that the bedroom was however not disturbed and the gun was four feet away from the deceased.

8. PW8, Cpl Paul Kiilu, attached to the scenes of crime Narok CID, took photographs of the scene the following morning. On his arrival he found the body of the deceased on the floor in a pool of blood. There was a gun on the floor 5 to 6 metres away. He proceeded to take 10 photographs. In his opinion, two bullets were fired, one directly on the chest of the deceased and another at the blanket.

9. PW9, Lawrence Kinyua Muthuri, the Government analyst, received a number of items from PW8. After analyzing them, he concluded that the DNA on the polo shirt, vest, seat cushion and towel were

similar to the blood sample drawn from the appellant while the DNA profile generated from the blood stains on the bed cover matched the DNA profile generated from the blood sample of the deceased.

10. PW6, Dr Titus Ngulungu, conducted post mortem examination on the body of the deceased on 28th January 2015 after the body was identified by PW3. His findings were that the body was cyanosed due to lack of oxygen and there was a gunshot wound below the clavicle on left chest above the nipple. The bullet entered through left chest and exited through the right buttock and fractured the 2nd to 8th ribs. There were lacerations on the diaphragm and the cardiac muscles were lacerated at the root of the aorta. There were fractures of the lumbar sacral region. In his opinion, the death was due to gunshot injuries to the heart, diaphragm, and lacerations of internal organs close to the gunshot wounds. According to him, the shot was fired almost at contact less 5 cm.

11. On 22nd January 2015 the appellant was examined by Hillary Kiptoo, PW11, a clinical officer at Narok referral Hospital on 22nd January 2015. The appellant complained of an assault by a person known to her who fatally shot himself on 20th January 2015. At the time, the appellant had a discolouration of the left eye and tenderness on the nasal bridge. She told Pw 11 that the deceased assaulted her and then shot himself.

12. PW10, Cpl Solomon Njoroge, the investigating officer, was on patrol on 20th January 2015 within Narok town with his colleagues when he received a report of a shooting incident at Simba Estate. Due to the poor state of the road, resulting from the rains, he arrived at the scene at 11.00pm and found the scene secured by AP Officers from Ngoringori AP Station. They were shown where the shooting took place in a residential house in the sitting room. In the sitting room they found the appellant seated bleeding from her nose and left eye and there were signs of struggle since the coaches, table and chairs were disturbed. The shot gun was one metre away from the bedroom door and two metres away from the shot gun lay the body of the deceased, beside the bed, smartly laid out in a pool of blood. On the bed was a spent cartridge with a hole through the bed cover and mattress, exiting at the other end. He took statements from the witnesses before moving the body to Narok Referral Hospital. From the scene he collected the gun, the spent cartridges and other items. In his opinion, it was not possible for the deceased to have shot himself using the shot gun.

13. In cross-examination, PW10 stated that although the gun was dusted for finger prints, the report therefrom was not received due to the fact that the police officer who did the dusting was involved in a fatal accident, a year later in 2016, before handing over the report. He stated that the deceased was not licenced to carry the gun but that the gun was licensed to his employer. The deceased was however using it to take care of the property and to scare animals and birds. He would, however, fire the gun outside the house when drunk.

14. When placed on her defence, the appellant gave sworn evidence and called no witnesses. She testified that the deceased was her boyfriend, whom she knew in 2007 and was the father of her two children. On 20th January 2015 the deceased rang her telling her to meet him at Ololulunga at 3.00 pm. She told him to await until she closed her cosmetics business and continued with her business until 5.30 pm, when she closed. She then went and met the deceased at Ololulunga. The deceased was, by that time, very angry with her for having not turned up at 3.00pm, to the extent that he was gasping for air. She entered the car and the deceased started the car and drove at between 120 KPH and 130 KPH warning her that she was going to die with him. On the way, to Simba Estate, the deceased drove the vehicle into a bridge so that both of them could die but the appellant got hold of his arm and persuaded him to go home and resolve the issue. He then braked instantly and as a result hit the bridge. While driving, the deceased was drinking his Smirnoff vodka, until they arrived at the camp in Simba estate, between 7.00 pm and 7.30 pm. By then, the deceased was still enraged. As they were alighting from the vehicle, he threatened her saying "Leo nitaona" before entering the bedroom and locking himself. He came out in

a towel, having changed his clothes and when he realised that the appellant had poured out his vodka, he became more annoyed, went into the kitchen, took another Smirnoff vodka and drank the whole of it before telling PW2 to go and get him two more bottles of vodka from his vehicle which PW2 did. By then, the deceased, completely drunk was drinking directly from the bottle. He then told his cooks to hurry up in cooking and leave his house and they complied. In the course of drinking the vodka the deceased got angry with the appellant, because the latter had hidden his Smirnoff vodka. According to the appellant, she did so because the deceased was so drunk that he was now staggering. At one point the deceased retrieved a bottle of Smirnoff vodka that the appellant had hidden and smashed it on the floor.

15. The appellant decided to use the visitor's room for the night, but the deceased grabbed her to stop her from entering that bed room and started slapping her and hitting his head against her face. As a result, she started to bleed from her nose until she became unconscious. On regaining her consciousness, she heard a snoring sound and when she went to the bed room, she saw the deceased at a corner of the bed room bleeding from his chest. She then tried to stop the bleeding using her hands and on failing to do so, went to call PW1 who informed her that he was used to the deceased firing his gun after drinking so he did not bother to find out what was going on when he heard the gun shot. Together they went back to the deceased's house where they found him lying at the corner of his bed room. PW1 then called the workers as well as the police. She was then arrested and taken to Narok police station. After mental assessment, she was charged with the offence in question. It was her evidence that she did not know how to use a gun and did not commit the offence.

16. Upon considering the evidence, the learned Judge found: that the loud bang which PW3 heard were the two gun shots, one of which fatally shot the deceased and that it was the appellant who shot the deceased; that contrary to the expectation in the case of Tekerali son of Korongozi & others v. Regina (1952) 7 EACA 259, that the appellant would, in her first report to PW1, mention the issue of suicide, the appellant did not do so only raised it as an afterthought in order to direct culpability away from herself; that the appellant's conduct of packing her belongings and leaving the camp and her running out of the house was consistent with her having shot the deceased; that the evidence of Dr Titus Ngulungu, PW 6, during the post- mortem examination, demonstrated that the deceased could not have shot himself; that this evidence was corroborated by the evidence of PW10, the investigating police officer; that there was no evidence that anyone else, apart from the deceased and the appellant, were in the house hence in terms of circumstantial evidence, it was only the deceased and accused who were in exclusive control of that house; that although PW1 to PW6 did not testify before the previous Judge, their evidence had "was true"; that although the fingerprint dusting report was important, it was not the only evidence against the appellant; and that, in the light of the circumstantial evidence which irresistibly pointed to her guilt, from the totality of the prosecution and defence evidence, it was the appellant who fired the fatal shot.

17. According to the learned Judge, the issue of the shot gun firing accidentally did not also arise since the report of the ballistic expert showed that the shot gun was in good general and mechanical condition and was capable of being fired. In his view, the appellant fired (which was the actus reus) the fatal shot and, in addition to the one that went through the mattress and the bed cover, directly into the body of the deceased hence was possessed of malice aforethought (mens rea) in terms of section 206 of the *Penal Code*. He did not believe the appellant's evidence that she did know how to use a gun and found her to be an intelligent but an untruthful witness.

18. In conclusion, the learned Judge found: that the prosecution proved the offence of murder beyond reasonable doubt and that the appellant was guilty of murder contrary to section 203 as read with 204 of the *Penal Code*. Pursuant to section 322(1) of the *Criminal Procedure Code*, he convicted the

appellant accordingly. After taking into account the aggravating as well as mitigating circumstances, the learned Judge sentenced the appellant to 20 years imprisonment.

19. Dissatisfied with the decision of the first appellate court, the appellant filed the present appeal based on the grounds that the learned Judge erred in law and in fact: in finding that the appellant committed the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* based on purely circumstantial evidence; in convicting the appellant for the offence of murder when there was utterly inadequate direct evidence to support the charge; by convicting the appellant when it had not been proved by the prosecution that the appellant committed the offence beyond reasonable doubt; in filling in the gaps and making up for the inadequacy and inconsistencies in the prosecution's case; in accepting and relying on evidence from the prosecution which ought not to have been received and/or admitted on record; by failing to appreciate that the testimony of the appellant was cogent, truthful and justified; by expressing personal opinions rather than being guided by the facts and evidence tendered; and by failing to determine the issues involved and evaluating the evidence on merits.

20. We heard the appeal on 26th March 2025 on the Court's virtual platform when the appellant was represented by learned counsel, Ms Penina Mwangi and Mr Mutai while learned counsel, Mr Omutelema, represented the respondent. Counsel relied entirely on their written submissions.

21. On behalf of the appellant, it was submitted: that that the death of the deceased was not a contested fact as it was due to gunshot injuries to the heart, diaphragm, and lacerations of internal organs close to the gunshot wounds; that there was no direct evidence presented to the court by the 11 prosecution's witnesses demonstrating a cause and effect relationship between the actions of the appellant and the deceased's death; that the witnesses were unable to prove that the appellant had the necessary knowhow to operate a firearm let alone the shot gun in question and that there was no evidence that the appellant handled the firearm on the night in question; that this would have been answered by a fingerprint dusting report which was not presented before the court; that the appellant's testimony that, upon being assaulted by the deceased, she lost consciousness while in the sitting room and upon coming to, discovered the deceased's body in the bedroom as he was dying, was not rebutted by any of the prosecution's witnesses; that the circumstantial evidence presented lacked the clarity and direct connection necessary to establish the appellant's guilt beyond a reasonable doubt; that the prosecution's reliance on circumstantial evidence, coupled with inconsistencies in witnesses' testimonies and the lack of conclusive forensic evidence, raised significant doubts about the accuracy and reliability of the conviction; and that the inability to definitively link the accused to the fatal shot cast serious doubt on the integrity of the prosecution's case.

22. In support of the submissions, the appellant cited: Abanga Alias Onyango v Rep CR. A No.32 of 1990 (UR) for the principles that determine whether the circumstantial evidence adduced is sufficient to sustain a conviction; and Mwangi v Republic [1983] KLR that in order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference.

23. The appellant further submitted: that the trial court noted in its judgment that there was no direct evidence that the appellant herein knew how to handle the firearm and that there was no fingerprint dusting report that would have determined who handled the firearm in question; that PW10 who testified about the angle and trajectory of the bullet, while stating that it was unlikely that the deceased shot himself, went ahead to demonstrate that it was indeed possible for one to shoot himself using the same firearm in question depending on how the firearm was held and positioned; and that, on the authority of the case of PON v Republic [2019] eKLR, Joan Chebichii Sawe v Republic [2003] eKLR and Mary Wanjiku Gichira v Republic, Criminal Appeal No 17 of 1998, suspicion alone, however strong, could not be the basis for a conviction.

24. It was the appellant's case that based on the lack of conclusive evidence, insufficiency of circumstantial evidence and the failure to establish guilt beyond a reasonable doubt, the verdict of guilty for murder was reached erroneously. We were urged to overturn the conviction and quash the sentence.

25. The respondent, on its part submitted: that the prosecution proved the case beyond reasonable doubt that the appellant murdered Roy Abraham; that the prosecution's case was, on the authority of the case of Rex v Kipkering Arap Koskei & Another 16 EACA 135, based on circumstantial evidence; that the deceased was last seen alive on 20th January 2015 in the company of the appellant in his house and later, the appellant was seen coming out of the deceased's house running towards PW1's house while wearing a blood stained t-shirt; that on 20th January 2015 around 9.00 pm PW2 and PW5 left the deceased and the accused in the house; that that the chain of events from the time the appellant was seen with the deceased and later found shot inside the bedroom was very explicit and elaborate; that PW4 overheard the appellant and deceased quarrelling and few moments later he heard the sounds of gunshots from the deceased's house; that from PW6's opinion, the cause of death was internal organs injuries especially to the heart, diaphragm and lacerations of organs due to single gunshot to the chest; and that there was clear evidence of the cause of death leading to a reasonable inference of an intention to cause death or to do grievous harm to the deceased.

26. On sentence imposed, the respondent submitted that it was appropriate in the circumstances as the trial court took into consideration the aggravating and mitigating factors. The respondent urged the Court to uphold the conviction and sentence and dismiss the appeal in its entirety.

27. We have considered the submissions made in this appeal. This being a first appeal, our duty, as a first appellate court is set out in Okeno v Republic [1972] EA 32 in the following terms:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA.
>
> (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's 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, see Peters vs. Sunday Post [1958] E.A 424."

28. The predecessor to this Court had itself appreciated that position in Pandya v Republic [1957] EA 336 when it held that:

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite

apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

29. In our view, the issues that fall for our determination are: whether the prosecution proved its case beyond reasonable doubt; and whether the sentence was appropriate. Of course, the determination of the second issue will only become necessary if we find that the case was proved. Section 203 the *Penal Code* provides that:

> " Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

30. In the case of Chiragu & another v Republic [2021] KECA 342 (KLR) this Court restated the ingredients of murder and held that:

> " The prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the appellant and that the appellant had malice aforethought as he committed the said act."

31. All the three ingredients must converge so that in the event that the prosecution fails to prove any one of them the charge of murder must fail.

32. In the case giving rise to this appeal, it is not disputed that the deceased passed away from gunshot wounds. It is however disputed that the death occurred as a result of the unlawful act or omission by the appellant and that the appellant had malice aforethought. In determining this appeal, we are expected to revisit the learned Judge's finding on these two aspects and make a finding whether or not those findings satisfy the standard of beyond reasonable doubt. We are aware that as regards findings of fact, our power is circumscribed to certain circumstances. In Mwangi v Wambugu (1984) KLR 453, this Court pronounced itself as follows:

> "A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

33. The same position was adopted by this Court in Dzombo Mataza v R [2014] eKLR where it was held that this Court can only interfere with findings of fact of the Courts below if it is shown that they considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence the court was plainly wrong. Therefore, this Court is entitled to interfere in cases where the findings of fact are perverse, and findings of a court may be perverse if: arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material; it is against the weight of evidence; the findings are outrageously illogical and irrational; or if arrived at on no evidence or on thoroughly unreliable evidence which no reasonable person would act upon. However, if there is some acceptable evidence on record which could be relied upon, the conclusions would not be treated as perverse, and the findings would not be interfered with, merely because the appellate court would have arrived at a different conclusion.

34. It is on the basis of the foregoing that we intend to examine and interrogate the findings of the learned Judge, as we are bound to do. Upon considering the evidence, the learned Judge took issue with the fact that the appellant, in her first report to PW1, did not mention that the deceased committed suicide and therefore, she must have raised it as an afterthought in order to direct culpability away from herself. The appellant stated that she lost consciousness when she was beaten by the deceased. When she came to, she heard snoring sound (must have meant groaning) and found the deceased bleeding in the bedroom. She then rushed to inform PW1 about the same. There is no evidence that, at that point, she examined the deceased to be able to tell what had happened to him. Coming from a state of unconsciousness, it was unreasonable to expect the appellant to be able to tell whether the deceased was dead and at that moment to conclude that he had committed suicide. This finding, in our view failed to take into account relevant material which was the appellant's ability to determine the cause of the deceased's injuries, considering her state of mind.

35. The learned Judge also found that the appellant's conduct of packing her belongings and attempting to leave the camp was consistent with her having shot the deceased. With due respect to the learned Judge, if the appellant wanted to leave the camp, she would have done so without making a report to PW1. After all, it was unlikely that anyone would discover the body of the deceased before morning since the residents of the camp were used to the deceased's unusual conduct of firing gunshots randomly at night. The fact that she reported the incident to PW1 was inconsistent with the conduct of a guilty person. This Court considered such conduct in the case of David Merita Gichuhi v Republic Nairobi Criminal Appeal No. 158 of 2003 and held that:

> "It is incredible that the appellant could have given his correct name to the members of the vigilante group near the home of the deceased when he was proceeding to her home to commit a crime. The fact that the appellant gave his correct name near the home of the deceased is a co-existing circumstance which destroys the inference that he was going to the home of the deceased on the night on 18th April, 1999 when Bakari met him...Lastly, Njambi (PW10) testified that she is the one who told the appellant about the death of Elizabeth Naymbura on 21/4/99 and that the appellant decided to remain at the home of the deceased and even slept there. The learned Judge concluded that the appellant went to the home of the deceased as a cover up. There was no evidence to support this finding. If the appellant had indeed committed the crime charged and had in fact seen by Bakari and the members of the vigilante group near the home of the deceased on the night of 18th April, 1999, the natural reaction would have been to go into hiding. The fact that he went to the home of the deceased after her death to console the family and even slept there is another co- existing circumstance which destroys any inference that he was the one who committed the offence. On our evaluation of the evidence we have come to the conclusion that the circumstantial evidence relied on by the trial Judge was so weak as to amount to a mere suspicion and could not have been a sound basis for a conviction."

36. The fact that the appellant decided to leave the camp after informing PW1 about the incident cannot be the basis for finding that she was responsible for the death of the deceased since, as held by Omolo, J (as he then was) in Kastelo v Republic [1992] eKLR:

> "Even if the appellants had run away from the police, as they alleged, mere running away from the police, in the Kenyan circumstance, cannot be conclusive proof that the person so running away is necessarily guilty of some crime."

37. At that time, she was not a suspect and there is no evidence that she was told not to leave the scene. As already stated, if the appellant wanted to run away from the scene, should had the opportunity to do so before informing PW1 as no one went to the scene after the shooting incident. The learned Judge's findings, in our view, was based on a misapprehension of the evidence.

38. It was further found that, since the evidence of PW6 was that the deceased could not have shot himself and since there was no evidence of a third party's involvement, circumstantial evidence proved that it was the appellant who fired the fatal shot that killed the deceased. PW6 was the doctor who carried out the post mortem examination. Our own re-examination of the evidence of PW6 does not reveal any demonstration that the deceased could not have shot himself. He could not have done so since he did not state that he was also a ballistics expert. What the witness stated was:

> " Not possible to tell some one right of (sic) left handed."

39. The evidence of PW6, in our view did not point to the culpability of the appellant. However, the learned Judge was of the view that this evidence was corroborated by the evidence of the investigating police officer, PW 10. Corroboration, as defined or stated in the Nigerian case of Igbine v The State {1997} 9 NWLR (Pt.519) 101 (a), 108:

> " ...means confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses".

40. This Court in Mukungu v Republic [2002] 2 EA 482, while citing Mutonyi v Republic [1982] KLR 2003, held that:

> " An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See Republic vs. Manilal Ishwerlal Purohit [1942] 9 EACA 58, 61."

41. PW10's evidence, as recorded at the material part, was that:

> " My height is 5 feet 8 inches which translates to 172 cm. Witness demonstrates whether he can shoot himself using shot gun exhibit 4 in both sitting and standing position. The bullet entry point on the body of the deceased was above the breast on his left side. The bullet exited on his right buttock. The bullet travelled and exited diagonally. If the deceased placed his thumb finger to fire from above his breast, the exit could have been on same side of left hand side of the body. One has to hold the gun units' pistol grip and in that position he can only fire using the thumb finger index finger could not reach the trigger. If the deceased held the pistol gun using his right hand, he could only fire using the thumb finger because the index finger could not reach the pistol grip."

42. It is clear that this witness was not called to testify as a ballistics expert. Although there was ballistics report, the author was not called to give evidence on it. In the absence of his pre-qualification as a ballistics expert, PW10's evidence, in so far as it tended to give an expert opinion as to whether the

deceased killed himself or not, was of little value. This Court, in In Mutonyi & Another v Republic [1982] eKLR, held that:

> "In Cross on Evidence 5th edition at p 446, the following passage from the judgment of President Cooper in Davie v Edinburgh Magistrates [1933] SC 34, 40, is set out as stating the functions of expert witnesses:
>
> > 'Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence.'
> >
> > So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:
> >
> > 1. Establish by evidence that he is specially skilled in his science or art.
> > 2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
> > 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.
> >
> > Judged by this standard, the expert evidence was most unsatisfactory. Superintendent Kariuki (PW 4) said he was attached to the Scenes of Crime Section at CID Headquarters, Nairobi. He made no attempt to prove that he was specially skilled in the forensic use of "APQ" powder, or to instruct the court in the relevant scientific criteria....We have come to the conclusion that it would not be fair to either appellant to treat any of the so called corroborative evidence as implicating him."

43. A consideration of PW10's evidence does not conclusively lead to the finding that the deceased could not have killed himself. Although he mentioned his own physique such as his height, he did not state that the deceased was of his height. His evidence, based on his abilities, in our view, does not pass the test of expert evidence, in order for his opinion to sway the court. In his own evidence:

> "If the deceased held the pistol gun using his right hand, he could only fire using the thumb finger because the index finger could not reach the pistol grip."

44. There was no evidence that the deceased was right handed or left handed. It was not his evidence that it was impossible for the deceased to use his thumb finger to press the trigger. The possibility that the deceased could have used his thumb finger was therefore not ruled out. These were all relevant matters that the learned Judge ought to have considered but he did not.

45. In our view, when the evidence of PW6 and PW10 is considered in totality, no conclusive finding can be made that the appellant fired the fatal shot or whether the deceased shot himself. At the risk

of repetition, it was clear from the evidence of the prosecution that the deceased was notorious for randomly shooting in the air and that is the reason no one in the camp bothered to leave their houses upon hearing the gun shot.

46. The learned Judge appreciated that the fingerprint dusting report was important, but found that it was not the only evidence against the appellant. In our view, in light of the inconclusive nature of the evidence of PW10, the report of the fingerprint dusting would have been very crucial to the prosecution's case. Without it, the evidence on record, being circumstantial in nature, could not prove beyond reasonable doubt that it was the appellant who pulled the trigger that led to the deceased's death. The law is that ccircumstantial evidence, though at times the best evidence, must be examined with circumspection before it can be relied upon to support a conviction. In the case of Sylvester Mwacharo Mwakeduo & Another v Republic [2019] eKLR this Court observed that:

> "Over the years, courts have set the threshold which has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. For circumstantial evidence to form the basis of a conviction several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of others. This test has previously been applied by this Court in a myriad of cases for instance in the case of Judith Achieng' Ochieng' vs Republic, Criminal Appeal 128 of 2006, this Court stated the law as follows:-
>
> > 'It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy four tests:-
> >
> > i. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established;
> >
> > ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
> >
> > iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else;
> >
> > iv. In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any reasonable hypothesis other than that of the accused's guilt.'"

47. In this case, the circumstances relied on by the learned Judge did not unerringly pointing towards the guilt of the appellant.

In the absence of the fingerprint dusting report, we cannot say that the circumstances, taken cumulatively, formed a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the appellant and none else. Based on the foregoing, the learned Judge ought not to have found that, in its totality, the incriminating facts led to the unimpeded conclusion of guilt and that there were no co-existent facts that were capable of explanation upon any reasonable hypothesis other than that of the appellant's guilt.

48. The learned Judge seemed to have been swayed by the strong suspicion that it was the appellant who fired the shot due to the evidence of past differences between her and the deceased. However as held in Joan Chebichii Sawe v Republic [2003] eKLR

> The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence."

49. In these circumstances, the "last seen with" principle does not apply. That doctrine as held in the case of Kimani v Republic (Criminal Appeal 41 of 2022) [2023] KECA 1390 (KLR):

> "...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."

50. In this case the appellant provided an explanation of what took place. It was not upon her to prove how the deceased met his death since the burden was not on her to prove her innocence. The learned Judge also failed to consider that the appellant sustained injuries. This was confirmed by PW11 when he examined the appellant. It was also confirmed by PW9's evidence who found that the DNA on the polo shirt, vest, seat cushion and towel were similar to the blood sample drawn from the appellant. The evidence of these two witnesses tallied with the appellant's defence that she sustained injuries as a result of being beaten by the deceased. This evidence, that was favourable to the appellant was not considered. In failing to do so the learned Judge failed to consider material facts. He thus arrived at the wrong findings and conclusion.

51. Having re-evaluated the evidence adduced, we come to the inescapable conclusion that the prosecution failed to prove that the death of the deceased was caused by the appellant. That being the case, we find merit in the appeal, set aside the conviction of the appellant in Narok High Court Criminal Case No. 7 of 2017 and quash the sentence imposed upon her. We direct that she be set at liberty forthwith unless otherwise lawfully held.

52. Those shall be our orders.

DATED AND DELIVERED AT NAKURU THIS 9TH DAY OF MAY, 2025.

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb.

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR