



REPUBLIC OF KENYA



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**Nakwai v Republic (Criminal Appeal 266 of 2018)
[2025] KECA 1347 (KLR) (25 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1347 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 266 OF 2018
JM MATIVO, PM GACHOKA & WK KORIR, JJA
JULY 25, 2025**

BETWEEN

JOHN EKULE NAKWAI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Eldoret (G. W. Ngenye-Macharia, J.) dated 24th October, 2014 in Criminal Case No.69 of 2010)

JUDGMENT

1. John Ekule Nakwai (the appellant), was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* in Eldoret High Court Criminal Case No. 69 of 2010. The information stated that on 30th September, 2010 at Murgusi Village, Ngenyilel Location in Uasin-Gishu District within the former Rift Valley Province, he jointly with others not before the Court murdered Sila Kipkoros Lagat. He pleaded not guilty to the charges and in the ensuing trial, the prosecution called a total of seventeen witnesses while his defence rested on his sole testimony. At the conclusion of the trial, he was convicted and sentenced to death.
2. Aggrieved by the said verdict, the appellant is now before this Court seeking to overturn both the conviction and sentence essentially faulting the trial Judge for: (a) convicting him on mere suspicion, yet the offence was not proved beyond reasonable doubt; (b) relying on circumstantial evidence; (c) failing to comply with section 200 (3) of the *Criminal Procedure Code*; (d) failing to consider there existed a grudge between the two families arising from a land dispute; (e) rejecting his defence without giving cogent reasons as provided in section 169 (1) of the CPC.
3. The prosecution called seventeen witnesses. Eunice Chemeli Lagat (PW1), the deceased's daughter testified that the appellant had been employed by the deceased to herd cattle lived in the same homestead with the deceased. She testified that the deceased had complained to her that whenever



he quarrelled with his wife, Mercy, the appellant would intervene and hold him as his wife, beat him up and for that reason he had decided to sack him. She also said that on 29th September 2010, the deceased's wife told her that she had quarrelled with the deceased and she vowed to report him to the Children's Department. She further testified that on 30th September 2010, the appellant was not on duty and she was informed by her cousin, Julius and an in law, Prisca, that the deceased could not be seen and there were blood stains at the deceased's house and towards the river. Later on, the deceased's naked body which had injuries on the legs and arms was found in the river. In cross-examination, PW1 confirmed that on 30th September 2010, the deceased's wife, Mercy, slept at Priscilla's house, who is her step mother because on 29th September 2011, she had quarrelled with the deceased.

4. Prisca Cherotich Moigei (PW2) testified that on 29th September 2010, Mercy (the deceased's wife) went to her house at 7.00a.m. and told her that she wanted to deliver a letter from the Children's Department to the Assistant Chief. The letter was in relation to her complaint that the deceased was giving her problems during harvest. The deceased's wife came to her house at 5.00 p.m. and spent the night at her house and left on 30th September 2010 at 6.00 am. indicating that she would be escorted home by a village elder who would sort out their problems. PW2 further testified that Mercy later returned to her house and informed her that she did not find the deceased at home. PW2 went to the deceased's home where she found two elders, two administration police officers and the appellant who subsequently escaped. She stated that at 1.00 p.m., they found the deceased's body at the river. It was naked and had injuries. Upon cross-examination, she stated that the deceased's wife told her that when she went home, she found some things had been burnt at her house but she could not state who had killed the deceased.
5. Julius Kiprop Brelei, (PW3), the deceased's brother testified that the deceased and his wife often quarrelled. On 28th September 2010, he went to the deceased's home and the deceased told him that he had been injured by the appellant and that he wanted to get rid of the appellant after paying him Kshs.3,000/= that he owed him. On the same day the deceased and his wife quarrelled in his presence over milk. He advised the deceased's wife to go and sleep at her in-law's house. PW3 further stated that on 1st October 2010, Prisca telephoned him and informed him that the deceased was not at home. Together with Prisca and a village elder they went to the deceased's house. They found some items had been burnt outside the house and there were blood stains inside the house. He left the scene and was later informed that the deceased's naked body was found in the river with head injuries and bruises all over. He reported the matter at Turbo Police Post. He also stated that he identified a partly burnt trouser, a rope, a jacket and a torn T-shirt which were found at the deceased's home.
6. Esther Chebet Ngetich (PW4), recalled that sometimes in August 2010, the deceased called him and informed him that the appellant had befriended his wife. She confronted both the appellant and the deceased's wife on the issue but they both denied the allegation. The deceased later told her that whenever he quarrelled with his wife, the appellant would hold him as his wife beat him. It was her evidence that she advised the deceased to pay the appellant his dues and send him home and the deceased promised to do so after the harvest. She also stated that she was called by Prisca and informed that the deceased had disappeared. When she went to the deceased's home, she found the body had been removed from the river and taken to the mortuary. She saw the body on 2nd October 2010 and confirmed that it had injuries. She also identified some burnt trousers as well as a rope which were removed from the deceased's house.
7. William Pyego (PW5), testified that on 30th September 2014 at 4.00 p.m., the deceased was working as a loader at a quarry. On 1st October 2010, he was informed by one of the workers that blood had been found at the deceased's home. On his way to the deceased's home, he met the appellant who informed him that the deceased had died. The appellant then told him that the deceased had been with Nyayo. PW5 spoke to Nyayo who informed him that the appellant should be arrested for killing the deceased



but he did not say whether he saw him kill the deceased. He then proceeded to the deceased's house where he saw blood stains and burnt clothes, but the appellant could not be found.

8. Philemon Sang (PW6), testified that he worked as a cattle herder for Esther Chebet Ngetich. On 1st October 2010 at 5.00p.m. as he went to sell milk, he noticed a stone on the way that had been disturbed and he saw blood on the path. He followed the blood spots up to the house of Esther where he found the appellant milking cows. On inquiring from the appellant about the blood, and the whereabouts of the deceased, the appellant stated that he knew nothing and that the deceased was still sleeping.
9. The next prosecution witness was Selina Jerubet Lagat (PW7). However, she was stood down because she could not speak Kiswahili. The record shows that she later testified as PW13.
10. Prisca Morojo (PW8), testified that she visited her sister Selina Lagat on 27th September 2010 at 4.00 p.m. There, she found her children Mercy and the deceased had quarrelled. She asked the deceased to settle the matter but he told her that he did not want Mercy. On that night Mercy slept at Selina's house. The following day, Mercy returned in the company of two people, one of whom was Nyayo, but she did not see the deceased on this day. She later discovered there were burnt clothes outside the deceased's house. She informed Selina and the appellant about the burnt clothes. They then entered the deceased's house but did not find him. A youth told them that he had seen some blood stains on the road. In the company of the deceased's wife, the appellant and an elder, the stains led them to the river where the deceased's body was found. In cross-examination, PW8 stated that on 30th September 2010, the appellant did not milk the cows and she had to do it herself the following day. On the same day, she had dinner with the deceased who soon thereafter left.
11. David Masinde Simiyu (PW9), a friend to the deceased confirmed that the appellant worked as a herder for the deceased. He stated that he last saw the deceased on 29th September 2010 at his home. He noticed he had scars on him and on enquiry, the deceased told him that the appellant had an affair with his wife and whenever he quarrelled with his wife, the appellant would intervene and hold him while his wife beat him and that the appellant also occasionally beat him and he therefore wanted to pay the appellant his Kshs.3,000/- so that they could part ways since the appellant was a threat to him.
12. PW9 also stated that the deceased used to take milk to their home everyday, but he did not see him on the fateful Friday. When he went to collect the milk, he was informed by the deceased's mother and his aunt that the deceased had not been seen. He proceeded to the deceased's home but the door was closed. Answering to questions on cross-examination, PW9 stated that he was with the deceased on 30th September 2010 and they parted ways in the evening after taking chang'aa at Sirengo's house. Both of them were drunk. He also met the deceased's wife with one Isaac. He stated that he suspected the appellant as the culprit because the deceased had previously complained about him, stating that the appellant would beat and tie him with a rope and that he was not aware of any inter-family dispute among the deceased and his step brothers.
13. Stephen Kipkolum Muigei (PW10), a step-brother to the deceased stated that on 29th September 2010 at 7.00 a.m. the deceased's wife went to his house and complained that she had quarrelled with the deceased and had reported him to the Assistant Chief. She spent the night in their home. The Assistant Chief sent her an elder and she left the next morning. He further stated that on 1st October 2010, he heard screams. He went to where the screams were coming from. There were blood stains which they trailed to the river where the deceased's body was found. The appellant who was the deceased's worker was nowhere to be seen.
14. Moses Naibei Misoi (PW11), testified that on 29th September 2010, the deceased's wife reported to him that she had conflicts with the deceased. He suggested that the matter be resolved the following Friday



- which was 1st October 2010. On 1st October 2010 he went to the deceased's home where he met his mother who informed him that the deceased had burnt his wives' clothes as he was drunk. They later saw some blood stains which led them to the river where the deceased's naked body was found. The suspect, who was the deceased's worker had fled.
15. Esther Rono (PW12), testified that on 1st October 2010 his worker Sang informed him that he had seen blood stains at Sila's house. She proceeded there where she met the appellant, Salina and Priscila. She also saw burnt clothes. She identified the burnt clothes in Court. The blood stains led them to the river where the deceased's body was found. PW12 returned to the deceased's house and peeped into the appellant's house and saw the deceased's blankets, mattress and clothes in the appellant's house. There was also a wet rope in the house. He identified the rope, blue jacket, red torn T-shirt, blue stripped shirt, grey trouser and black trouser as the items he saw in the appellant's house. He stated that the deceased suspected that the accused had a love affair with his wife.
 16. Selina Jerubet Lagat (PW13), testified that she was informed that the deceased's clothes had been burnt. Together with other persons, they went to the deceased's house. There, they found blood stains which led them to where the body of the deceased was in the river. The appellant then pretended to go to look for cows and he disappeared after the deceased's clothes were found in his house. In cross-examination, she stated that she did not witness the deceased's killing. She however, stated that although the deceased's wife did not kill the deceased, it is her who hired the killers since she had threatened to kill the deceased.
 17. Joseph Kipkotorch Sang (PW14), stated that he did not recall anything concerning the case.
 18. Earnest Muhanji PW15, testified that on 1st October 2010, one Murgus Ngenyilel, a village elder informed him that he was taking the deceased's wife home. He later told him that the deceased's wife's clothes had been burnt which he reported to the administration Police Officers. Later, a youth told them that some blood stains had been spotted. He was later informed that the deceased's body had been found in the river.
 19. Mwachiro Lalo No. 52565 (PW16), then stationed at Turbo Police Post testified that on 1st October 2010 at about 3.10 p.m., two men reported to him that a body of a male who was called Sila Koros Lagat had been found floating in Sosian River in Tapsagoi Location. The men had reported seeing blood stains inside and outside the deceased's home which led them to the river. PW16, together with colleagues proceeded to the scene. The body had been removed from the river. It had cut wounds on the head and bruises all over. The scene of crime officer took necessary photographs and they took the body to the Moi Teaching & Referral Hospital mortuary. Investigations revealed that on 29th September 2010 the deceased had quarrelled with his wife Mercy Wanjiru. The deceased's worker also went underground as soon as the body was found in the river. He also testified that he recovered two long trousers, a shirt, a t-shirt, a jacket and a wet nylon rope in the appellant's house which were identified as belonging to the deceased. He produced them as exhibits. He also produced as exhibit a burnt female skirt which was found outside the deceased's house. On 26th October 2010, he was informed that the accused had been arrested at Ziwa area by members of the public and taken to Moiben Police Station. He re-arrested him and charged him. In cross-examination, he stated that he was not the investigating officer. He said that he first visited the scene on 8th October 2010. He indicated that the appellant fled after the body was found in the river, and that the deceased's wife was released on instructions from the officer in-charge of the police post, Senior Seargent Kiprugut.
 20. Senior Seargent Kiprugut (PW17), then attached to Turbo Police Post testified that on 1st October 2010, he received information from PW16, PC Lalo that a body had been found in Kipkaren river. They arrested the deceased's wife and one David Masinde who was last with the deceased. He took



the deceased wife's mobile phone to Safaricom for investigations but it revealed nothing of use to the investigations.

21. On 10th October 2010, he visited the deceased's home in the company of PC Lalo. There were blood stains on the wall and bed. Outside the house were burnt box and clothes. They saw blood stains which led to the river. They suspected the appellant because he fled after the deceased's body was found in the river and also because the appellant was not in a good relationship with the deceased. The appellant was later arrested in Moiben area. He also stated that they recovered a paper bag from the appellant's house which had the deceased's clothes – that is two long trousers, a red T-shirt, a white striped shirt and a wet white rope. He identified the said items in court. In cross-examination, he indicated that he could not recall when he visited the deceased's home. He said that the deceased's wife and Masinde were released because there was no evidence to link them with the offence.
22. Doctor Walter Naliana (PW18), a pathologist at Moi Teaching & Referral Hospital conducted the post mortem on the deceased's body which was identified to him by Esther Ngetich and Justus Bwalei. He observed leakage around the neck with a mark of elevation on the right side. There was leakage around both wrist points. It had multiple bruises over both upper limbs. There was haematoma on the neck, lungs and left side of the brain. He formed the opinion that the cause of death was strangulation.
23. In his defence, the appellant gave a sworn statement. He denied killing the deceased. He stated that he was employed as a herder by the deceased's mother, PW13. He stated that there was a land dispute between the deceased and his brothers and wife and that PW13 had asked him to intervene but he had declined because it was a family dispute. Although PW10, a son to PW13 wanted him to leave employment, PW13 asked him to stay on.
24. The appellant stated that on 30th September 2010 the deceased wife quarrelled with PW13 but he never saw the deceased. He said PW13 told him to pack and leave but he declined stating that he would only leave with the deceased's permission. The following day he heard from neighbours that the deceased had been killed after a fight with family members. He stated that he wanted to confirm if it's true that the deceased was dead but PW13 warned him not to step into her compound. He fled to Esther's home where he stayed for five days.
25. The appellant also stated that he related well with the deceased but not his wife. It was his evidence that the deceased's wife was unwanted in the family because she was a Kikuyu by tribe and that she used to quarrel a lot with the deceased. He denied that he used to protect her whenever she quarrelled with the deceased. He also denied that he and the deceased's wife were involved in the deceased's death. He also denied that he fled after the deceased's death. He also stated that he was not aware that the deceased's body was found near the river. According to him, the deceased must have been killed on 30th September 2010 because he was with him on 29th September 2010.
26. During the virtual hearing of this appeal on 5th May 2025, the appellant appeared from Naivasha Maximum Prison. Learned counsel Mr. Kipsamo appeared for the appellant, while learned Assistant Director of Public Prosecution (ADPP) Mr. Lucas Tanui represented the respondent. Both counsel relied on their respective written submissions.
27. In his written submissions dated 15th September 2023, Mr. Kipsamo maintained that the prosecution did not prove its case beyond reasonable doubt. In particular, he argued that none of the 17 prosecution witnesses saw the appellant kill the deceased, therefore the Court relied upon circumstantial evidence. He also contended that the prosecution evidence was that the deceased was not in good terms with his wife who had issued death threats to him, and that, PW13 testified that the deceased slept at Kipkalum's house (her co-wife) and that she suspected that Kipkalum might have conspired with the deceased's wife to kill him. Counsel questioned why despite the said allegations including an alleged love affair



between the deceased's wife and the appellant, why the deceased's wife was not called as witnesses to shed light on those allegations. Counsel also questioned how Nyayo got to know about the deceased's demise before going to the deceased's home and why he implicated the appellant as the killer, yet he was never called as a witness notwithstanding the fact that his evidence would have been crucial because it would have shed light as to how he got know that the appellant had killed the deceased.

28. Counsel maintained that PW8 testified that the deceased quarrelled with his wife who went away and returned with two people who included Nyayo whom she claimed were police officers, and that they slept but in the morning, they did not see the deceased. Later, she discovered burnt clothes which she brought to the attention of the appellant and PW13 and upon entering the deceased house, they did not find him.
29. The appellant's counsel contended that there existed a land dispute between the deceased and other family members which might have created a motive for his killing, and that PW4's evidence was full of discrepancies and contradictions since she testified that she saw the deceased's burnt trousers and also saw a rope. However, upon cross-examination, she denied seeing the police remove the incriminating items from the deceased's house. Further, PW16 confirmed that the deceased's clothes together with a wet rope were in a nylon bag inside the appellant's house. However, no concrete evidence was tendered to prove that indeed the clothes belonged to the deceased since no single witness testified that they ever saw the deceased wearing the said clothes and the proper person to confirm whether the clothes belonged to the deceased was his wife who was never called as a witness.
30. Regarding the rope found in the appellant's house, counsel maintained that the appellant was a herder, therefore having a rope in his house was not something abnormal. Consequently, the trial court relied on mere suspicion and circumstantial evidence which was not based on evidence. To buttress his submission counsel cited the case of *Joan Sawe vs. R Cr. App No. 2 of 2011* in support of the proposition that suspicion, no matter how strong it may be cannot form the basis of a conviction.
31. The appellant's counsel further contended that PW4 testified that the police visited the appellant's house on 2nd October 2010 and took away the deceased's clothes. However, PW16 stated that he recovered the incriminating items from the appellant's house on 10th October 2010 and that PW16 also stated that he revisited the scene meaning that there was a first visit which begs the question of why they never recovered the said items during the first visit. The appellant's counsel maintained that the circumstantial evidence was not sufficient to sustain a conviction.
32. Regarding the mandatory death sentence, counsel maintained it was an error to impose a death sentence considering the unique circumstances of the case thereby resulting in the undesirable effect of over punishing the appellant. Therefore, counsel urged this Court to resentence the appellant under the Supreme Court decision in *Francis Karioko Muruatetu & Ano. vs. Republic [2017] eKLR* and that the period he spent in remand be taken into account taking into consideration that he was a first offender.
33. Learned counsel for the respondent Mr. Tanui, opposed the appeal through his written submissions dated 31st October 2023. He maintained that this case was based purely on circumstantial evidence and cited *R vs. Taylor Weaver and Donovan [1928] 21 CR APP R. 20*, a leading decision which underscored the probative value of circumstantial evidence and the Court's duty while considering such evidence. He also relied on this Court's holding in *Neema Mwandoro Nduzya vs. R [2008] eKLR* that circumstantial evidence is often the best evidence because it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics.



34. Mr. Tanui maintained that according to PW2, the appellant later escaped from the home when it was clear that the deceased was missing and some items were burnt outside his house. Counsel also pointed out that PW3 testified that they found a wet rope and the deceased's jacket and torn red T- shirt in the appellant's house and this prompted them to suspect him. He also stated that PW4 confirmed that she saw the burnt trousers which were removed from the appellant's house as well as the rope which had blood, while PW5 stated that as he was heading to the deceased's home, he met the appellant who told him to look for persons who were with the deceased last and thereafter when they tried to look for the appellant, he was nowhere to be seen and he abandoned the cows he was herding. PW13 informed the Court that the appellant pretended to go to look for cattle and disappeared because the deceased's clothes were found in his house. Counsel urged that it was PW9's evidence that he suspected the appellant because the deceased had complained to him that the appellant would hold him as his wife assaulted him and that the appellant would tie the deceased with ropes and beat him up.
35. Regarding the deceased's items which were found in the appellant's house, PW16 and PW17 who are Police Officers confirmed the evidence of PW12 and PW13 that the deceased's clothes and a rope were found in the appellant's house and that the appellant escaped as soon as the deceased's body was found in the river and was only arrested by members of public in Ziwa and there was no attempt by the appellant to explain the presence of the wet rope and the deceased's clothes in the house he was living in.
36. Regarding the ground that the provisions of section 200 (3) of the *Criminal Procedure Code* were not complied with, Mr. Tanui contented that the record is clear at page 66 of the typed proceedings that on 19th February 2014 directions were taken and the matter proceeded from where it had reached.
37. Addressing the argument that there existed a land dispute among the deceased's family members, Mr. Tanui submitted that there was evidence that the deceased's three families coexisted peacefully.
38. On whether the appellant's defence was considered, counsel submitted that the appellant's defence was duly considered and the trial court found that it did not dislodge the prosecution evidence because the prosecution evidence unerringly pointed to the appellant as the perpetrator of the offence, leaving no room for the co-existence of circumstances negating or weakening the inference that the appellant is the person who, of malice aforethought, committed the unlawful acts leading to the deceased's death; and that by escaping, he was deeply suffering from guilt.
39. Regarding sentence, the respondent submitted that the trial court considered all the aggravating circumstances including the deceased's badly mutilated body and it exercised its discretion and sentenced the appellant to death. In support of the foregoing, the respondent's counsel cited Bernard Kimani Gacheru vs. Republic [2002] eKLR where this Court held that sentence is a matter that rests in the discretion of the trial court, it must depend on the facts of each case, and an appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked material factors or took into account irrelevant factors, or acted on a wrong principle.
40. In this first appeal, the appellant challenges both the conviction and sentence imposed by the High Court. Our mandate in a first appeal under section 379 (1) of the *Criminal Procedure Code* is that this appeal is akin to a retrial because it involves a reconsideration of the facts and the legal principles relevant to the conviction and sentence. It is the appellant's expectation that we will conduct a thorough and fresh examination of the evidence, carefully weighing conflicting testimonies before reaching our independent conclusions. In doing so, we must remain aware that we did not have the opportunity to hear and observe the witnesses as they testified in order to gauge their demeanor, therefore, we must give room to that fact. (See Mark Oiruri Mose vs. Rep [2013] eKLR). Alive to the stated mandate, we have considered the record, submissions by counsel and the law. From the testimony



of the doctor who produced the post mortem report, there can be no doubt that the deceased's death was caused by strangulation and grievous bodily harm. The report states that there was leakage around the neck with a mark of elevation on the right side. There was leakage around both wrist points. It had multiple bruises over both upper limbs. There was haematoma on the neck, lungs and left side of the brain. Therefore, prove of death is not in doubt.

41. The question is who caused the death. It is common ground that there was no eye witness to the murder. A reading of the entire record shows that the appellant's conviction was purely based on circumstantial evidence. In a criminal trial, the prosecution evidence is crucial for establishing the accused's guilt beyond a reasonable doubt. This evidence, which can be direct or circumstantial, aims to prove every element of the crime and build a compelling narrative that supports the prosecution's case. The strength of the prosecution's evidence directly impacts the outcome of the trial, potentially leading to conviction or an acquittal.
42. Upon evaluating the evidence before him, the trial Judge had this to say:

The facts of this case are that key witnesses indicated that the deceased had complained that whenever he quarrelled with his wife, the accused would hold him as his wife beat him. He would also shield his wife from the deceased whenever they fought or quarrelled. Indeed, the accused could also occasionally beat the deceased.

In the period just preceding the deceased's disappearance, he had quarrelled with his wife. The latter had even sought refuge in a neighbouring home. At the same time, the deceased had asked the accused to leave employment because he suspected he had a love relationship with his wife. This then explains that there existed a grudge between the two—that is the accused and the deceased.

Immediately the deceased was killed, a rope was found in the accused's house alongside some deceased's clothing. Although it is not clear what was used to strangle the deceased, it is worthwhile to note that the rope was recovered when it was wet. The deceased's body was recovered in the river. Hence, the inference that this rope was either used to strangle the deceased or drag the deceased's body to the river cannot be far-fetched.

To cap it all, the accused went underground as soon as the deceased's body was found in the river. According to him, he had no grudge with the deceased. So, why did he flee at a time when the deceased's family needed him most? I only conclude that he fled because he knew what had killed the deceased. And he did not only know

what had killed him, but the guilty conscience in him compelled him to flee as he feared he could be arrested. If he was innocent, he ought to have remained behind and helped the police with investigations. Instead, he fled far from home to Moiben and was to be arrested close to a month later by the members of the public.

In my view, although there was no eye witness, the accused's behaviour after the deceased's death leaves no doubt in my mind that he had a hand in the death of the deceased. He cannot therefore claim innocence as he did in his defence. He was a friend turn foul, and must embrace the consequences of his action.

I need not say more about the motive that precipitated the accused to kill the deceased. I have already indicated the genesis of the grudge between the two which ultimately drove him into crafting the death of the deceased. So as to conceal the death, the accused threw the body into the river. Unfortunately, the same was recovered in a matter of hours.



43. The question before us now narrows to whether it was proved by way of evidence that it is the appellant who caused the deceased's death. As observed above, the prosecution evidence was purely circumstantial. Circumstantial evidence refers to indirect evidence that does not directly prove a fact but suggests a conclusion based on a series of related facts. Unlike direct evidence (such as eyewitness testimony), circumstantial evidence is inferred from the situation and surrounding facts. Decided cases have set out five essential principles for evaluating circumstantial evidence. These are: (a) the circumstances must be fully established; (b) the facts must be consistent with the hypothesis of the accused's guilt; (c) the circumstances should have a conclusive nature and tendency; (d) every possible hypothesis, other than the one that proves guilt, must be excluded; (e) the chain of evidence must be complete, leaving no reasonable doubt as to the innocence of the accused. The Supreme Court in *Republic vs. Mohammed & Ano.* [2019] KESC 48 (KLR) citing numerous decisions reiterated the said principles 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 eye witness 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 evidence of some collateral facts from which the existence or nonexistence of some facts in question may be inferred as a probable consequence

(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 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, ...

(68) As was further stated in the case of *Musili v. Republic* CRA 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.¹⁶ 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.”

44. This Court in *Mwangi & Another vs. Republic* [2004] 2KLR 32 stated that:

“In a case depending on a circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of events as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge.”



45. In summation, before a court can rely on circumstantial evidence to convict in a criminal trial, two key principles must be satisfied: (a) The proved facts must be consistent with the accused's guilt, and (b) the proved facts must exclude every reasonable inference except that of the accused's guilt. This means the evidence must point so strongly to the accused's guilt that it leaves no other reasonable explanation. Bearing in mind the above principles, we will now address the definitive question in this case, which is whether the circumstantial evidence adduced meets this high threshold. Determining this issue also requires us to consider both the prosecution and the defence case.
46. The appellant's defence is that there existed a land dispute between the deceased's brothers and his wife and that the deceased used to quarrel with his wife. He maintained that he related very well with the deceased. He denied ever protecting the deceased's wife when she quarrelled with the deceased. He denied fleeing after the deceased's death. He also denied that he was aware that the deceased's body was found near the river.
47. At the risk of rehashing the circumstantial evidence implicating highlighted earlier, the evidence tendered by PW1, PW3, PW4, PW6, PW9 & PW13 was that whenever the deceased quarrelled with his wife, the appellant would hold the deceased and let the wife beat the deceased and it is for that reason that the deceased had resolved to part ways with the appellant upon payment of his dues and indeed, before his demise, he had quarrelled with his wife resulting to his wife seeking refuge at PW2's house.
48. It is noteworthy that upon the body of the deceased being discovered in the river, on 1st October, 2020, the appellant disappeared in the pretext that he was going to feed cattle never to return. He was only apprehended by members of the public on 26th October, 2010, at Ziwa area who took him to Moiben Police Station. We also note that upon inspection of the appellant's house, PW17 stated that they recovered a paper bag from his house which had the deceased's blood stained clothes – that is two long trousers, a red T-shirt, a white stripped shirt and a wet white rope. The question is whether the appellant in his defence offered any explanation as to how the said items got to his house and why he escaped after the discovery of the body.
49. Two fundamental issues are discernible in this case. One is appellant's disappearance after the body was discovered, which in legal parlance is described as "the post offence conduct". The following remarks made by Rothstein, J in *R vs. White* [1999] 2 SCR on behalf of the majority of the Canadian Supreme Court, indicate the approach to the assessment of post-offence conduct as circumstantial evidence of guilt:
- “The principle that after-the-fact conduct may constitute circumstantial evidence of guilt remains good law. At its heart, the question of whether such evidence is admissible is simply a matter of relevance ... As Major J. noted in *White* (1998), ‘evidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence. In some cases, it may be highly incriminating, while in others it might play only a minor corroborative role’ ... As with all other evidence, the relevance and probative value of post-offence conduct must be assessed on a case-by-case basis ... Consequently, the formulation of limiting instructions with respect to the broad category of post-offence conduct is governed by the same principles as for all other circumstantial evidence.”
50. Actions such as attempting to conceal evidence, making false statements, fleeing the scene or fabricating an alibi can suggest that the accused is trying to hide his involvement in the crime. The Court must determine if the conduct is relevant to the crime and if it has probative value, meaning it tends to prove guilty. Inferences of guilt drawn from post- offence conduct must be reasonable and supported by evidence and not just speculative. The Court considers whether there are other reasonable explanations



for the conduct that don't suggest guilt. Our reading of the appellant's defence leaves us with no doubt that he never even offered plausible reasons for his post-offence disappearance. As was held in *Douglas Thiongo Kibocha vs. Republic* [2009] eKLR:

“When parliament enacted section 111 (1), above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters especially within his knowledge. Otherwise, the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. Section 111(1), above, places an evidential burden on an accused to explain those matters which are especially within his own knowledge. It may happen that the explanation may be in the nature of an admission of a material fact.”

51. The circumstantial evidence on the record when taken cumulatively shifted the evidential burden to the appellant to explain why he escaped after the body was discovered.
52. The second issue that cannot escape the attention of this Court is that after the appellant had fled, the deceased's clothes and a wet nylon rope which was suspected to have been used to strangle and/or tie up the deceased were found in his house. The appellant did not explain how the said items found themselves in his house. We are persuaded that the circumstantial evidence pointed irresistibly to the appellant as the offender and no other reasonable hypothesis can be made after properly analyzing the said evidence.
53. The other issue is whether motive was proved. There were allegations that the appellant had an affair with the deceased's wife, and any time the deceased fought with his wife, the appellant would hold the deceased as the wife beat him up. Lastly, there is uncontroverted evidence that the deceased was planning to fire the appellant. In our view, the prosecution evidence established a possible motive for the murder. As for the malice aforethought, it is settled law that it can be inferred from the way a murder is carried out. This means that the circumstances surrounding the killing, such as the type of weapon used, the number and nature of injuries inflicted, and the attacker's conduct before, during, and after the act, can provide evidence of the killer's intent and state of mind. (See this Court's decision in *Kaburu vs. Republic* [2024] KECA 536). Considering the totality of the evidence, and the cruel manner in which the murder was executed, we are persuaded that malice aforethought was proved to the required standard.
54. The other ground raised in this appeal is that the provisions of section 200 (3) of the *Criminal Procedure Code* were not complied with. However, it is evident from the record that on 16th April, 2014, Mr. Miyianda learned counsel for the appellant informed the trial court that the appellant wished to proceed with the case from the stage it had reached and following the said request, the trial court directed that the further hearing shall proceed from where the trial had reached before Azangalala, J. (rtd). Consequently, the appeal fails on that ground.
55. Arising from our analysis of the issues discussed above and the conclusions arrived at, we find no basis to interfere with the conviction. Accordingly, the appeal against conviction is dismissed.
56. Regarding the legality of the death sentence, Section 379 (1) (a) & (b) of the *Criminal Procedure Code* provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court as follows:

379. Appeals from High Court to Court of Appeal



1. A person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding twelve months, or to a fine exceeding two thousand shillings, may appeal to the Court of Appeal—
 - a. against the conviction, on grounds of law or of fact, or of mixed law and fact;
 - b. with the leave of the Court of Appeal, against the sentence, unless the sentence is one fixed by law.

57. In Francis Muruatetu & Another vs. Republic (Supra) the Supreme Court affirmed the importance of judicial discretion in sentencing. It emphasized that courts must weigh the specific circumstances of both the offender and the offence to ensure a just outcome.

58. It is noteworthy that the ruling on sentence was made pre- Muruatetu case and indeed learned counsel for the appellant during sentencing appreciated the mandatory sentence of death for the offence of murder. Be that as it may, he submitted that the accused was remorseful and he asked this Court to temper justice with mercy. The trial Judge in the ruling on sentence dated 24th October 2014 considered the appellant’s mitigation and noted the existence of aggravating circumstances in the gruesome manner in which the deceased died and held that the appellant must embrace the consequences of his actions. She therefore sentenced the appellant to suffer death.

59. From the learned Judge’s sentiments in the ruling on sentence, it is that the trial court did not pay regard to the plea in mitigation since its hands were tied and therefore it could not exercise its discretion in making an informed decision with regard to sentencing. We have considered the aggravating factors and weighed them against the extenuating factors in the case. Guided by the Muruatetu case (supra), we have no doubt in our mind that the death sentence ought to be set aside, which we hereby do. Accordingly, we substitute it with a prison term of forty (40) years from the date of his arrest. The upshot is that, the appeal against conviction is dismissed while the appeal against sentence succeeds only to the limited extent expressed above.

DATED AND DELIVERED AT NAKURU THIS 25TH DAY OF JULY, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCI Arb.

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.

