Kaburu v Republic (Criminal Appeal 103 of 2023)
[2024] KECA 536 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 536 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 103 OF 2023

PO KIAGE, LA ACHODE & JM MATIVO, JJA

MAY 9, 2024

BETWEEN

CHRISTINE LUGATSIVA KABURU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from judgment of the High Court of Kenya at Nairobi (Mutuku, J.) dated 12th April 2017 in HCCRA No. 39 of 2013)

JUDGMENT

1. Christine Lugatsiva Kaburu, (the appellant), was arraigned before the High Court of Kenya, Nairobi, in High Court criminal case number 39 of 2013 charged with two counts of the offence of murder. It was alleged that on 21st January 2023, at Kangemi area, Dagoretti District, within Nairobi area, she murdered her own children, BB, aged 5 years and AA aged 8 months, contrary to section 203 as read with section 204 of the Penal Code. The appellant pleaded not guilty to the charges.

2. The prosecution case rested on the testimony of 8 witnesses, namely; PW1, Wycliffe Shililu Mutsami; PW2, Daniel Kakai; PW3, Inviolata Mutola Shichikha; PW4, No. 222908, Sgt. Zachaeas Kirumi; PW5, Dr. Peter Muruiki Ndegwa; PW6, No. 39114 PC, Morris Mukara; PW7, No. 83321 PC Joseph Kigara Gachatha; and PW8, Henry Kiptoo Sang. The crux of the prosecution case was that the appellant married Paul Bulinda in 2005. The marriage was blessed with 2 children, BB aged 5 years and AB aged 8 months. They resided at Kangemi area, in Nairobi where B was attending school.

3. PW1 testified that while attending a burial at Kakamega on 21st January 2013, his mother in law called him on the phone to say that the appellant had called her and informed her to wait for three bodies for burial. She also told him that subsequently, the appellant called her and told her "she had finished the job and only her was remaining." He travelled to Nairobi the following day, went to the appellant's house, and confirmed that the appellant had killed her children. He noted a lot of blood in the house.

He went to Kangemi Police Station where the incident had been reported and confirmed that B's body had already been taken to the mortuary while A had died at the Hospital. He noted that both children had stab wounds while the appellant was in hospital under police guard.

4. PW2 was the caretaker at the building where the appellant was residing in a single room. It was his evidence that on 21st January 2013, his wife came running and told him the appellant had called her to say she had killed her children and she wanted to commit suicide. He rushed to the scene accompanied by the wife of a neighbor called Ritho. They found the appellant's single room locked from inside. To gain entry, they broke the door only to find A was already dead. The appellant was lying on the floor with a knife stuck in her stomach. B, whom he had just greeted a few minutes before as she was coming from school, was still alive, but had been stabbed at the chest and the stomach. She was rushed to hospital where she died.

5. PW3 (the appellant's mother in law) testified that on 21st January 2021, the appellant called her and informed her to wait for two coffins. PW3 called the appellant's husband (her son) and informed him what the appellant said but he downplayed it and told her to leave the appellant alone. However, a few minutes later her son called her and told her that the appellant had killed their children. During cross-examination, it was her evidence that the appellant was short tempered, holds grudges for long even when cautioned, and that in September 2012, she informed her that she would do something in that home which would make her appear on the TV and newspapers.

6. PW4, an Administration Police Officer testified that he visited the scene with a colleague. He found the appellant lying on the floor with a knife stuck in her stomach. B was dead. A was lying on the floor bleeding from the stomach. It was his evidence that there was a small note on the floor written by the appellant stating that she had killed her children because she had a quarrel with her husband. As they lifted the appellant to take her to the hospital, the knife stuck on her stomach dropped. He handed the knife to scenes of crime officers who took photos at the scene.

7. On 30th January 2013, post mortem examination was done by PW 5 after the bodies were identified by PW1 and PW3.

8. In the impugned judgment, Mutuku J. returned a verdict of guilty on both counts and sentenced the appellant to death as by law prescribed. However, the sentence in respect of count 2 was held in abeyance.

9. In this appeal, the appellant seeks to overturn both the conviction and sentence on the following grounds:

    a. The learned judge erred in law and fact by finding that the prosecution had proved its case to the required standard.

    b. The learned judge erred in law and in fact by shifting the burden of proof to the appellant, when it questioned why the appellant failed to raise the defence of insanity yet the burden of proof lies with the prosecution.

    c. The mandatory death sentence meted on the appellant should be reviewed in light of the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic.

10. During the virtual hearing of this appeal, Ms. Ng'ang'a, learned counsel for the appellant, and Mr. O'mirera, learned counsel for the State highlighted their written submissions.

11. The appellant submitted that the prosecution failed to prove its case beyond reasonable doubt. To buttress this argument, the appellant asserted that the prosecution failed to produce the telephone

records pertaining to the calls allegedly made by the appellant to PW3 informing her that she would kill her children. The appellant allegedly made the other call to PW2's wife informing her she had killed her children and she wanted to commit suicide. The appellant argued that since no eyewitness was present during the commission of the offence, the failure to avail call data records rendered the said evidence hearsay, therefore, inadmissible.

12. It was also the appellant's contention that the suicide note allegedly recovered at the murder scene by PW4 on 21st January 2013 immediately after the commission of the offence was not produced in evidence, and as a result, malice aforethought, a key ingredient of the offence of murder was not established. It was also argued that the appellant's husband, who was a crucial witness was not called as a witness to confirm the existence of a domestic dispute between the appellant and himself, which could have contributed to the commission of the offences. To buttress her submissions, the appellant cited Bukenya and Another vs Uganda [1972] EA in support of the proposition that where a crucial witness is not availed to testify, the court is entitled to draw an adverse inference that his evidence would have been adverse to the prosecution case.

13. In addition, the appellant submitted that the learned judge erred by shifting the burden of proof to her when he asked her why she never raised the defence of insanity. The appellant contended that the learned Judge doubted her sanity at the time the offence was committed, therefore, notwithstanding the contents of the P3 Form, under section 150 of the Criminal Procedure Code, the trial Judge should have ordered a psychiatrist evaluation to ascertain whether she was mentally fit at the time of the commission of the offence.

14. Regarding the circumstantial evidence adduced by the prosecution, the appellant's counsel maintained that the prosecution evidence had glaring loopholes that were not attended to in the course of investigations and the appellant's defence that persons who accompanied her husband attacked them was not dislodged. The appellant relied on Sawe vs Republic, [2003] eKLR where this Court held that in order to justify circumstantial evidence, there must be no other co-existing circumstances weakening the chain of circumstances relied upon. Furthermore, the burden of proof rests with the prosecution and it never shifts to an accused person.

15. Regarding the death sentence, the appellant cited the Supreme Court decision in Francis Karioki Muruatetu & Another vs Republic & 5 Others [2016] eKLR which declared the mandatory nature of the death sentence under section 203 and 204 of the Penal Code unconstitutional for depriving courts their unfettered discretion to impose appropriate sentences on a case by case basis.

16. In opposition to the appeal, the respondent dismissed the appellant's defence that she and the deceased children were victims of a brutal retaliatory attack perpetuated by her husband's friends over an alleged deal gone sour. The respondent referred to the overwhelming circumstantial evidence against the appellant, which it argued unerringly points to a hypothesis inconsistent with the appellant's innocence. The respondent argued that the trial court properly applied both the "res gestae and "last seen alive" principles to convict the appellant, therefore, the conviction is safe. It was the appellant's position that malice aforethought can easily be inferred from the nature of the injuries inflicted on the deceased children, the weapon used, the parts of the body stabbed with the knife and the appellant's conduct prior to the commission of the offence. This conduct includes making telephone calls communicating her intention to kill her two children and closing the door from the inside. Furthermore, the respondent argued that the fact that the trial court made comments relating to the appellant's sanity, thereby communicating the dilemma it was facing owing to the disturbing features of this case does not imply that the court shifted the burden of proof to the appellant.

17. Responding to the submission that the prosecution did not prove its case beyond reasonable doubt, the respondent conceded that the knife, which was lodged in the appellant's stomach at the time PW2 and PW4 arrived at the scene, was not produced in evidence because when the appellant was being lifted, it dropped down leading to PW4 inadvertently touching it. Therefore, it could not have made sense to subject it to forensic analysis and reporting. In any event, the appellant argued that the trial court had no reason to doubt PW6's, (the investigating officer), PW2's and PW3's evidence. Furthermore, the door to the appellant's single room was locked from inside and it is only after breaking the door, that the appellant and the deceased minors were discovered critically wounded.

18. Responding to the submission that PW2's evidence regarding her telephone conversation with the appellant was hearsay; the respondent relied on the principles enunciated in Subramanium vs Public Prosecutor [1959] WLR 965 in support of the proposition that PW2's evidence was part of the circumstantial evidence against the appellant.

19. Regarding the contestation that the call recordings between the appellant and PW3 were not produced in evidence, the respondent stressed that the trial court invoked sections 62 and 63 of the *Evidence Act* and accepted the evidence of PW3, the absence of forensic evidence notwithstanding. The respondent argued that there is no rule of law or practice mandatorily requiring telephone conversations to be proved by way of forensic evidence. In any event, the appellant in her unsworn defence conceded having a telephone conversation with PW3 two months prior to the offence. Thus, her assertion that PW3 did not know her mobile number cannot be true.

20. Regarding the argument that the trial court shifted the burden of proof to the appellant, the respondent submitted that sections 111 and 119 of the *Evidence Act* are applicable to this case because the totality of the prosecution case indicates that only the appellant who knew how both the deceased children met their death. The appellant maintained that the last seen alive theory coupled with the circumstantial evidence establishes an important link in the chain of circumstances thereby proving the appellant's guilt. To buttress his argument, the appellant relied on the Supreme Court of India decision in State of Rajasthan vs Kashi Ram [2006] 12 SCC 254 in support of the holding that if a person is last seen with a deceased person, he must offer an explanation as to how and when they parted company. The explanation must be probable and satisfactory in the eyes of the court. If he does so, he must be held to have discharged his burden. If he fails to offer an explanation based on facts within his special knowledge, he fails to discharge the burden cast upon him.

21. Addressing the issue of mental insanity at the time of commission of the offence, the respondent maintained that no prejudice was occasioned to the appellant because throughout the trial, she did not depict a behaviour that could suggest insanity, and, in any event, her P3 form shows she was normal.

22. Regarding sentence, the respondent maintained that whether death sentence is justified depends on the unique circumstances of the case. The most important consideration being the aggravating circumstances, which could attract imposition of a death sentence. It was the respondent's case that it is evident that the appellant intended to kill the minors because she used a sharp penetrating object aimed at the heart and its arteries leading to death. Furthermore, considering the deceased were aged 5 years and 8 months respectively there are no mitigating circumstances whatsoever that could be a basis for meting out a lenient sentence.

23. This being a first appeal, our mandate is to re-appraise the evidence and draw inferences of fact on the appellant's guilt or otherwise. (See Kariuki Karanja vs Republic [1986] KLR190).

24. The first question for determination is whether there is merit in the appellant's contestation that the learned judge erred in finding that the prosecution had proved its case to the required standard. In

addressing this argument, it is important to bear in mind the key elements of the offence of murder, and ascertain whether these elements were proved to the required standard. Section 203 of the Penal Code provides:

> 203. Murder
>
> Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

25. A reading of the above section shows that to succeed in a murder case, the prosecution is obliged to prove the following prerequisites:

    (a) The death of the deceased.

    (b) That the death was caused by an unlawful act or omission on the part of the accused.

    (c) That in causing the death of the deceased, the accused had malice aforethought.

    (d) That it was the accused who killed the deceased. (See this Court's decision in Titus Ngamau Musila Katitu vs Republic [2020] eKLR).

26. Malice aforethought refers to an intentionally harmful act that typically leads to someone's death. It is a critical element of the crime that distinguishes the offence of murder from other types of homicide cases, such as manslaughter. Malice aforethought shows the following:

    (a) The killer's state of mind at the time of the murder,

    (b) The killer thought about the murder before committing it, and,

    (c) The killer took specific steps to facilitate the murder.

27. Malice may be express or implied. Express malice is when a deliberate intention is manifested to take away the life of a person unlawfully. Malice is implied when no considerable provocation appears or when the circumstances attending the killing show a reckless and wicked heart. To be convicted of murder, malice aforethought must be proved. Malice cannot not be imputed to an accused person based solely on their participation in a crime. If it is shown that the killing resulted from an intentional act with express or implied malice, no other mental state need be shown to establish malice aforethought.

28. The threshold for determining malice aforethought is provided in section 206 of the Penal Code, which provides:

> 206. Malice aforethought Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
>
> a. an intention to cause the death of or to do grievous harm to any person, whether that 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 that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. an intent to commit a felony;

d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

29. We will now examine the facts of this case to satisfy ourselves that malice aforethought was proved. There is no dispute that the two minors were brutally killed. Serious injuries were inflicted on the minor children using a sharp object. It is a fact that their death was unlawful. The contestation is whether the appellant is the killer, and whether malice aforethought was proved to the required standard. PW1 testified that on 21st January 2013, her mother in law called her and told her that the appellant called her and informed her to wait for three bodies. Later, the appellant called her again and told her "she had finished the work and only her part was remaining."

30. PW2, testified that on 21st January 2013, his wife, Agnes came running and told him that the appellant had called her and told her she had killed her children and she wanted to commit suicide. He rushed to the scene and found the appellant's house closed from inside. They broke the door and gained entry only to find one- child dead with a stab wound in her chest and her stomach and the other one bleeding with a stab wound at her stomach. Her intestines were protruding.

31. PW3, testified that the appellant telephoned her and told her to wait for two coffins. She called her son, the appellant's husband, who down played the information. It was her evidence during cross-examination that in September 2012 the appellant informed him "she would do something in that home that would cause her to appear on TV and newspapers." PW3 also corroborated PW2's evidence that the appellant telephoned different persons and informed them about her plans to commit murder. PW4, an administrative police officer visited the scene. After gaining entry into the room, he found the appellant lying on the floor, with a knife stuck in her stomach. He assisted in taking the appellant to the Hospital together with A who died at the hospital.

B was taken to the Mortuary.

32. The correct approach is to consider the accused person's alibi in light of the totality of the evidence and the court's impression of the witnesses. It is acceptable in evaluating the evidence to consider the inherent probabilities. Here is a case were the appellant claimed her husband's friends committed the offence. She sought to depict the murder of the two children and the attack on her as a retaliatory attack committed by her husband's friends.

The probability of this alibi being true is what we shall examine.

33. The proper approach is to weigh up all the elements which point towards the guilt of the accused, against all those which are indicative of her innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the appellant's guilt.

34. There is credible and un assailed prosecution evidence that the appellant's single room house was locked from the inside. To gain entry into the room, PW2 testified that they had to break the door. They found B dead, with a stab wound on the chest and stomach. Annointed was still alive, with a stab wound on her stomach and her intestines protruding. No evidence was adduced to the effect that the room had another exit. One wonders whether the alleged strangers committed the offence, then closed the door from the inside and miraculously vanished. Such a probability is nil. The other improbability is whether they committed the offence, exited through the door, and miraculously closed the door from the inside while outside, then escaped. Conversely, there is ample prosecution evidence to suggest that the appellant closed the door, killed her children and then stabbed herself at her stomach.

35. Also relevant is the fact that she made telephone calls communicating her intention to kill the children. She called her mother in law and told her to wait for three coffins. It is also on record that she called PW2's wife and informed her she had killed her children and next she would commit suicide. She also called PW3 and informed her that she had killed the children. The brutal manner in which the children were killed and the weapon used, suggests a pre-meditated intention to kill. The severe deep wounds inflicted on the victims' chest targeting their hearts and the stomach leaving the intestines protruding suggests a premediated plan to kill. The foregoing evidence leaves no doubt that the element of malice aforethought was proved to the required standard. We find support in the decision of the East African Court of Appeal in R vs Tubere S/O Ochen 1945 12 EACA 63 which held that to discern malice aforethought the court considers the following elements: (a) Nature of weapon used. (b) The manner in which it was used. (c) The part of the body targeted. (d) The nature of the injuries inflicted either a single stab wound or multiple injuries. (e) Conduct of the accused before, during and after the incident.

36. We find that the prosecution evidence proved the above considerations to the required standard. Therefore, the evidence irresistibly points to a carefully planned murder by the appellant. Consequently, the suggestion that malice aforethought was not proved collapses. In any event, the elements of malice aforethought in section 206 of the Penal Code were proved.

37. Closely tied to the above issue is the question whether it was proved beyond reasonable doubt that the appellant was the killer. The other side of the foregoing question is whether the appellant's defence raised reasonable doubts on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.

38. It is also important to mention that the appellant was the last person seen with the deceased children in her house. This brings into play the "last seen doctrine." According to this doctrine, if an individual is the last person seen with a deceased individual, he/she is required by law to provide an explanation regarding the circumstances surrounding the death. The burden of proof lies on the person last seen with the deceased to provide at least a minimum explanation regarding their knowledge of the events leading to the death.

39. In cases where the doctrine of last seen applies, the law presumes that the person who was last seen with the deceased bears full responsibility for his/her death. Therefore, if an accused person was the last person seen in the company of the deceased, and the circumstantial evidence overwhelmingly supports this conclusion, there is no room for acquittal. The appellant, in such circumstances, has the duty to provide an explanation regarding how the deceased met their death. In the absence of a satisfactory explanation, both the trial court and the appellate court are justified in drawing the inference that the accused person was responsible for killing the deceased.

40. Generally, the doctrine of last seen places a legal obligation on the person last seen with a deceased individual to provide an explanation regarding the events leading to their death. Failure to provide a satisfactory explanation can lead to the inference that the accused person is responsible for the death. Therefore, the appellant had obligation to provide a plausible explanation how the children lost their lives.

41. The obligation to provide an explanation in circumstances where it is shown by evidence that an accused person has knowledge of any facts or circumstances is also provided under Section 111 of the *Evidence Act* which reads:

1. 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 defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

2. Nothing in this section shall—

   a. prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

   b. imposes on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

   c. affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

42. The Supreme Court in Republic vs Ahmad Abolfathi Mohammed & Another [2019] eKLR underscored that:

> " Section 111(1) deals with the burden of proof and only comes into play in the trial when the prosecution has proved, to the required standard of beyond reasonable doubt, that the accused person committed an offence and part of the prosecution case comprises of a situation only "within the knowledge" of the accused person so that if he does not offer an explanation, he risks conviction."

43. We are persuaded that the appellant, as the last person seen with her children, was best and solely placed to provide a plausible explanation as to how the children died. In absence of a plausible explanation, we find that the facts as proved in this case are incompatible with the innocence of the appellant. The facts cannot be reasonably explained upon any other reasonable hypothesis other than that of the appellant's guilt. There are no other co- existing circumstances weakening the chain of circumstances relied upon by the prosecution. The upshot is that the appellant was properly found to be the killer.

44. The other ground of assault mounted by the appellant is that the prosecution relied on hearsay evidence. The accusation here is that the call logo and the gadgets used in the telephone calls made by the appellant were not produced in evidence to support the fact that the appellant indeed made the calls as claimed. Granted, the general rule is that hearsay evidence is inadmissible. However, there are exceptions to the general rule. Sections 33 and 35 of the *Evidence Act* has provisos, which create exceptions to the general rule. The rationale for having the exceptions to the hearsay rule is explained in Sarkar on Evidence (1990, Reprint) at p. 370, quoting from Wigmore on Evidence (ss 1420-1422) as follows:

> " The purpose and reason of the hearsay rule is the key to the exceptions to it. The theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to

> light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous: it may be sufficiently clear, in that instance, that the statement offered is free from the risk, of inaccuracy and untrustworthiness so that the test of' cross- examination would be a work of supererogation. Moreover, the test may be impossible of employment - for example, by reason of the death of the declarant, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. A perception of these two principles (a necessity for the evidence and a circumstantial probability of trustworthiness) and their combined value has been responsible for most of the hearsay exceptions."

45. This Court in Maina wa Kinyatti vs Republic [1984] eKLR held:

> "The evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made." 'Per Dickson J, in The Queen vs O'Brien (1977), 38 CR N, S 325, at p 327, 35 CCC (2d) 209, at p 211 (SCC), and see the locus classicus, Subramaniam v Public Prosecutor, [19561 1 WLR 965 (PC).

46. We agree with the trial court's finding that the evidence relating to the appellant's phone calls to PW2's wife (Agnes) and PW3 (appellant's mother in law) was not hearsay. This is because the evidence was to establish the truth of the phone calls, but not the fact that the appellant made the phone calls to communicate her intention to murder the children or to confirm that she had killed them.

47. The other ground urged by the appellant was that the prosecution failed to call a crucial witness, that is, the appellant's husband Mr. Bulinda. The argument here was that PW3 testified that after she got a call from the appellant informing her that she would receive two caskets for burial, she called her son who down played the message. It was also claimed that PW2's wife was not called as a witness yet it was claimed that the appellant called her after committing the offences and told her she had killed the children and she would commit suicide. The appellant placed heavy reliance on Bukenya & Others vs Uganda {1972} E.A.549. in which the former East African Court of Appeal laid down the following principles:

    i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

    ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

    iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

48. However, the court in the above case was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. As Mahoney J. said in Fabre vs Arenales [1992] 27 NSWLR 437, 449-450, the significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. There are circumstances in which it has been recognized that such an inference is not available or, if available, is of little significance. The rule only applies where a party is required to explain or contradict

something. What a party is required to explain or contradict depends on the issues in the case as thrown in the pleadings or by the course of the evidence in the case. No inference can be drawn unless evidence is given of facts requiring an answer.

49. It is also important to mention that section 143 of the Evidence Act provides that No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact. The Court of Appeal in Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005 (unreported) stated as follows:

> " ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

Also, see Suleiman Otieno Aziz vs Republic [2017] eKLR and Donald Majiwa Achilwa & 2 Others vs Republic [2009] eKLR.

50. We have re-evaluated the entire record. In our view, there is nothing to suggest that the prosecution case had glaring gaps that could only have been filled by the evidence of the persons who were not called to testify. In addition, there is nothing to attribute the failure to call the alleged witnesses to oblique motive by the prosecution. We therefore find no reason upon which the trial court could have drawn an adverse inference against the prosecution for failure to call the alleged witnesses.

51. The appellant further argued that the learned judged shifted the burden of proof of the defence of temporary insanity to the appellant. Much as the appellant raised this ground, it does not escape our attention that the appellant throughout the trial maintained her innocence, blamed the demise of the two minors on her husband's companions who she claimed had differences with him, and decided to revenge by committing the offence. No defence of insanity was raised throughout the trial.

52. Section 11 of the Penal Code provides that every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question until the contrary is proved. This provision in our considered view shifts the burden of proving the defence of insanity to the accused person. However, the presumption of sanity is rebuttable, hence the recognition in criminal law, of the defence of insanity. This is provided for in section 12 of the Penal Code which provides for the application of the defence of insanity in the following terms:

> 12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.

53. It was the respondent's contention that the defence of insanity was not raised by the appellant before the trial court and that the appellant has raised the same for the first time in this appeal. The question is, the accused having not raised the defence of insanity under section 12 of the Penal Code during the trial, was the trial judge entitled to make a finding of insanity. Or, is it exclusively for the accused to raise the defence of insanity. Insanity will only be a defence if it is proved that at the time of commission of the offence, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act that he is charged with or was incapable of knowing that it was wrong or contrary

to law. The test is strictly on the time when the offence was committed and no other. As was held in Leonard Mwangemi Munyasia vs R [2015] eKLR:

> " Under the rule insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal but undersection 167 (1) (b)of the Criminal Procedure Code he would be convicted and ordered to be detained during the President's pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners."

54. In our view, it was upon the appellant to demonstrate that she could not have premeditated the two murders and that she was not in her right state of mind. The only evidence on record is the P3 Form, which indicated that the appellant was in a stable mental status. Indeed, the trial court noted that the accused did not raise the defence of insanity or provocation. No evidence was led by the appellant to demonstrate that at the time the two murders occurred she was suffering from temporary insanity. This Court also notes that PW3 in cross-examination confirmed that in September 2012, the appellant told her that she would do something in PW3's home until she will appear in the TV and newspapers. Consequently, we find that no evidence was adduced on the basis upon which the court could determine whether the appellant was suffering from insanity at the material time.

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 death sentence, the appellant argued that since the Supreme Court declared the mandatory nature of the death sentence unconstitutional, therefore, this Court should review the sentence and or substitute it with a lesser sentence.

57. The trial court was constrained to impose the death sentence prescribed by the law, which was mandatory at the time. However, guided by the Supreme Court decision in the Muruatete case, we are inclined to interfere with the sentence. We have considered the mitigation tendered by the appellant before the trial court that her mother died of breast cancer and that she had been in custody since her arrest and while in custody she has undergone anger management courses and therefore this Court ought to give her another chance in life by sentencing her to a non-custodial sentence. We note that the appellant still maintains her innocence and she is not remorseful. However, upon due consideration of the facts of this case, the manner in which the offence was committed; we shall reluctantly interfere with the sentence in the manner stated below.

58. In conclusion, we dismiss the appellant's appeal against the conviction. However, we hereby allow the appeal against sentence on both counts. We hereby substitute the death sentence imposed in respect of the two counts with a prison term of forty (40) years for each count. The sentences shall run concurrently from 11th March 2013 when the appellant was arrested and later on remanded at Langata Women Prison.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR