Odhiambo v Republic (Criminal Appeal E013 of 2023)
[2024] KECA 571 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 571 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E013 OF 2023

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

MAY 24, 2024

BETWEEN

MANFRED OTIENO ODHIAMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Mombasa (D. Chepkwony, J.) dated 30th September 2021 in High Court Criminal Case No. 45 of 2015)

JUDGMENT

1. The appellant, Manfred Otieno Odhiambo, was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, the particulars of the offence being that between 14th and 17th December 2015 in Likoni Sub-County within Mombasa County, he murdered SWM.

2. The appellant pleaded not guilty and, to prove its case, the prosecution called 9 witnesses. The deceased in this case was a 12 year old daughter of PW1. On 15th December 2015, PW1 returned home from work at about 8.00pm and found her 2nd born child at home. Upon inquiring from her where the deceased was, the said child informed her that she had likewise not found the deceased at home, although she found rice and beans already placed on the table. According to PW1, the deceased had not performed all the chores she was expected to do.

3. Upon inquiring from the shop-owner who had sold to the deceased the beans, PW1 was informed that the deceased was not seen at the shop after she bought the beans. Similarly, PW4, the landlord informed PW1 that although he had seen the deceased around 4 pm, he did not see her thereafter. The search for the deceased then commenced but by 4am, she had not been traced. The following day, the search for the deceased resumed at the ferry, the mosque and the police station without any success. In the search company, was the appellant who even gave out his phone number to the police for contact purposes at the time the report was made. At nightfall, it was decided that a door to door search be

carried in all the houses in the plot, and that PW4 would lock the entry and the exit. For that purpose, it was directed that no one should leave the plot. However, from the information PW1 gathered from PW4, the appellant approached him to permit him access. At around midnight the landlord's daughter, PW6, was heard screaming that the appellant had jumped over the bathroom roof and had escaped. Upon going to the appellant's house, the deceased's body was found under the bed with a lesso tied around her neck and body.

4. According to PW1, she had no problem with the appellant as her children used to go to the appellant's house and the appellant even had supper in her house on the day the deceased disappeared. She said that their houses were single houses situated within a Swahili type plot with houses facing each other and that, while hers was plot no. 1 next to the gate, the appellant's was plot no. 4. She stated that she had no keys to the appellant's house, and nor did the appellant have keys to her house.

5. On 15th December, 2015 at around 3.30pm, the landlord of the plot, Lucas Odhiambo Ondiso, who testified as PW4, was painting one of the rooms within the plot when he received a phone message from the appellant to collect rain water for him. PW4 took the appellant's jerricans and requested another lady tenant to fetch water for the appellant. As the lady was doing so, the deceased was next to their door also fetching water. It was his evidence that the appellant had just arrived half an hour before and had requested him for indulgence to allow him pay his rent in the next three days after getting money, a request to PW4 acceded. The appellant who looked tired then left saying he was going to rest. When he ran out of the paint, and as he was going to collect more materials, PW4 noticed that the appellant's door was locked and he assumed that the appellant was resting inside. However, after collecting paint and as he was proceeding back to the room he was painting, he saw the appellant standing at the door to the deceased's house. Thereafter, PW4 continued with his work with the door of the room closed due to the wind until 5.30pm when he went back to his house. He was therefore unable to tell what was going on.

6. At about 6.19pm, PW4 testified that he was informed by a tenant that the deceased, who had been sent to the shops by the appellant had not returned. From his own inquiries, PW4 learnt that the deceased had been sent to buy porridge by the appellant. The following day, he continued with his work and, between 1pm and 2pm, he heard the deceased's parents talking and when he inquired from them if the deceased had been found, the parents who were in the company of the appellant, informed him that she had not yet been found. Later the appellant requested him to open for him the gate at 4am since there was a job he had been called to undertake, a request which PW4 found strange since the appellant had never made such a request before. It was at that time that PW4 asked the appellant what he had been doing outside the deceased's house when he saw him the previous day and the appellant informed him that he had gone to collect his change. Suspicious about the appellant's request for the early egress from the plot before the usual gate-opening time of 6am, PW4 decided to exchange this information with PW2, who suggested that they should search the appellant's room, but PW4 was reluctant to do so.

7. It was his evidence that he was with PW2 until 11.30pm when he left to go to his room and found his children in the sitting room. When he explained to them the discussion he had had with PW2, they insisted that he should have gone into the appellant's house to search for the deceased just as PW2 had suggested. Leaving them there, he proceeded to the bedroom to sleep but, before he slept, his wife alerted him about the noise from his children that the appellant was escaping. When he got out, one of his daughters informed him that the appellant had escaped through the bathroom roof after pretending that he had gone there to bathe. Accompanied by PW2, PW4 proceeded to the appellant's room where they discovered the body of the deceased under the bed. By then the body of the deceased had changed and was emitting some stench while the mouth and the tongue were swollen and the teeth appeared

to have been burnt. There was fluid near the body, but the deceased had her pants on. The body was collected by the police after they made the report.

8. When, in the company of other neighbours, they went to where the appellant had landed outside the wall. They saw blood trails which they followed all the way to a place called Magongo Malenje. Along the way they came across a dera dress and a pair of shorts that the appellant had been wearing prior to his escape, both of which were blood stained. According to PW4, the appellant was staying with his wife and child, but the two had travelled to the village.

9. PW2, Thomas Joshua Were, a neighbour and a resident of the plot was on 16th November 2015 informed by his neighbour Mwangi, the deceased's father that the deceased's whereabouts were unknown since she had not spent the night at home. PW2 reassured the father that the deceased, at her age, could not have gone far, and that she must have been with her neighbouring school mates, and he proceeded to work. In the evening when he returned, PW2 found the deceased still missing, and was informed by PW1 that the appellant had sent the deceased to the shop to buy him cigarettes or flour. Since it was late, it was decided that the search for the deceased resumes the following morning. It was his evidence that on the same day in the evening, the landlord informed him that the appellant had asked for the gate to be opened for him at around 3am because he was going somewhere. At around 1am, there was a loud scream from the landlord's daughter that the appellant was running away. When the neighbours woke up, they were shown the place where the appellant had escaped from. Upon going to the appellant's house, they found it locked and, when the landlord opened the door, they noticed that the bed had been shifted and that under, the bed, was the body of the deceased lying between the wall and the bed. PW2 then called the police who arrived at around 3pm and took the body away.

10. PW5, Robert Aoko, another neighbour, testified that, on 16th December 2015 at 7am, he met the deceased's parents in the company of the appellant outside the deceased's house looking sad. Upon inquiring what the problem was, the appellant informed him that the deceased had disappeared since the previous day. When he asked the attire that the deceased had before she disappeared, the appellant informed him that she had a lesso at the time he saw her, and that he had reported the matter to the police. The appellant then informed him that the deceased had gone to his house and asked him for Kshs 10/- to buy porridge but he had given her Kshs 50/- and had not seen her thereafter. According to PW5, the deceased's mother disclosed that there was a young boy of the deceased's age who the deceased liked walking with. There was also another young boy called Malwa the deceased would occasionally be with. However, their search at Malwa's house did not yield any positive results and they returned. The appellant asked the deceased's father to buy him cigarettes.

11. While they were pondering where the deceased could be, the appellant said that the deceased would be found as she was just probably around 100 metres away. This statement was repeated by the appellant later that night when the neighbours were still wondering where the deceased was. At midnight, PW5 heard noise and a knock on his door and recognised the voice of PW6 shouting, "we have seen him! We have seen him! He is escaping, open the door". PW6 was knocking on everyone's door asking them to open. PW5 went outside and found PW4, the deceased's father, PW2 and other neighbours. PW6 then informed them that they had seen the appellant climb over the bathroom and jump out of the compound. They then proceeded to the appellant's house and found it locked.

12. Upon the door being opened they were met with a bad stench and when the bed was pulled, the body of the deceased was found in pants on the floor swollen. Also found was a Maasai sword in the mattress. PW5 then got in touch with the police who later collected the body. The following day, they went round the plot and found the appellant's slippers where he had landed and saw blood stain trails which they decided to follow until they came upon a pair of shorts the appellant had been wearing. They

also found a blood stained dera not far from the pair of shorts. They returned home and informed the police what they had found, and the police went and retrieved the items.

13. Shortly thereafter, PW4 received information from the police that someone called Manfred was at the station alleging that he knew PW4. PW4 confirmed to the police that the appellant, who was later transferred to Likoni Police Station, was known to him. At the police station, he confirmed that the appellant was injured on his left hand. According to the witness, they had stayed with the appellant for 4 years and their wives were friends.

14. PW6, Roda Awuor Odhiambo, testified that she had also learnt of the fact that the deceased had gone missing. On the morning of 16th December 2015, she was on her way to work when she met the appellant, PW5 and the deceased's mother standing at the door of the deceased's house next to the gate, planning how to carry on the search for the deceased. Upon her return in the evening she was informed that the deceased had not returned. At about midnight after she had finished plaiting her sister's hair, the sister decided to take a bath and, while escorting her sister to the bathroom, they saw the appellant leaving the bathroom and enter his house. After the sister had finished taking a bath, her child woke up and, while they were watching television as the sister was breast feeding the child, she heard a loud bang from the bathroom and when she went out, she saw the appellant on top of the roof of a bar neighbouring their plot. On seeing the appellant, she shouted that the appellant was escaping and called her father, PW4 whereupon PW4 and PW2 came out and proceeded to the appellant's house while she followed from behind. She then heard PW4 say "ameuwa" meaning "he has killed" but apart from seeing the legs, she did not get into the house. According to her, she had known the appellant for 4 years and, although the appellant was married with a wife and a child, the wife and the child were away. She stated that many people used to go to the appellant's house, including children whom the appellant's family welcomed.

15. PW3, Sgt John Mwashigadi, was on 17th December 2015 at about 3 pm at Timbwani Administration Police Post when a member of the public went running and reported that he had seen someone who appeared to have gunshot injuries in his hand. Together with his colleague APC Stephem Wambua, they proceeded to the road where a reportee had informed them that he had seen the said person. As they neared a catholic church, they met an old man who pointed to the person he was talking about. Upon inquiring from the person where he was going, he informed them that he was going to the hospital having fallen in the house and sustained injuries. PW2 saw that the person had a deep cut injury on his left hand. They then took him to the Police Post and upon further interrogation, he revealed his name as Fred Otieno and that he had escaped from home because a child had been found dead in his house and he feared being beaten by members of the public. The matter was then relayed to Likoni Police Station whose officers picked up the appellant. In cross-examination, he admitted that the OB showed that the appellant presented himself to Timbwani Administration Police Post.

16. PW9, Dr Ngali Mbuuko, carried out a post mortem examination on the body of the deceased on 22nd December, 2019 after the body was identified by Samwel Mwangi and Willy Mwangi Munir. In his examination of the body that was in a state of decomposition, he noted deep cyanosis of the tongue, lips and nail; bruises on the chin; blood material around the vaginal opening; and tears in the vaginal opening and the walls of the vagina which were contused. He formed the opinion that the cause of death was asphyxia consistent with manual smothering. He took two specimens for analysis and handed them over to police officer for onward transmission to the government chemist. In cross-examination, he stated that it was possible that the deceased had been sexually assaulted.

17. PW8, Lawrence George Oguda a Principal Chemist at the Government Chemist department examined the items submitted to him by PW7 and, in his opinion, the white short and yellow dress tested positive

for human blood. The white short generated a DNA profile that matched the profile generated from the referenced buccal swab of the appellant.

Although the high vaginal swab of the deceased generated a male profile, it was not the same as that of the appellant.

18. PW7, IP Yusuf Ibrahim, who at the time was in charge of crime investigations at Likoni Police Station was the investigations officer. He narrated how on 17th December 2015 he was called by the OCS and informed that a murder had occurred in Likoni area, which he was requested to investigate. It was the case of the murder of SM. He went through the OB and confirmed the report that the body had been found under the bed in the appellant's house. He proceeded to the plot in question and interrogated the residents and, when he went outside the plot to the place where the appellant was alleged to have landed after jumping over the perimeter wall, at the foot of the wall, he found a white pair of shorts which were identified by PW4 as belonging to the appellant and a blood stained yellow dress. According to him, there was a lot of blood. He took possession of the said items for the purposes of submitting them to the government chemist for analysis. He then proceeded to the Coast General Mortuary where he found the parents of the deceased and saw the body of the deceased.

The body had several marks on the cheeks and her tongue had turned black. He asked the doctor who performed the post mortem examination on the body to extract for him the vaginal swabs of the deceased's underwear from the deceased's pant which was done. He took the pair of white shorts, the yellow dress, vaginal swab and buccal swab from the appellant, who had been arrested by Administration Police from Timbwani, to the government chemist to ascertain the swabs in DNA with samples collected from the deceased. Since at the time of his apprehension, the appellant was injured, he was taken to the hospital for treatment. According to his investigations, the appellant was staying in his room alone although earlier on he had been residing with his wife and child who had gone to the village. After investigations, he charged the appellant with the offence in question.

19. At the close of the prosecution's case, the appellant was placed on his defence. It was his evidence on oath that he had stayed in the plot for about 5 years during which period he had a good relationship with the family of the deceased whom he would regularly visit and share meals with.

According to him, he was not in the plot when the deceased disappeared on 15th December 2015 since he always used to leave the plot at 5 am till 5.15pm. That day he was not in the plot the whole day till around 5pm. He met PW4 opposite his door renovating the room opposite the one he occupied. After collecting his key from PW4 he entered his house. That evening he stated, never saw the deceased. The following day he returned to the plot at 8pm and found a group of neighbours in the plot discussing the disappearance of the deceased and he joined them. He agreed to accompany the deceased's father to the police station to report the incident after which they proceeded to the ferry and to Shelly Beach and to Inuka and Mtongwe. They returned between 8pm and 9pm and found the deceased's relatives gathered outside the house where he joined them and even shared food with the family of the deceased after which he excused himself to go and sleep upon taking the keys to his house from PW4. As he was undressing to go and take a bath, PW6 went and told him in Kiswahili language: "Baba Frezil unakaa kwako hivi na S ameuliwa na kufichwa kwa kitanda chako huko nyuma" translated as "Father to Frezil, how can you be sitting here when S has been killed in your house and hidden behind your bed".

20. Upon hearing this, he got shocked and after a while checked and saw the body of the deceased besides his bed. He decided to leave and go to report the matter to the police station and exited through the door near PW6's house which was still open. In his evidence he sustained glass cut injuries on his hand as he hurrying to go to the police station. However, he was unable to reach the police station that night

and fainted from the said injuries. The following morning at about 8am he was able to reach the police station by himself.

21. It was his evidence that PW4 ought to have been investigated and his samples taken in order to confirm his involvement in the murder of the deceased since he was in the plot when the deceased disappeared and had the keys to the appellant's house. According to the appellant, it was possible that it was PW4 who informed the neighbours and the deceased's family that the deceased was in his house since it was his daughter, and PW6, had told him that the deceased was in his house. According to him, he had a disagreement with PW4 over rent payment. At that time, his wife and son with whom he was staying had travelled home 5 days before the incident. He denied that he escaped over the wall, but admitted that, when he got to Timbwani AP Camp, he had an injury. According to him, he was unsettled after PW6 disclosed to him of the presence of the body in his room, hence his decision to flee after being informed by PW6 that the neighbours wanted to beat him.

22. In her judgement, the learned Judge (Chepkwony, J) found that the death of the deceased was proved by PW1, PW2, PW3, PW4, PW5 and PW6 and the appellant confirmed that the body of the deceased was inside his house. She also found that the deceased died as a result of an unlawful act from the evidence of PW9 as corroborated with that of PW4, PW5 and PW7. It was her finding that the circumstantial evidence that linked the appellant to the deceased's death were: the fact of the finding of the body in the appellant's house; the escape of the appellant from the plot just before the body was found and after the neighbours decided to carry out a door to door search; the fact of appellant having sent the deceased to buy him something on the day before she went missing meant that he was the last person to have been seen with the deceased; and the evidence of PW4 that, on 16th December 2015, the appellant asked him to open the gate for him at 4am since he had a job he had been called to do earlier than the usual gate opening time. According to the learned Judge, the appellant did not address these issues in his defence.

23. While appreciating that there was no direct evidence against the appellant, the learned Judge found that, from the circumstances enumerated above, the conduct of the appellant was suspicious. The learned Judge also noted that the appellant spent the night in his house before the body was found. Accordingly, the learned Judge found that the appellant knew that the body was in the house since there was no evidence that any other person slept in his house on the day the deceased went missing. In her judgement the principles guiding the finding of guilt on circumstantial evidence as espoused in the cases of *R v Kipkering Arap Koskei* [1949] EACA 135; *Sawe v R* [2003] KLR 304; and *R v Taylor Weaver & Donovani* [1928] 21 Cr Appr 205, were satisfied and that there existed inculpatory facts that were incompatible with the innocence of the appellant and incapable of any explanation upon other reasonable hypothesis other than that of guilt.

24. She found that the appellant's defence was weak and was a belated attempt to try and cast aspersions on PW4. Notwithstanding that the DNA was exculpatory, the learned Judge was of the view that the DNA swab was not the only evidence to prove the offence of murder of the deceased by the appellant or any other person since it was possible that the offence could have been committed jointly with others not before the court. She found that it was only the appellant who lived in that house and no one else was seen going into the said house during that period and that there was no evidence that the house was broken into and that there was no corroboration of his evidence that the keys would be left with PW4. In any case, the issue was not put to PW4 in cross- examination. The learned Judge found that the appellant, and possibly together with another or others known to him, murdered the deceased in an effort to conceal the sexual attack on her. In her conclusion, the circumstantial evidence against the appellant was consistent and credible to support a verdict of guilty as charged. She convicted the appellant accordingly. After considering the social inquiry and pre- sentencing report as well as the

appellant's mitigation, and taking into account the Supreme Court guidelines in the *Muruatetu & another v R* [2017] eKLR, she sentenced the appellant to serve 25 years imprisonment.

25. It was that decision that the appellant was dissatisfied with and preferred this appeal in which he contends that the learned Judge erred in law and in fact for not considering that: there was no malice aforethought in the instant case; the whole of the prosecution case was based on circumstantial evidence; the prosecution case was not proved beyond any shadow of doubt; the appellant's source of arrest had no link with the case; and the appellant's defence was not vitiated by the prosecution. It was further contended that the learned Judge erred in law and in fact by giving a harsh and excessive sentence.

26. We heard the appeal on the Court's GoTo virtual platform on 12th February 2024 during which learned counsel Mr. Obara appeared for the appellant while learned counsel Mr. Mulamula, appeared for the respondent. Both learned counsel, who had filed their respective submissions, relied on them entirely.

27. The appellant's written submissions dated 17th November 2023 were filed by the firm of Obara & Obara Advocates. In those submissions, it was contended that the trial court erred in not properly considering that malice aforethought had to be proved; that no reason was given why the deceased was killed; that there was evidence that the appellant and his family were on very good terms with the deceased and her family; that had the DNA test confirmed that the sperm found on the deceased matched that of the appellant, a conclusion would have been reasonably drawn that he killed her so that she would not disclose the person who defiled her; and that in the absence of that evidence, malice aforethought was not proved, and yet the burden to do so lay with the prosecution.

28. It was further submitted that from the as evidence, adduced, it could not be concluded that no other inference, other than that of guilt, could be made since there was evidence that: PW4, the landlord, had access to the appellant's house as he was able to remove jerricans for purposes of assisting the appellant collect rain water; that, according to PW2, when the appellant left the plot, other tenants went to his house and found the door locked from inside, and that the landlord unlocked the door; that this confirms that at least one other person had access to the appellant's house; and that this one person was not investigated even though the police had prior knowledge, from witness statements, that he could access the house.

29. It was further submitted that specimens were taken from both the appellant and the deceased, and that the sperm samples taken from the deceased did not match the appellant's DNA ; that, since it was in evidence that the deceased was defiled, it was definitely not by the appellant; that this introduced the possibility that someone else, who had access to the appellant's house, defiled and then killed the deceased and dumped her body in the appellant's house; that, in the circumstances, PW4, Lucas Odhiambo, the landlord as well as the young man, Malwa, who was mentioned by PW5, ought to have been investigated; that the trial court simply convicted the appellant because the body was found in his house, and because he is alleged to have fled; that, without a DNA test having been carried out on the appellant to match it with the samples taken from the deceased's fingernails, it cannot be said that he is the one who strangled the deceased; and that, had the learned Judge applied her mind to the lacunae in this evidence, she most probably would have arrived at a different decision other than that of guilt.

30. It was noted that, in the judgement, the trial court delved into the issue of the appellant going missing as evidence that he was guilty of committing the offence. In the appellant's submissions, flight is not necessarily an indication of guilt; that the appellant explained why he had left the plot due to fear of being beaten up since a body had been found in his house; and that there was evidence that he went to the police station to seek refuge.

31. The appellant pointed out that, whereas in the information it was specified that the offence was committed by the appellant, the learned Judge found that the appellant, and possibly together with another or other persons known to him, murdered the deceased in an effort to conceal the sexual assault on her; that, by arriving at that finding, the trial court was speculating, and yet the particulars of the offence referred only to the appellant; that, since there was uncertainty or doubt, the benefit ought to have gone to the appellant since mere suspicion is not a ground for returning a guilty verdict.

32. We were urged to find that the prosecution failed the test of proof beyond reasonable doubt, and that the trial court's finding of guilty against the appellant be substituted for a finding of not guilty and that the conviction be set aside and the appellant be set at liberty.

33. The respondent's submissions were prepared by Edgar Mulamula, Assistant Director of Public Prosecutions. In those submissions, the respondent cited section 206 of the Penal Code on what constitutes malice aforethought and cited the case of *Rex v Tubere s/o Ochen* [1945] 12 EACA 63, submitting that, in determining the existence or nonexistence of malice, one has to look at the facts proving the weapon used, the manner in which it is used, and the part of the body injured. The respondent also cited the case of *Ernest Asami Bwire Abanga alias Onyango v R* CACRA No. 32 of 1990 where the Court held that the question of intention can be inferred from the true consequences of the unlawful acts or omission. It was submitted that, although no one saw the appellant killing the deceased, there was circumstantial evidence against the appellant, such as the fact of the appellant escaping from the plot when it was decided by all neighbours that there was to be a door-to-door search for the deceased; the finding of the body of the deceased in the appellant's house between the wall and a bed after a search for her for almost two (2) days; that, on the day the deceased went missing, the appellant had been seen sending the deceased to buy him something from the shop, making him the last person to have been seen with the deceased on that day; that the appellant never bothered to address this serious evidence against him; and that there was no evidence that the appellant's house was accessed by anyone else before the deceased's body was found.

34. In the respondent's submissions, the phrase "beyond reasonable doubt" means evidence which establishes all elements of the offence to the satisfaction of the court. The respondent cited the cases of *Woolmington v DPP* [1935] AC) and *Miller v Minister of Pensions* [1947[2 ALL ER 372 and submitted that the phrase does not require the court to reach certainty; and that, although it must carry a high degree of possibility, it does not mean proof beyond the shadow a doubt.

35. While appreciating that the case hinged on circumstantial evidence, the respondent relied on the case of *R v Hillier* [2007] 233 A.L.R 63; and *Shepherd v R* [1991] LRC CRM 332 on the need to consider the evidence holistically; and *Simon Musoke v R* 1 EA 715 where it was observed that, before convicting on circumstantial evidence, the court must be satisfied that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

36. According to the respondent, given the fact that there was no evidence dispelling the fact that the appellant was the last person seen accessing his house where the deceased's body was found, it is only probable to infer guilt from his conduct after all the neighbours had decided to conduct a search within the establishment where they all lived. Furthermore, the appellant did not present himself to any police station, but was rather arrested and interrogated where he eventually opened up on the deceased's body that was found in his house.

37. The respondent also cited the case of *Ahamad Abolfathi Mohammed and another v Republic* [2018] eKLR where the Court held that circumstantial evidence is evidence which enables a court to deduce

a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence.

38. It was the respondent's case that, the prosecution having proved all the ingredients that constitute the charge under section 203 of the *Penal Code*, the circumstantial evidence relied upon to arrive at the conclusion was safe under the law; that the fact that there was blood beneath the perimeter wall where the appellant is believed to have escaped from was indicative of someone who sustained injuries while trying to scale the perimeter wall; that there were exhibits that were collected from the same trail of blood; that, in as much as the DNA evidence never established that the appellant's spermatozoa were the ones found on the deceased vagina, there are other circumstances that the trial Judge informed herself on with regards to any other evidence adduced to weaken the inference of guilt in the prevailing circumstances; that the prevailing circumstances only pointed to the appellant as being the only one who accessed his own house during the material time; and that as at the time he was fleeing the scene of crime there was an intended door to door search whereupon the appellant sought to leave in the wee hours of the morning but ended up scaling the perimeter wall where he sustained injuries.

39. Regarding the sentence, it was submitted that since sentencing is based on a judicial officer's discretion, this Court must be careful not to interfere with such a decision, unless it is demonstrated that the sentence was manifestly excessive, was illegal, improper or founded or based on misrepresentation of material facts. In this regard, the respondent cited the case of *R. v Scott* (2005) NSWCCA 152 in which it was held that the sentence imposed must ultimately reflect the objective seriousness of the offence committed, and that there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed.

40. The respondent noted that, in Kenya, sentencing is governed by the *Judiciary Sentencing Policy Guidelines 2016*, which exist to ensure that judicial officers do not, in a whimsical manner, mete out sentences that are not only disparate and inconsistent, but also disproportionate and unjustified under the circumstances of each case. Based on the foregoing, it was submitted that the findings of the trial court upon taking into account the evidence adduced by the prosecution, the sentence of 25 years imprisonment is safe within the law and its constraints.

41. We were urged to find that the prosecution proved its case against the appellant to the required threshold; that the High Court properly evaluated the prosecution's evidence in the exercise of its discretion and arrived at the correct conclusion; and that the conviction and sentence was safe, and not to interfere with the sentence meted out by the trial court.

42. We have considered the submissions made as well as the material on record. The issues that fall for determination in this appeal are:

    i. Whether malice aforethought was proved.

    ii. Whether the circumstantial evidence met the threshold for returning a guilty verdict.

    iii. Whether the evidence findings of the learned Judge were in tandem with the information.

    iv. Whether the sentence meted against the appellant was appropriate.

43. As we determine these issues, we must bear in mind the fact that, this being a first appeal, we are legally enjoined to subject the evidence adduced to a scrutiny, re-evaluate it afresh and come out with our own findings, but always bearing in mind that we had no advantage of hearing or seeing the witnesses as they testified before the trial court and must give allowance for that handicap. If any authority is required

for that position, we refer to the decision by the predecessor to this Court in *Pandya v Republic* [1957] EA 336 in which the Court pronounced itself as follows:

> "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."

44. The appellant's case is that malice aforethought was not proved; that the evidence that was adduced was that the appellant and his family were on very good terms with the deceased and her family; and that the finding by the learned Judge that the deceased was killed so as to conceal the disclosure of the person who sexually defiled her had no basis in light of the results of the DNA test that did not link the appellant to the sexual assault on the deceased. Section 203 of the *Penal Code* provides that:

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

45. According to that section, for the offence of murder, to be proved, one of the ingredients that must exist is that of malice aforethought. It is malice aforethought that distinguishes murder from manslaughter.

46. Section 206 of the said Code sets out the circumstances which constitute malice aforethought as follows:

> "Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
>
> a. An intention to caused death or to do grievous harm to any person whether such person is the person actually killed or not.
>
> b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.
>
> c. An intention to commit a felony.
>
> d. An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.

47. It is trite that malice aforethought does not necessarily denote motive, and that the former may be inferred from the circumstances of the case. According to this Court in *Robert Onchiri Ogeto v Republic* [2004] KLR 19 –

> "The prosecution does not have to prove the motive for commission of any crime, neither is evidence of motive sufficient by itself to prove the commission of a crime by the person who possess the motive – see *Karukenya & 4 Others v Republic* [1987] KLR 458. By section 206(a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm. It can be reasonably inferred that when the appellant stabbed deceased with a knife on the chest he intended to cause death or grievous harm to the deceased. That being the case, we are satisfied that the appellant was properly convicted for the offence of murder."

48. In this case, PW9's opinion upon conducting post mortem examination on the body of the deceased was that the cause of death was asphyxia consistent with manual smothering. This Court dealing with a similar cause of death in the case of *Dida Ali Mohmmed v R* Nakuru Court of Appeal Criminal Appeal No. 178 of 2000 (UR) held that:

> "Mr Amingá for the appellant submitted before us that the learned trial Judge did not consider an important ingredient of motive for the killing. With due respect to him, and this he conceded when we pointed it out to him, motive is not a material element in establishing guilt. [See section 9(3) of the Penal Code]...But perhaps what Mr Amingá had in mind is the element of mens rea. Assuming that is so, we say this. The learned trial judge did not specifically advert to the issue. That indeed was an error. However, the evidence which he accepted clearly shows that the appellant killed the deceased with the necessary malice aforethought. Medical evidence shows that pressure was applied to the deceased's neck which suffocated her. From that evidence, it is quite clear that by pressing against the deceased's neck the appellant intended to cause the deceased grievous harm or death."

49. What the appellant contends is that the prosecution ought to have proved what motivated the appellant to smother the deceased. However, as held in the above case, the prosecution does not necessarily have to prove the motive as long as the unlawful act causing death was meant either to terminate the life or cause grievous harm. The reason behind that action does not constitute an ingredient of the offence. We therefore find that malice aforethought was proved.

50. The next issue taken by the appellant was that, from the circumstantial evidence adduced, the threshold for basing a conviction thereon was not met. As Mativo, J. (as he then was) in *Moses Kabue Karuoya v Republic* [2016] eKLR correctly expressed himself:

> "The evidence used to prove guilt is classified as either direct or circumstantial. Direct evidence, is a statement about a fact constituting a disputed material proposition of a rule of law, while circumstantial evidence is testimony about a fact or facts from which the disputed material proposition may be inferred. Thus, circumstantial evidence can be defined as relying on certain proved or provable circumstances from which a conclusion can be drawn that it was the accused person who committed the offence. It is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly, typically when a witness testifies about something which that witness personally saw, or heard. Both direct and circumstantial evidence are to be considered, but to bring a verdict of

guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty. This follows from the requirement that guilt must be established."

51. Circumstantial evidence, just like direct evidence, may properly lead to a conviction as long as the threshold is met. Evidence is not worthless merely because it is circumstantial and, as was observed by this Court in *Neema Mwandoro Ndurya v R* [2008] eKLR in which the decision in the case of *R v Taylor Weaver and Donovan* [1928] 21 Cr. App. R 20 was cited with approval for the position that:

> "Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

52. In this case, the evidence presented was that the appellant was the last person to have interacted with the deceased when he sent the deceased to buy porridge. When seen next to the deceased's room he explained that he had gone to get his change presumably from the Kshs 50 that he had given the deceased. Section 111(1) of the *Evidence Act* provides that:

> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
>
> Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

53. While dealing with the said section, this Court in *Dida Ali Mohammed v R* (*supra*) held that:

> " Then there is the circumstantial evidence which shows that it was the appellant who was the last person seen with the deceased before her death...As to when the deceased left the appellant's home and upto where the latter escorted her are maters which were peculiarly within the appellant's knowledge which we think, under section 111(1) of the Evidence Act, he was the only person who could but did not explain. And the evidence of recovery of the deceased's body consequent upon information the appellant gave are all circumstances which when taken cumulatively lead to irresistible conclusion that the appellant and no other person killed the deceased, and which exclude any other reasonable hypothesis than that the appellant killed the deceased."

54. Apart from being the last person to have been in contact with the deceased, when the proposal to conduct a door to door search was conducted, the appellant approached PW4 to permit him to egress from the plot before the usual time under the pretext that he was going to work early. When this request was not forthcoming, he decided to flee from the plot at night and risked his life in the process by jumping from the top of the wall separating the plot from the neighbouring building, and in the

process sustaining serious injuries. While he explained these injuries to have been sustained an accident due to his hurry to go to the police, the nature of the injuries sustained by him seemed to have been so serious that, according to him, he fainted as a result thereof. Clearly, they were not the kind of injuries sustained accidentally by glass cut. His evidence that he fainted is corroborated by the evidence of PW2 and PW4 that there was a lot of blood at the place where he landed at the bottom of the wall. For him to have fainted, he must have lost a lot of blood or was seriously injured. The body of the deceased was also found in his room in which the bed's position was found to have been shifted.

That body had started emitting pungent smell. Surely the appellant ought to have realised that something was unusual in his room even without the alleged disclosure to him by PW6 that the deceased was in his room. When PW6 testified that the appellant did not put it to her that it was her who disclosed to him the presence of the deceased's body in his room. That piece of evidence and the attempt to link PW4 with the death of the deceased was rightly found by the learned Judge to be an afterthought. In her judgement, the learned Judge found that:

> " In my view, the accused person's defence is a weak belated attempt to try and cast suspicion on the landlord as the person who could have committed the said murder and a defilement of the deceased since he had been at the plot the whole of that fateful day."

55. We agree with the learned Judge.

56. Whereas considered separately the circumstances may not necessarily lead to a verdict of guilty, the circumstances must be considered together, since as was held in the case of *R v Hillier* [2007] 233 A.L.R 63 and *Shepherd v R* [1991] LRC CRM 332:

> "The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence."

57. Pollock, CB in the case of *Regina v Exall & Others* [1866] 176 ER 850 graphically expressed himself as follows:

> " It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link breaks, the chain would fail. It is more like the case of a rope comprised of several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus, it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of."

58. The manner in which the circumstantial evidence is to be considered was explained by the Court in the case of *Mwangi & another v Republic* [2004] 2 KLR 32 as follows:

> "In a case depending on circumstantial evidence, each link in the action 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 evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that he accuse is guilty of the charge."

59. After considering all the circumstances, the court must then ask itself whether the threshold has been met. That threshold was restated in *Sawe v Rep* [2003] KLR 364 where this Court held that:

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

60. In this case, the circumstances set out above, particularly the fact that he appellant spent the night in the same room as the decomposing body of the deceased without being perturbed by the smell, can only lead to the conclusion that the appellant was the one who caused the death of the deceased.

61. The appellant took issue with the fact that the information did not indicate that the offence was committed with others, yet the learned Judge found that, if the appellant did not commit the offence alone, that he then did so with others. In order for the appellant to succeed on this ground, he must indicate the prejudice that was occasioned to him. In our view, any defect to the information and the effect thereof has to be weighed against the test set out by this Court in *Obie Kilonzo Kevevo v Republic* [2015] eKLR which is:

> "The test applicable by an appellate court when determining firstly the existence of a defective charge and secondly its effect on the appellant's conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the applicant."

62. We find that no prejudice was occasioned to the appellant by the fact that the information did not indicate that the offence was committed with others.

63. On the issue as to whether the sentence meted against the appellant was appropriate, in *S v Malgas* 2001 (1) SACR 469 (SCA), it was held at para 12 that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'."

64. This Court in *Bernard Kimani Gacheru v R*. [2002] eKLR expressed a similar opinion when it held that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the 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 some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist..."

65. We have considered the learned Judge's decision on sentencing in this case and find nothing to persuade us that the learned judge's exercise of discretion was improper. In her detailed and well-reasoned decision, she considered all the relevant facts, and did not consider any irrelevant one. Her decision on the sentence was well within the law.

66. We find no merit in this appeal which we hereby dismiss.

67. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR