Ajowi & another v Republic (Criminal Appeal 126 of 2022) [2024] KECA 642 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KECA 642 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 126 OF 2022

KI LAIBUTA, A ALI-ARONI & GV ODUNGA, JJA

JUNE 7, 2024

BETWEEN

JOSEPH OGOLLA AJOWI .... 1ST APPELLANT

JOHN OCHIENG AYIEKO .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (A. Ongeri, J.) delivered on 28th October 2018 in Criminal Case No. 28 of 2016)

JUDGMENT

1. This is a first appeal arising from the judgment of the High Court of Kenya at Mombasa (Asenath Ongeri, J.) dated 26th October 2018 in HC Criminal Case No. 28 of 2016 in which the appellants, Joseph Ogolla Ajowi (the 1st appellant) and John Ochieng Ayieko (the 2nd appellant) were jointly charged with murder contrary to section 203 as read with section 204 of the *Penal Code*.

2. The particulars of the charge were that between 4th and 6th January 2016 at Nyali Estate within Mombasa County, the appellants and one Stephen Okoth Oboo jointly with others not before court murdered Jagobous Van Der Goes. The three denied the charge and stood trial, culminating in the impugned judgment.

3. At the trial, the prosecution called thirty-two (32) witnesses while the appellants, their co-accused and one other person testified in their defence.

4. PW1 – Ingrid Ann Margarita Van Der Goes, a daughter of the deceased, testified that, in the year 2016, she lived in Holland while her deceased father had lived in Kenya for a period of 25 years; that her father had a home in Nyali area of Mombasa County where he lived on his own; that she knew the 2nd appellant, who worked as her father's gardener, and that she had his (the 2nd appellant's) telephone

number since the month of either October or November 2015; that, on 11th November 2015, the 2nd appellant had sent her a text message saying that his father had died, and that he needed some money, which the deceased had not given him; that she did not send him any money; that she later learnt from her deceased father that his house had been broken into the night she received the text message from the 2nd appellant and money stolen therefrom; and that her father reported the incident at Nyali Police Station.

5. PW1 testified further that, a week later, her father's house was broken into and a lot of tools went missing, but that her father did not report this incident because the police did not take any action after the first incident; that her father was ailing from cancer, and was becoming too weak, which prompted her to make arrangements to come to Kenya and take him back to Holland; and that she planned to come to Kenya on 11th January 2016 as agreed between them on 4th January 2016.

6. PW1 went on to testify that her telephone calls to her father on 5th, 6th, 7th and 8th January 2016 went unanswered, except for the voice notification that the subscriber could not be reached; that she called the 2nd appellant on 11th January 2016 to inquire of her father's whereabouts, and that he informed her that her father had left for Nairobi one month earlier; and that the 2nd appellant declined to disclose the date on which her father had allegedly left for Nairobi, or whether he had left in his car, or whether he had taken a flight or a bus.

7. Concerned with her father's wellbeing, PW1 and her husband, Renee Petrus Adreanus (PW6), travelled to Kenya and arrived in Mombasa on 12th January 2016; that they went straight to Nyali Police Station where they reported that they were afraid that something had happened to her father; that, on further inquiry from the 2nd appellant, he insisted that her father had been in Nairobi for the preceding one month; that, thereafter, the 2nd appellant left her father's house, and that her subsequent telephone calls to him went unanswered, except for a text message informing her that he would return on 13th January 2016, but did not disclose his whereabouts; and that their search for her father in Bamburi, among other places, was in vain.

8. PW1 also told the trial court that, upon being picked for interrogation at Bamburi Police Station, the 2nd appellant told the police that the deceased had travelled to Nairobi by bus in the company of PW4 – Elizabeth Wahinya; that when they spoke to PW4, she said that she had visited the deceased for a few days, but later travelled to Nairobi alone, leaving the deceased behind; that their search for him in hospitals and mortuaries was all in vain; and that, after 10 days, she returned to Holland with PW6, who later travelled back to Kenya with her two brothers, Johanes Willihammis Van Der Goes (PW2) and Frank Van Der Goes (PW3) soon after the 2nd appellant's arrest in February 2016.

9. According to PW4, she visited the deceased and stayed with him in his Nyali residence from 29th December 2015 to 3rd January 2016 when she left for Nairobi, leaving the deceased behind.

   PW4 also told the court that the deceased introduced the 2nd appellant to her as his gardener, who she met for the first time in the deceased's house; that, during her stay, the deceased told her about the numerous break-ins and theft in his house; that on 4th January 2016, the deceased called her to confirm that she had arrived in Nairobi safely; and that this was the last time she heard from him.

10. In his testimony, PW6 stated that he returned to Kenya on 2nd May 2016 whereupon he sought assistance from the Criminal Investigation Department in Nairobi to locate the deceased's whereabouts; that he was assigned a number of officers to accompany him to Mombasa to search for the deceased; that after 11 days of continued search in the deceased's house, compound and beaches, they eventually found his body covered with a mattress in a soak pit outside his house; that, along with

the body, the police recovered a hammer and a crowbar. And that pictures of the scene were taken in his presence, and the deceased's remains taken to the mortuary.

11. PW6 told the court that he informed PW1, PW2 and PW3 of the unfolding developments, and the three returned to Kenya on 26th June 2016; that, on return, samples of their DNA were taken by PW8 – John Kimani Mungai (a government analyst based at the Government Chemist at Nairobi), who confirmed that their samples matched the deceased's DNA; and that a postmortem examination of the deceased's body was carried out in PW6's presence.

12. PW9 – Dr. Ngali Mbuko, a consultant pathologist at Coast General Hospital, performed a postmortem examination on the deceased's body and found that the remains were comprised of bones, all soft tissue having decomposed; that there was a hole on the left side of the skull; and that the zygomatic and lower jaw bones were fractured. From the findings, PW9 concluded that the cause of death was damage to the head following severe blunt trauma applied to the left side of the head. He produced the postmortem report (PExhibit15).

13. PW31 – No. xxxx Cpl. Philip Lonyala, attached to the Tourist Police Unit at Bamburi, told the trial court that, in the course of investigation into the deceased's death, he arrested the 2nd appellant at the deceased's house in Nyali and recovered from him a mobile phone and a camera belonging to the deceased; that he charged the 2nd appellant at the Shanzu Chief Magistrate's Court in Criminal Case No. 168 of 2016 with the offence of theft by servant, to which the 2nd appellant pleaded guilty and was sentenced to two-and-a-half years imprisonment; and that, thereafter, PW31 handed over the stolen mobile phone, camera and the CCTV footage of the scene of crime to the homicide team investigating the case.

14. At the appellants' trial in the High Court, PW12 identified the camera handed over by PW31 and produced by PW32 – Cpl. Oliver Nabonwe (the investigating officer attached to DCI Headquarters, Homicide Division) as the one he had seen the 2nd appellant in possession of when he visited him in his house on 7th January 2016.

15. In addition to the mobile phone and camera recovered by PW31 and produced by PW32 as exhibits, PW32 testified further that, his team recovered several items from the 2nd appellant's house at Magongo, including a hacksaw and an electric iron box, which were identified by PW6 as belonging to the deceased. Also recovered were cash sale receipts for assorted items, a motorcycle, a battery, electronic equipment, a stereo amplifier, a car battery, assorted electrical cables, two mounted speakers, two cigarette lighters, two novels, two dictionaries, two textbooks, tin snips, three pairs of shoes, registration book and insurance certificate for the motorcycle.

16. The items recovered from the 2nd appellant were believed to have been either the deceased's property or bought with money withdrawn from his bank accounts, including a Dutch bank account belonging to the deceased, but which had been emptied by a series of withdrawals between 6th and 8th January 2016 after the deceased's demise. According to PW1, an equivalent of KShs. 300,000 had been withdrawn from that account alone. In addition to the above-mentioned bank withdrawals, PW32 also recovered from the 2nd appellant an Equity Bank prepaid Mastercard for Account No. xxxx believed to be the deceased's property

17. Finally, the deceased's motor vehicle Registration No. xxxx Toyota RAV4 was also recovered following an accident while driven by the appellants' co-accused, Stephen Okoth Oboo (Stephen) on 5th February 2016 and who, according to PW29 – Derrick John Ochanji, had claimed to have bought the vehicle.

18. PW13 – a mechanic by the name Bernard Makhisa Wanjala identified the motor vehicle aforesaid as the one he had repaired for the deceased at his residence. PW28 – Albert Reidino Leibor (a registration and licensing officer stationed at NTSA Mombasa) testified that motor vehicle Registration No. xxxx belonged to the deceased.

19. Following further investigations, PW32 testified that the appellants were seen riding in the deceased's motor vehicle almost the whole day on 6th January 2016 after which they parked it at Kongowea Methodist Church; that the parking register and records showed that the vehicle was brought by the 2nd appellant; that PW21 – Kibet Korir Peter (a former security guard at Kongowea Methodist Church) confirmed that the vehicle was parked at the church at 5:00 pm; that, on the same day, the 2nd appellant withdrew KShs. 155,000 from the deceased's ABN Amro Bank account using the deceased's ATM card, after which he bought an amplifier, a battery and two mounted speakers; that on 7th January 2016 he withdrew a sum of KShs. 100,000 from the deceased's account at Equity Bank lobby, Kengeleni; that on 8th January 2016, he withdrew KShs. 50,000 from the deceased's account at Equity Bank, Diani branch; that, on 11th January 2016, he withdrew KShs. 10,000 at Kericho; and that, at the time of making those withdrawals, the 2nd appellant had KShs. 2,101 in his account with Chase Bank, the only account that he held with a bank.

20. According to PW32, the 2nd appellant's movements and withdrawals were supported by Safaricom call data, which showed that he was at the three aforementioned places. PW32 also told the trial court that the 2nd appellant travelled to Msambweni where he bought drinks for PW12 and that, on that day, he was in possession of a camera identified as belonging to the deceased; that on 8th January 2016, he travelled to his rural home where he built a semi-permanent house using the deceased's money; that he was later arrested and charged at Shanzu law courts with 5 counts of stealing in Criminal Case No. 168 of 2018; and that, during arrest, the 2nd appellant was found in possession of the deceased's camera, which was later identified by PW4 and PW6.

21. Finally, PW32 told the trial court that, on searching the deceased's residence at Nyali, they recovered from a soak pit in the compound body parts (skeleton) suspected to be that of the deceased, a metal bar, a crow hammer, a mattress, two towels, a burnt piece of cloth, and three pieces of charred wood; that the body parts were moved to Coast General Hospital for preservation; and that the DNA specimens taken from the body parts matched those of the deceased's children (PW1, PW2 and PW3).

22. At the conclusion of investigations, the appellants and their co-accused were arrested and charged with the offence of murder, whose particulars are set out above. They denied the offence and gave sworn testimonies in their defence.

23. In his defence, the 2nd appellant admitted that he worked for the deceased as a gardener in daytime and as a dog handler for Corporate Safety Solutions Limited at night; that between 4th and 6th January 2016, he was still working for the deceased on part-time basis; that at the end of 2015, the deceased's motor vehicle xxxx developed mechanical problems which, due to his medical condition, the deceased could not repair it; that he called PW13 – Bernard Makhisa Wanjala, who came and repaired the vehicle; that, when the vehicle continued overheating, the deceased told him to call another mechanic; that he called Stephen, who was his nephew, whereupon the deceased allowed him (the 2nd appellant) to take the vehicle to Changamwe where he left it and returned; and that Stephen repaired the vehicle.

24. The 2nd appellant stated further that he asked the deceased for permission to go home in Kisumu for a period of one month; that he travelled on 8th January 2016; that the deceased's daughter (PW1) called him on 11th January 2016 and informed him that she was coming to Mombasa; that, prior to him leaving for Kisumu, the 2nd appellant engaged the 1st appellant on 7th January 2016 to stand in for him

as gardener while he was away; that, when he took the 1st appellant to the compound, he found no-one; that he called PW4, who informed him that she had left with the deceased for Nairobi, but requested him not to tell anyone; that he explained to PW1 what PW4 had told him; and that the last time he saw PW4 was 30th December 2015.

25. With regard to his trip to Kisumu, the 2nd appellant admitted that he undertook some developments, built a house, bought a motorcycle, a music system and two speakers. He stated that the money he used to build the house and buy the items aforesaid belonged to him; that it was comprised of savings earned from his previous employment at Unifresh Company; that he was also paid by the deceased and by Corporate Security Solutions; and that he had also earned money from sugarcane farming at home.

26. Concerning his charge and conviction in Shanzu Magistrate's Court in Criminal Case No. 168 of 2018 on his own plea of guilty, the 2nd appellant alleged that he pleaded guilty because he was tortured; that he served two-and-a-half years in prison, during which he heard that the deceased had died, but that he did not know how the deceased met his death.

27. On the issue concerning withdrawal of funds using the deceased's ATM card, the 2nd appellant stated that the deceased never game him an ATM card, and that he was not found in possession of any ATM card; and that the prosecution evidence that he had allegedly withdrawn money from the deceased's accounts was false because he did not have any ATM card. However, the 2nd appellant later admitted that the photos showing him withdrawing money from ATMs were indeed his, but that he was withdrawing money using his own ATM card; that he had accounts with Equity Bank and Chase Bank; and that he was withdrawing his own money.

28. In his defence, the 2nd appellant stated that, when PW1 and her family members came to Mombasa on 12th January 2016, he was in Kisumu, and that he returned to Mombasa and accompanied them to Bamburi Police Station where they reported that the deceased was missing; that he returned to Kisumu to continue with his leave, but returned to Mombasa on 8th February 2016 whereupon he resumed his part-time work at the deceased's compound, and in the security company; and that he did not know that the deceased had been killed.

29. According to the 2nd appellant, he was later summoned by PW31 on 9th February 2016, taken to Bamburi Police Station where he was allegedly tortured; and that, thereafter, he was taken to court and charged. Regarding the camera, iron box and hacksaw recovered from him, the 2nd appellant alleged that he was gifted by the deceased.

30. In his defence, the 1st appellant testified that he worked as a security guard at Sentinel Security Services at night; that, the 2nd appellant called him on 1st January 2016 and requested him to stand in for him as a gardener at the deceased's compound, which he agreed; that, on 7th January 2016, he met the 2nd appellant, who took him to the deceased's home at Nyali; that the 2nd appellant went in and, when he came out of the house, he told the 1st appellant that he had not found the deceased; that he nonetheless showed him the work he was to do in the garden and how to water the plants; that the 2nd appellant did not leave him with keys to the deceased's house when he left for Kisumu on 8th January 2016; that he worked for 21 days on the compound for KShs. 150 per day, and that the 2nd appellant paid him a total of KShs. 2,100; that when the 2nd appellant returned on 12th January 2016, he informed him that there were visitors, but that he (the 2nd appellant) would return to Kisumu and continue with his leave; and that, when PW1 and PW6 came on 11th January 2016, he informed them that he was standing in for the 2nd appellant as gardener.

31. The 1st appellant testified further that he was arrested on 28th May 2016 while at work at Sentinel Security Services and questioned about the 2nd appellant; that his house was searched; and, thereafter, he was taken to Bamburi police station. The 1st appellant testified further that he did not know the deceased, and that he had never seen him; that he did not know how the deceased met his death; and that he had never seen anyone else at the deceased's compound.

32. Testifying in his defence, Stephen stated that he worked as a mechanical engineer and had a garage at Changamwe; that, on 6th January 2016, the 2nd appellant (his uncle) called and informed him that he wanted to give him a vehicle belonging to his employer to carry out some repairs; that the 2nd appellant told him that his employer was a white man from Netherlands, and had travelled abroad; that the 2nd appellant brought him the vehicle on 7th January 2016 in the company of the 1st appellant and a driver, who Stephen did not know; that the 2nd appellant told him that he was going home, but did not know when he would return; that he parked the vehicle near his house and carried out the repairs, but that, soon thereafter, he was involved in an accident and the vehicle towed and detained at Makupa police station; that he was arrested on 24th May 2016 and questioned about the 2nd appellant and, thereafter, charged jointly with the appellants. He explained that he did not know the deceased and had never talked to him.

33. DW4 – Michael Oboo Ayieko testified that the 2nd appellant was his brother, and that Stephen was his son; that, on learning of Stephens arrest, he (Michael) travelled to Mombasa where he was informed at Mbaraki police station that Stephen was found in possession of a motor vehicle belonging to a person who had been murdered; that the police questioned him about the 2nd appellant and Stephen, and proceeded to search his home and compound.

34. In her judgment dated 26th October 2018, Asenath Ongeri, J. acquitted the co-accused, Stephen Okoth Oboo, and convicted the 2nd appellant as charged and the 1st appellant for being an accessory after the fact of murder. She sentenced the 1st appellant to life imprisonment and the 2nd appellant to death.

35. In her judgment, the learned Judge had this to say with respect to the charge and findings against the 2nd appellant:

> " 106. …I find that there is circumstantial evidence upon which an inference can be drawn that accused 1 was involved in the murder of the deceased…
>
> 109. In the Current Case, I find that the evidence against accused 1 forms a chain so complete that there is no escape from the conclusion that accused 1 was involved in the murder of the deceased. The accused 1 stole the property of the deceased and there is conclusive evidence that he was found guilty on his own plea.
>
> 110. I have considered the defence by the accused 1 and the same is a series of lies. The accused 1 person said the deceased gave him the camera and rickshaw and that the money he used on a shopping spree from 61h to 11th January belonged to him. The accused 1 shamelessly treated the court to blatant lies in full glare of evidence that he was convicted on his own plea of guilty on five charges of stealing by servant.
>
> 111. The body of the deceased was discovered six months after accused 1 pleaded guilty to the charges of stealing. The deceased's body was badly decomposed

and there is medical evidence that the deceased was battered to death in a most cruel way....

112. I find that the Prosecution has proved that the motive for killing the deceased was in order to steal his property and the A1 indeed stole the deceased's' property and was convicted on his own plea of five counts of stealing by servant This was a murder most foul. The accused 1 killed an innocent man who was sickly in order to help himself to his property.

113. The prosecution has proved the guilt of A1 to the required standard and I accordingly convict him as charged."

36. Aggrieved by the learned Judge's decision, the 1st appellant moved to this Court on appeal on 1 ground set out in his undated memorandum of appeal contending that he "... pleaded not guilty at the trial." This ground was later bolstered by his supplementary memorandum of appeal dated 11th July 2023 faulting the learned Judge for: convicting the 1st appellant in the absence of any evidence linking him to the knowledge or involvement of the deceased's death or any act of omission or commission perpetrated by him or under his authority; convicting him on circumstantial evidence of the weakest calibre, which did not meet the required legal standards; relying on hearsay evidence to make a finding of guilt against him; ignoring unequivocal and exculpatory evidence on record, and hence failing to evaluate the entire evidence and draw proper conclusions; making a finding of guilt against him on circumstances similar to those of the 3rd accused, who was justifiably acquitted despite there being similar or more evidence of recent possession compared to that of the 1st appellant; by failing to consider the fact and unrebutted evidence that the reason why the 1st appellant was in recent possession was because he was standing in for the 2nd appellant; and for holding that the 1st appellant participated in covering up of the offence without tangible evidence to that effect.

37. Also aggrieved by the learned Judge's decision, the 2nd appellant moved to this Court on appeal on 5 grounds set out in his undated memorandum of appeal faulting the learned Judge for: failing to consider that there were no eye witnesses hence the case relied on circumstantial evidence which was not proved beyond reasonable doubt; failing to see that the production and admissibility of the post mortem report did not estimate the duration of any fracture found on the deceased's body which could determine when the death occurred; failing to consider that the 2nd appellant was the first person to report the matter to Bamburi Tourist police unit about a missing person; failing to consider that the alleged ATM cards were not found in the 2nd appellant's possession nor produced in court as exhibits and were not in the hands of the prosecution for inspection; and for failing to find that the case was based on fabrications.

38. The 2nd appellant's further supplementary memorandum of appeal dated 22nd September 2023 faults the learned Judge for convicting him on the basis of suspicion and disjointed circumstantial evidence, and while the case against him was not proved beyond reasonable doubt. It also makes reference to a supplementary memorandum of appeal said to have been filed on 28th February 2023, but which is not contained in the record as put to us.

39. In support of the appeal, learned counsel for the 1st appellant, M/s. A. O. Aminga & Company, filed written submissions and list of authorities dated 11th July 2023 citing 4 judicial authorities to which we will shortly return. According to learned counsel, the 1st appellant was a mere innocent pawn in the heinous crime; that the assistance by an accessory as envisaged under Section 396(1) of the *Penal Code* is directly linked to the crime in question; that, on the contrary, there is no evidence, direct or circumstantial, to demonstrate that the 1st appellant indeed performed any acts or omitted to do

anything with intent to conceal the murder; that there is no evidence that he actually knew of the murder, but simply stood in for the 2nd Appellant to undertake ordinary and innocent tasks, and departed from the scene of crime oblivious of the death in question; and that the 1st appellant could not have assisted and/or facilitated the cover-up or concealment of the deceased's death.

40. Learned counsel submitted further that the evidence adduced in the trial court on why the 1st appellant was in the deceased compound was clearly compatible with his innocence given that he had a valid explanation as to why he was there; and that his evidence was corroborated by that of the 2nd appellant and PW1, who confirmed that she found him (the 1st appellant) outside the house doing gardening with a tool and work clothes, on and that she always found the garden well done.

41. Counsel invited us to consider, as we hereby do, the High Court decision in *LK v Republic* [2020] eKLR for the proposition that "… the rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact."

42. On circumstantial evidence of recent possession, counsel submitted that there was nothing out of the ordinary for the 2nd appellant to be in possession of his Employer's motor vehicle in which the 1st appellant was allegedly seen at Kongowea Methodist Church on 6th January 2016; that, in any event, PW32's evidence in that regard was hearsay and contradictory to that of PW31, who testified that the vehicle was parked outside the church by a driver who he could not identify, and who was accompanied by the 2nd appellant; that, in view of the fact that there was no eyewitness to the allegation that the 1st appellant was seen riding in the deceased's motor vehicle that day before being parked at Kongowea Methodist Church, the learned Judge erred in law and in fact by convicting him on the basis of the uncorroborated hearsay evidence of PW32; and that, even if it were true that the 1st appellant was indeed in the deceased's vehicle as alleged, that in itself was not incriminating conduct, and that it was capable of innocent explanation, much as was his presence in the deceased's compound from 7th January 2016.

43. In conclusion, counsel submitted that the 3rd accused (Stephen) was justifiably acquitted despite similar evidence of recent possession in comparison to that on which the 1st Appellant was convicted. He urged us to allow the appeal.

44. On their part, learned counsel for the 2nd appellant, M/s.Kakai Mugalo & Co., filed their written submissions and list of authorities dated 22nd September 2023. Counsel cited 6 judicial authorities to which we will address ourselves shortly.

45. In their submissions, counsel posited that the case before the trial court was premised purely on circumstantial evidence, none of which pointed at, or hinted at, a common intention or conspiracy to kill the deceased; that the 2nd appellant was convicted on the basis of suspicion without more; that it was not unusual or out of the ordinary for the 2nd appellant to have been found with items belonging to the deceased, whose premises he frequented as a part-time employee; that the personal items recovered from the 2nd appellant had been gifted to him by the deceased in anticipation of death in the face of his advanced age and failing health; that the deceased apparently planned and caused his own death, which he was already looking forward to; and that there was no dying declaration or any antecedent event ever cited to suggest that there was any bad blood between the deceased and the 2nd appellant for him to contemplate murdering the deceased so as to benefit from his properties.

46. Surprisingly, and in addition to the foregoing, learned counsel for the 2nd appellant submitted that, despite the 2nd appellant having been convicted on five counts in Shanzu CMCRC No. 168 of 2016, the conviction did not exempt the prosecution from adducing evidence in support of the claims that the 2nd Appellant withdrew money from the deceased's bank account on diverse dates. According to

counsel, there was no report of loss of the deceased's ATM card, and neither was it recovered from the 2nd appellant. Suffice it to observe that the 2nd appellant had been charged with the offence of theft by servant, to which he pleaded guilty and sentenced to two-and- a-half years' imprisonment.

47. On the issue as to the identity of the person who withdrew money from the deceased's account, counsel argued that the 2nd appellant's identification was founded on PW1's bad blood "laced with venom;" that PW1 had previously accused the 2nd appellant of several incidents of theft from the deceased's house and sought to have him dismissed; and that PW1's claim that the 2nd appellant had keys to the deceased house was uncorroborated.

48. Counsel submitted further that the call data records produced by PW11 constituted electronic evidence in respect of which a certificate ought to have been prepared and submitted as evidence pursuant to section 106B(4) of the *evidence Act*; that the electronic evidence aforesaid was obtained illegally in contravention of Article 50(4) of the *Constitution*, and that the same was therefore inadmissible in evidence; that the call data records and signals placing the 2nd appellant at the vicinity of the deceased's location were unreliable as they were not authenticated by any forensic examination; that the CCTV footages in which the 2nd appellant was captured making ATM withdrawals from the deceased's bank account were equally inadmissible for failure to comply with the certification procedures mandated by the Evidence Act; and that the bank statements of the deceased's account were not authenticated and, therefore, were of no evidential value.

49. So much for the highly spirited contentions characterized by intricate technical rules of procedure that determine the reliability and admissibility of such electronic evidence in respect of which learned counsel cited the High Court decisions in the cases of *Levi Simiyu Makali v Koyi John Waluke & 2 others* [2018] eKLR; *Republic v Barisa Wayu Mataguda* [2011] eKLR; and *Abdul Mohamed Abdulrahman v Republic* Garissa HCCRA No. 9 of 2016 (UR), for the proposition that there is need to strictly comply with the law when dealing with electronic evidence, which can easily be altered or made up; and that, for electronic evidence to be deemed admissible, it must be accompanied by a certificate in terms of section 106B(4) of the *Evidence Act*.

50. Turning to the ingredient of motive, learned counsel faulted the learned Judge for reaching the conclusion that the 2nd appellant had the requisite mens rea and the motive to murder the deceased so as to benefit from his money and other personal items in the absence of any evidence in that regard; and that there was no element of planning or pre-meditation on the part of the 2nd appellant to commit the offence.

51. Section 203 of the *Penal Code* sets out three elements, which the prosecution must prove beyond reasonable doubt to earn a conviction, namely: (a) The death of the deceased, and cause of that death; (b) that the accused committed the unlawful act which caused the deceased's death; and (c) that the accused had malice aforethought. See *Nyambura & others v Republic* [2001] KLR 355.

52. Section 206 of the *Penal Code* defines "malice aforethought" as follows:

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.

53. This Court in *John Mutuma Gatobu v Republic* [2015] eKLR lent further clarity to the conception of malice aforethought thus:

> " There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought."

54. On the circumstantial evidence of recent possession of the deceased's motor vehicle with which the 2nd appellant was sighted on several occasions, counsel submitted that the same had been handed over to the 3rd accused for repairs at the time the deceased disappeared; that it could not be ruled out that the deceased had sold it considering that he had lost all hope of staying alive due to old age & ill health, which was compounded by his intended relocation to Holland; that the 3rd accused was heard bragging to PW5 that he had bought the vehicle from a mzungu (white man), and which was in his possession from early January 2016.

55. In addition to the foregoing, learned counsel submitted that the metal bar, crow hammer, mattress, burnt clothes/towel and three pieces of charred wood recovered from the septic tank along with the deceased's remains were not associated with the 2nd appellant. According to counsel, the death of the deceased is far from resolved and the culpable people arrested. He urged us to allow the 2nd appellant's appeal or, in the alternative interfere with his sentence.

56. On sentencing, counsel cited the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR; the Court of Appeal decision in *Julius Kitsao Manyeso v Republic*, Criminal Appeal No 12 of 2021 (UR); and the High Court decision in *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR), submitting that the emerging jurisdiction is that sentencing is a matter of discretion depending on both the mitigating and aggravating circumstances vis-à-vis the objectives of sentencing. According to him, if the conviction is upheld, the sentence must be interfered with.

57. Counsel submitted further that the 2nd appellant was a 1st offender, who pleaded for leniency; that he was suffering from some serious underlying illness as appears from the record, and which requires consideration pursuant to section 333(2) of the *Criminal Procedure Code*. Finally, counsel submitted that the 2nd appellant has been in custody from 9th February 2016 to date, which is sufficient punishment for someone suffering from a terminal illness. It is noteworthy that the 2nd appellant has put on a spirited fight against both conviction and sentence in this appeal and desires to have his sentence reconsidered in the event that his appeal on conviction fails.

58. Ms. Vivian Kambaga, learned Assistant Director of Public Prosecutions, filed her written submissions dated 17th July 2023, which we have taken to mind, noting that counsel did not cite any judicial authorities to inform our decision either way. It is noteworthy, though, that the State conceded the 1st appellant's appeal, a matter on which we will pronounce ourselves shortly.

59. We have carefully considered the record of appeal, the rival submissions and the applicable law. Our mandate on a first appeal as set out in rule 31(1) (a) of the Rules of this Court is to reappraise the evidence and to draw our own conclusions. In principle, a first appeal takes the form of a rehearing (see *Ogaro v Republic* [1981] eKLR).

60. This being a first appeal, it is by way of a retrial. As the first appellate court, the Court has a duty to re-evaluate, re- analyze and re-consider the evidence afresh and draw its own conclusions on it. However, the Court should bear in mind that it did not see the witnesses as they testified and give due allowance for that. See *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123.

61. With regard to the cardinal duty to re-evaluate, re-analyze and re-consider the evidence on record, this Court In *Makube v Nyamiro* [1983] eKLR set down the ground rule, stating thus:

> " A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

62. In the same vein, the predecessor of this Court, the Court of Appeal for Eastern Africa pronounced itself on the cautious approach to be employed in discharge of its mandate on a first appeal and stated thus in *Peters v Sunday Post Limited* [1958] EA 424:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

63. It must be borne in mind, though, that scrutiny without more is not sufficient. The Court is mandated to undertake a fresh and exhaustive examination and reach its own decision on the evidence on record. In this regard, the Court in *Okeno v Republic* [1972] EA 32 set out the duty of a first appellate court in the following words:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

64. This cautious approach has deep roots in comparative common law jurisdictions as demonstrated in the decision of the Supreme Court of India in *Ganpat v State of Haryana* (2010) 12 SCC 59. 4. where the court set out the principles to be borne in mind by a first appellate court while dealing with appeals and stated thus:

> " a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.

b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.

c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.

d. When the trial Court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question."

65. Having carefully considered the record of appeal, the grounds on which it is anchored, the respective written and oral submissions and the law, we form the view that the appellants' respective appeals stand or fall on our finding on the following four main issues, namely: whether the circumstantial evidence on record was sufficient to sustain the 1st appellant's conviction for allegedly being accessory after the fact of murder contrary to Section 222 of the *Penal Code*; whether the evidence that the 1st appellant was seen riding in the deceased vehicle on 6th January 2016 amounted to hearsay evidence; whether the circumstantial evidence adduced against the 2nd appellant was safe to sustain a conviction against him; and whether the charge against the 2nd appellant was proved beyond reasonable doubt.

66. On the 1st and 2nd issues, which are closely linked, the 1st appellant's case was that he was convicted without any evidence linking him to the knowledge or involvement of the deceased's death or any act of omission or commission perpetrated by him or under his authority; that the circumstantial evidence on which he was convicted of being an accessory after the fact of murder was of the weakest calibre, and that it did not meet the required legal standards to sustain a conviction; that the circumstantial evidence of recent possession on which he was convicted was hearsay and similar to the evidence which justified Stephen's (the 3rd accused's) acquittal; and that the circumstantial evidence of recent possession on the basis of which he was convicted was fully explained by the fact that he was standing in for the 2nd appellant. All in all, he denied participating in covering up of the deceased's murder, stating that he did not know how the deceased met his death.

67. With regard to the 1st issue, section 222 of the *Penal Code* creates the offence of accessory after the fact to murder and provides:

222. Accessory after the fact to murder

Any person who becomes an accessory after the fact to murder is guilty of a felony and is liable to imprisonment for life.

68. In this regard, section 396 of the *Penal Code* defines "accessories after the fact" as follows:

396. Definition of accessories after the fact

(1) A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.

69. The Black’s Law Dictionary (9th Ed.) at p. 16 further describes an accessory after the fact as follows:

> “ Most penal statutes establish the following four requirements: (1) someone else must have committed a felony, and it must have been completed before the accessory's act; (2) the accessory must not be guilty as a principal;
>
> (3) the accessory must personally help the principal try to avoid the consequences of the felony; and (4) the accessory's assistance must be rendered with guilty knowledge ... At common law, an accessory after the fact is one who knowing that a felony has been committed by another, receives, relieves, comforts, or assists the felon, or in any manner aids him to escape arrest or punishment. To be guilty as an accessory after the fact one must have known that a completed felony was committed, and that the person aided was the guilty party. The mere presence of the defendant at the scene of the crime will not preclude a conviction as an accessory after the fact, where the evidence shows the defendant became involved in the crime after its commission.”

70. The South African Supreme Court of Appeal in S v Morgan and Others [1993] ZASCA 94 emphasized the element of knowledge of the committal of an offence as follows:

> “ ...intention or dolus is an essential element of the offence of being an accessory after the fact. It follows that it must be shown by the prosecution that the accused, the alleged accessory, knew that the person whom he helped had committed a crime.”

71. The uncontroverted evidence on record shows that the 1st appellant was a night security guard in the employment of Sentinel Security Services; that he was approached by the 2nd appellant on 1st January 2016 to stand in for him as a gardener at the deceased’s compound during the day; that he reported on 7th January 2016 and met the 2nd appellant, who informed him that the deceased was not in; that he (the 1st appellant) did not know the deceased, and had never seen him; that the 2nd appellant left for Kisumu on 8th January 2016 and returned on 12th January 2016; and that he was later paid by the 2nd appellant for the 21 days worked.

72. The only evidence of recent possession presumably on the basis of which the 1st appellant was convicted is that he was in the 1st appellant’s company when he (the 2nd appellant) took the deceased’s vehicle to Stephen for repair before leaving for Kisumu on 7th January 2016, the day the 1st appellant came to stand in for the 2nd appellant as gardener in the deceased’s compound.

73. With regard to the charge against the 1st appellant, the learned Judge made the following findings in her judgment in which reference to “A1” should be understood as reference to the 2nd appellant and “A2” to the 1st appellant:

> “ 114. The A2 was in the company of A1 when A1 took the deceased's motor vehicle to Methodist church on 6/1/2016. The A2 was also found at the compound of the deceased on various dates after the deceased had gone missing. I also find that there is circumstantial evidence that points to the guilt of A2 as an accomplice to the crime.
>
> 115. I have considered the defence by A2. He said he came to the deceased's compound on 7/1/2016 and that he did not know the deceased. However there is evidence in the company of A1, A2 took the deceased's motor vehicle

the Methodist church on 6/1/2016 and on 7/1/2016 again in the company of A1 they took the deceased's motor vehicle to A3. I find that the behavior of A2 was inconsistent with an innocent man.

116. I find that there is evidence that A2 was an accessory after the fact to murder and I accordingly convict him of the offence of being an accessory after the fact to murder."

74. The decisive question falling to be determined in relation to the 1st appellant's appeal is whether the uncontroverted evidence that he was in the 2nd appellant's company on 6th and 7th January 2016 when he (the 2nd appellant) went from one place to another in the deceased's motor vehicle before leaving it with Stephen for repair after which he departed for Kisumu on or about 8th January 2016 and returned on 11th January 2016 made the 1st appellant accessory after the fact of murder.

75. It is clear from the impugned judgment and the evidence on record that the 1st appellant's conviction was founded on the principle of recent possession solely on the fact that he was in the 2nd appellant's company on 6th and 7th January 2016 aboard the deceased's vehicle on two locations, namely at the Kongowea Methodist Church and at Stephen's garage respectively; and that he stood in for the 2nd appellant as gardener during the day on the deceased's compound for 21 or so days from 7th January 2016 during which period the 2nd appellant shuttled between Mombasa and Kisumu.

76. On the evidence of "recent possession, this Court in *Raymond Hermes Odhiambo v Republic* [2002] eKLR observed:

> "It is settled in law, that evidence of recent possession, is circumstantial evidence, which, depending on the facts of each case, may support any charge, however penal."

77. As the High Court correctly observed in *John Mutembei Muthama v Republic* [2013] eKLR:

> "Furthermore, on the doctrine of recent possession, it has been soundly held that the Court must, before deciding upon a conviction, find 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."

78. Cognisant of the circumstantial evidence of recent possession on which the 1st appellant was convicted, and the need to be careful in considering such evidence, we call to mind this Court's decision in *Sango Mohamed Sango & another v Republic* [2015] eKLR where the Court expressed itself thus:

> "The court ought to be extremely careful before relying on circumstantial evidence as a basis for conviction. ... circumstantial evidence must be incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of his guilt and further that for circumstantial evidence to form the basis of a conviction, there must be no other existing circumstances which would weaken the chain of circumstances." [Emphasis added]

79. To our mind, the two occasions on which the 1st appellant was seen with the2nd appellant aboard the deceased's motor vehicle before the 2nd appellant deposited it with Stephen for repair, and the subsequent assumption of his tasks as gardener from 7th January 2016, cannot reasonably impute knowledge on the 1st appellant's part that the deceased had been killed, or that he was accessory after the fact of murder with which they were jointly charged. The uncontroverted evidence that the 1st

appellant came to the deceased's compound for the first time on 7th January 2016, and that he had never known or seen the deceased before the 2nd appellant left for Kisumu on 8th January 2016, raises doubt as to whether the 1st appellant knew or suspected what had happened to the deceased. Indeed, his satisfactory explanation of the sequence of events leading to his conviction on the circumstantial evidence of recent possession negates the trial court's conclusion that he was guilty of the offence for which he was convicted.

80. Moreover, the issue as to the deceased's whereabouts from the 1st appellant's standpoint was further compounded by the 2nd appellant's narrative that the deceased had left for Nairobi on 30th December 2015 in the company of PW4, and that he (the deceased) did not want anyone to know about it. In effect, the circumstances under which the deceased met his death soon after PW4's visit and departure on 30th December 2015 remained closely guarded by the 2nd appellant, who alone knew or reasonably ought to have known how the deceased met his death.

81. In conclusion, the evidence of the 1st appellant's acquaintance with the 2nd appellant; their having been seen together on 6th and 7th January 2016 riding in the deceased's motor vehicle; and the 1st appellant's engagement to stand in for the 2nd appellant as gardener on the deceased's compound from 7th January 2016 do not, in our considered view, prove beyond reasonable doubt that the 1st appellant concealed or, otherwise, was accessory after the fact of, the deceased's murder. Neither does the circumstantial evidence of recent possession by reason of the fact that he was a passenger in the deceased's motor vehicle soon after his murder strictly implicate the 1st appellant in the offence as jointly charged. Indeed, it is most likely that he knew nothing of it, which reasonably explains why the State readily conceded to his appeal, a concession that does not necessarily bind this Court.

82. We reach this conclusion on the authority of the decision in *Odhiambo v Republic* [2008] KLR 565 where this court stated:

> "The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."

83. Having carefully subjected the evidence tendered before the trial court to clear and fresh scrutiny, and having re- assessed it, we reach the conclusion, based on the evidence on record as put to us, that the prosecution did not prove its case against the 1st appellant beyond reasonable doubt; and that his conviction was unsafe. In effect, the 1st appellant's appeal succeeds. Consequently, his conviction and sentence in Mombasa High Court Criminal Case No. 28 of 2016 are hereby set aside. Accordingly, we hereby order and direct that the 1st appellant be set at liberty unless otherwise lawfully held.

84. Turning to the 3rd issue as to whether the circumstantial evidence adduced against the 2nd appellant was safe to sustain a conviction against him, we take to mind the grounds on which he comes to this Court on appeal, namely: that there was no eyewitness, and that the case against him was founded on circumstantial evidence; that the production and admissibility of the postmortem report did not determine when the death occurred; that the learned Judge failed to consider that he (the 2nd appellant) reported the deceased as a missing person; that the alleged ATM's cards were not found in his possession; that the case against him was fabricated; and that the charge against him was not proved beyond reasonable doubt.

85. Circumstantial evidence is so called where no eyewitnesses, if any, are called to testify in support of the prosecution or defence case but, rather, surrounding circumstances point to proof beyond reasonable

doubt that the accused is criminally liable for the offence charged. In the 2nd appellant's case, such evidence included, inter alia, the evidence of recent possession of various personal items belonging to the deceased's, and for which he was charged and convicted for theft by servant on his own plea of guilty in Shanzu Magistrate's Court Criminal Case No. 168 of 2016; evidence of records of ATM withdrawals of large sums of money from the deceased's account, and the application thereof in his building project at his rural home; the application of those moneys in acquisition of various electronic equipment; the personal engagement of the 1st appellant as gardener on the deceased's compound and payment of his 21 days' wages personally; the evidence of unrestrained personal use of the deceased's motor vehicle, which he deposited with Stephen for repair; the peddling of false information that the deceased had left for Nairobi with PW4, and that he (the deceased) did not want anyone else to know of it; the 2nd appellant's sudden liquidity and the out-of-the-ordinary generous entertainment of his friends with moneys believed to have been withdrawn from the deceased's account; and his tight-lipped attitude towards the deceased's disappearance, among other telling narratives that emerge from his learned counsel's written submissions, which we need not analyse point by point, save to observe that most of the speculative suppositions and evidential matters raised were neither in issue at the trial nor related to the specific grounds of appeal which we have been invited to consider.

86. Addressing itself to the principles on which a trial court may convict an accused on circumstantial evidence, this Court in *Ahamad Abolfathi Mohammed and another v Republic* [2018] eKLR had this to say:

> "... it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. 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. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -
>
> > 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.'

87. Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Suffice to mention the case of *Abanga alias Onyango v Republic* Cr. App No. 32 of 1990(UR) in which this court held as follows:

> 'It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.'"

88. Having keenly analysed and re-assessed the evidence on record, we reach the inescapable conclusion that the circumstantial evidence on which the 2nd appellant was convicted satisfies the threefold test enunciated in the afore- cited case of *Abanga alias Onyango v Republic* (ibid). To our mind, the

circumstances from which the inference of the 2nd appellant's guilt was drawn was cogently and firmly established to the satisfaction of the trial court. We are equally satisfied that those circumstances point to his guilt, and that no-one but the 2nd appellant was responsible for the deceased death.

89. Taking the circumstances of this case cumulatively, we are satisfied that the evidence forms a chain so complete that there is no escape from the conclusion that the crime was committed by the 2nd appellant. His contention that he could not have been responsible because he reported the deceased as a missing person does not hold. Neither does the fact that he was not found in possession of the deceased's ATM card at the time of arrest raise any doubt as to his guilt. Addressing itself to the weight of circumstantial evidence in *Sawe v R* [2003] KLR 364, this Court expressed itself thus:

> "In order to justify conviction 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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

90. On the authority of *Sawe v R* (ibid), we find no co-existing circumstances that weaken the chain of the circumstantial evidence relied upon in arriving at the conclusion that the 2nd appellant was guilty as charged.

91. The submission by learned counsel for the 2nd appellant that there was no eyewitness to the crime with which he was charged and, that, therefore, his conviction was unsafe, is not persuasive or consequential upon our finding to the contrary. Likewise, his speculative argument that the deceased had given up on life; that he had planned his death; that, in preparation therefor, he had gifted the 2nd appellant with the personal items recovered from him; and that, therefore, the 2nd appellant had no hand in his employer's death, defeat reason. If this overly- imaginative and unrealistic narrative were to hold, then counsel stopped short of telling us that the deceased bludgeoned himself, burnt his own body with wood and cloth, covered himself with a mattress and buried himself in the soak pit outside his house. With tremendous respect to counsel, the 2nd appellant's line of glaringly odd and fanciful contention is, to say the least, a mockery of criminal justice.

92. We need not overemphasise the fact that the mere fact of the 2nd appellant's conviction on circumstantial evidence does not of itself impute error of judgment on the part of the trial court. We take to mind the celebrated decision in *R v Taylor Weaver and Donovan* (1928) 21 Cr. App. R 20 where the court stated 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."

93. In the same vein, Madan & Potter, JJ.A. and Chesoni, Ag.JA., had this to say in *Mwangi v Republic* [1983] KLR 327 on the weight of circumstantial evidence:

> "In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or

tendency and should not have been acted on to sustain the conviction and sentence of the accused."

94. Considering the decisions in the afore-cited cases with regard to the reliability, admissibility and weight of the circumstantial evidence led by the prosecution, we reach the inescapable conclusion that the cumulative weight of the evidence in proof of the charge against the 2nd appellant dispels the allegation that the case against him was fabricated. We find nothing to suggest that this was the case.

95. The 2nd appellant goes on to challenge the reliability and admissibility of the post-mortem report on the ground that it did not establish when the death occurred. It is noteworthy that the admissibility of the post-mortem report is challenged for the first time on appeal to this Court, and was not objected to at the trial. To our mind, this is a mere afterthought that is of no consequence to this appeal.

96. That said, we take judicial notice of the fact that postmortem reports are mainly intended to establish the cause of death, and not necessarily to determine the precise time when it occurred. Notably, the postmortem report produced by PW9, Dr Ngali Mbuko, a consultant pathologist, disclosed the cause of the deceased's death and the state of his remains, stating that it had decayed and reduced to bare bones. That in itself led to inference that the deceased's death occurred around the time he went missing. In any event, section 77(1) of the *Evidence Act* lays this issue to rest. It reads:

77.

(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

97. The 2nd appellant also challenges his conviction on circumstantial evidence of several withdrawals from the deceased's bank account, claiming that the deceased's ATM card was not found in his possession. This claim comes too late in the day, and flies in the face of his trial and conviction in Shanzu Magistrate's Court Criminal Case No. 168 of 2016 in which he was charged with stealing by servant on 19th January 2016.

98. In that case, the 2nd appellant was accused of, among other things, withdrawing money from the deceased's account using the deceased's ATM card. He pleaded guilty to the offence whereupon he was convicted and sentenced to imprisonment for two-and-a-half years. The record of his trial, conviction and sentence in that case was produced in evidence before the trial court by PW10 – the Executive Officer of Shanzu Magistrate's Court. Even though the appeal before us is not a request to reconsider the outcome of that criminal case, it is instructive that the 2nd appellant pleaded guilty and was convicted accordingly. Section 47A of the *Evidence Act* provides that:

> A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

99. Be that as it may, PW32, the Investigating Officer, testified before the trial Judge that the 2nd Appellant alleged that he found the deceased's ATM card on the table, but did not explain how he got the PIN. In effect, the 2nd appellant's claim is merely an afterthought and does not hold.

100. Our foregoing findings of fact and holdings on points of law reached on careful consideration of the several grounds advanced in the 2nd appellant's appeal herein conclusively settle the 3rd main issue before us, namely whether the circumstantial evidence adduced by the prosecution was safe to sustain a conviction. Our brief answer is in the affirmative.

101. Turning to the 4th and last issue as to whether the prosecution proved its case against the 2nd appellant beyond reasonable doubt, we hasten to observe that this issue is closely interwoven with the 3rd issue on which we have already pronounced ourselves, leaving nothing more to say, save to call to mind the decision in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 where the court rightly observed:

> "Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent."

102. In conclusion, we find nothing to fault the learned Judge for her well-considered decision. Having carefully examined the record of appeal as put to us, the written and oral submissions of learned counsel for the 2nd appellant and of the State Counsel, the afore-cited judicial authorities and the law, we reach the inescapable conclusion that the 2nd appellant's appeal has no merit and is hereby dismissed, save for the issue as to whether we should exercise our discretion to reconsider the severity of the sentence meted on him.

103. Notwithstanding our finding on both conviction and sentence, the 2nd appellant urges the Court to exercise its discretion and reconsider his sentence in the event that his appeal on conviction fails. In their submissions, learned counsel advanced several reasons for our consideration and cited persuasive authorities in that regard. He drew the Court's attention to, *inter alia*, the 2nd appellant's state of chronic illness. According to counsel, the 2nd appellant was a 1st offender, who pleaded for leniency.

104. We take to mind the recent guidelines for resentencing in similar cases as enunciated in the afore-cited judicial decisions of the Supreme Court, this Court and the High Court (see para 56 above). Accordingly, we are inclined to exercise our discretion to reconsider the death sentence meted on him, taking into account the mitigating and aggravating factors brought to the Court's attention. Consequently, the judgment of the High Court of Kenya at Mombasa (A. Ongeri, J.) delivered on 28th October 2018 in Criminal Case No. 28 of 2016 is hereby upheld in part on both conviction and sentence in relation to the 2nd appellant, save that the death sentence imposed on him is hereby substituted for imprisonment to a term of forty (40) years. Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE, 2024

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

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR