GPM v Republic (Criminal Appeal 36 of 2018) [2024] KECA 1287 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KECA 1287 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 36 OF 2018

AK MURGOR, GV ODUNGA & KI LAIBUTA, JJA

SEPTEMBER 27, 2024

BETWEEN

GPM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (Chitembwe, J.) delivered on 21st September 2017 in HCCRA No. 4 of 2016)

JUDGMENT

1. The appellant, GPM, comes to this Court on appeal from the judgment of the High Court of Kenya at Malindi (S. Chitembwe, J.) dated 25th August 2017 and delivered by W. Korir, J. on 21st September 2017.

2. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. According to the Information Sheet, the particulars of the offence were that, on 11th and 12th March 2016 within Kilifi County, the appellant unlawfully murdered his wife, HG (the deceased). He pleaded not guilty to the offence.

3. At the trial, the prosecution called 6 witness in support of its case.

   PW1, KKB (the deceased's step-mother), who lived on the same compound with the appellant and the deceased, testified that, on the material night at about 1:00am, she was asleep when she heard the deceased's child crying; that she got up and went to the deceased's house and called out the deceased, but that she did not respond; that the appellant came out and told her that the child had woken up crying, but that the deceased was breastfeeding her; that PW1 returned to her house, but that the child continued crying; that she returned to the deceased's house and called her out, but she did not respond; that the appellant came out with the child and gave her to PW1; that the house was dark; that PW1 took the child, gave her some milk, and the child eventually slept.

4. PW1 testified further that she returned to the deceased's house, which was dark, accompanied by her husband (PW2), who took a torch with him; that, when he went in, PW2 saw the deceased's body lying on a mat; that there was a big stone nearby; that, by that time, the appellant had already left; and that they (PW1 and PW2) examined the deceased and realised that she had been killed. According to PW1, the deceased had told her earlier that she had a misunderstanding with the appellant.

5. GBP (PW2) testified that, on 12th March 2016 at 1:00 am, his wife (PW1) called him to check on the deceased (his daughter) after PW1 had unsuccessfully tried to open the deceased's door; that PW2 went with a torch into the deceased house and found the deceased lying on the floor with blood flowing on to the floor; that there was a big blood-stained stone at the scene; that the appellant had left the scene; that PW2 decided to go and inform the Nyumba Kumi elder, who came to the scene, and, soon thereafter, the police came and took the deceased's body to the mortuary. According to PW2, the deceased and the appellant had had a disagreement; and that, four days prior to the incident, PW2 asked the appellant if he could divorce the deceased, but that the appellant said that he could not as the deceased had infected him with HIV, and that the appellant had seen the deceased's medical note prescribing HIV medication.

6. PW3, Alex Safari Kashuru (the Nyumba Kumi elder and PW3's neighbour) testified that, on the material night, he was asleep when PW2 woke him up and told him that the deceased was dead; that he took a torch and accompanied PW2 to the scene; that he saw the deceased's body beside the door; that she had severe injuries on her head; that near the door was a big stone that had blood stains; and that, thereafter, the police came to the scene.

7. Dr. Ibrahim Yusuf (PW4), a medical officer at Malindi Sub-County Hospital, produced the post-mortem report on the deceased. The post-mortem had been performed by one Dr. Ruth Fondo, who had since left the hospital. PW4 stated that there was a deep cut wound on the frontal region of the head extending to the lateral side measuring 10 cm in length; that the brain matter was exposed, and that there was a bruise on the left eye; that there were multiple bruises on the forehead and wrist; that no fracture was noted, but that no other abnormalities were noted; and that the cause of death was severe head injury.

8. PW5, Corporal Oman Athman Wayu, a police officer then based at Gongoni, testified that, on 12th March 2016, members of the public brought a report that someone suspicious was hiding on top of a mango tree near Majengo Kiembeni area; that, on the same day, they received a report that a woman had been hit with a stone and killed; that, together with two of his colleagues, PW5 proceeded to the scene and saw the appellant on a mattress on top of the tree; that they ordered the appellant to climb down; that the appellant climbed down whereupon PW5 and his colleagues took him to Gongoni and, later, to Marereni Police Station; and that the appellant was arrested on suspicion of being the killer.

9. PW6, Corporal Njue Njagi of Marereni Police Station, the investigating officer, testified that on 13th March 2016, he was on duty at the station when he received a call from his superior, Sergeant Ngere, informing him of a murder at Gongoni; that they went to the scene and found the deceased's body; that they found the murder weapon, a stone, at the doorstep; that PW6 took photos of the body and of the scene, collected exhibits, drew a sketch plan of the scene, recorded witness statements, and escorted the body to Malindi Sub-County Hospital pending post-mortem; and that PW6 later escorted the appellant to Mombasa General Hospital for mental assessment.

10. In the course of his investigations, PW6 learned that the appellant and the deceased were living as man and wife when an argument arose; that the appellant found the deceased taking ARV pills; that, when the deceased was asleep, the appellant used the big stone and hit her; that the deceased's mother went to check on the deceased; that the appellant handed over the child to her but that, when she

returned with her husband, they found the deceased's body, and that the appellant had fled from the home. The appellant was spotted by members of the public on a mango tree where he had taken refuge, whereupon they informed the Administration police at Gongoni, who arrested the appellant at 6:00pm and thereafter charged him with the offence of murder.

11. At the close of the prosecution case, the learned Judge found that the appellant had a case to answer and put him on his defence.

12. In his defence, the appellant gave an unsworn statement stating that, on the material night, he was at home with the deceased and the child; that the deceased boiled milk for the child when PW1 came and asked for the child; that PW1 asked him where the deceased was, and that he said that she was boiling milk for the child; that PW1 left and returned for the milk; and that, at the time, the deceased had gone to take a bath. The appellant stated further that he later got a call to go to the quarry where he worked to load a lorry at about 10:00pm; that he worked at the quarry up to 6:00am; that he got a call from his friend Maisha, who informed him that the deceased had been killed, and that he was the prime suspect. He stated that boda boda operators were looking for him, and so he went to his rural home and met his elder brother Shauri, who advised him to report to the police; and that they called the chief, who sent police officers who took him to Gongoni and later to Marereni Police Station where he was later charged with the offence. The appellant denied having a grudge with the deceased.

13. In its judgment delivered on 21st September 2017, the trial court noted that the evidence against the appellant was circumstantial. The court found that the appellant's defence that he left at 10:00pm was disproved by the evidence of PW1, who went to the deceased' house and found the appellant there at about 1:00am and, when she returned with her husband, the appellant was not in the house. The court considered the circumstantial evidence and had this to say:

> "From the evidence on record, the inculpatory facts point to the accused's guilt. There is no any other explanation other than that it is the accused who killed the deceased. Counsel for the accused contends that there was no motive for the accused to kill the deceased. The evidence shows that the accused suspected that the deceased was HIV positive and he had infected him.
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> Although the evidence does not establish whether indeed the deceased was HIV positive or that the accused had been infected, it is clear from the evidence that the accused suspected that he had been infected with HIV.
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> According to PW4, it took about four days from the date the accused complained of having been infected with HIV to the deceased's death. The contention that the stone was too heavy to be lifted by one person cannot hold. The evidence is clear to the effect that the deceased could not respond to the calls by PW1. The accused is the one who responded to those calls and came out of the house.
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> He was very much aware that he had killed the deceased. It is the child's cries which seemed to have disturbed the accused's plan to escape unnoticed."

14. The trial court also found that the appellant's account of how he was arrested was disproved by the evidence of PW5, who had seen the appellant on top of a mango tree, and ordered him to come down whereupon he was arrested. The court concluded that the defence evidence raised no doubts on the prosecution case; that the fact that the appellant thought that he had been infected with HIV could not justify a conclusion that the appellant was provoked to commit the offence; and that the appellant had malice aforethought and opted to hit the deceased with a stone while she was asleep whereupon the deceased succumbed to the heavy blow. The court found the appellant guilty of the

offence and convicted him. At the hearing for sentencing on 30th October 2017, the court considered the appellant's mitigation to wit that he was a first offender, and was remorseful. The court noted from the pre- sentence report that the deceased had six children, who were now left in the care of the deceased parents; and that the community would need time to heal from the actions of the appellant. The court sentenced the appellant to death.

15. Aggrieved, the appellant moved to this Court on appeal challenging his conviction and sentence. In his undated memorandum of appeal, the appellant faulted the learned Judge for failing to consider that there was no proper identification of the appellant as the perpetrator of the alleged crime; for relying on insufficient circumstantial evidence to convict him; for not finding that the prosecution failed to prove its case beyond reasonable doubt; and for dismissing the appellant's defence without reasonable grounds.

16. The appellant subsequently filed an undated amended grounds of appeal faulting the learned Judge for convicting and sentencing him, yet the deceased's body was not properly identified; for failing to find that section 33 of the *Evidence Act* was not complied with in the production of the medical evidence; for failing to find that the post mortem report was inconclusive as to the cause of the deceased's death; and for sentencing the appellant to suffer death, and yet the death sentence was declared unconstitutional by the Supreme Court.

17. Thereafter, the appellant filed supplementary grounds of appeal dated 18th April 2024 containing the grounds that the learned Judge erred by failing to find that the post-mortem report was not signed, and that it was neither a document nor a medical report within the meaning of sections 33, 72 & 77 of the *Evidence Act*, and thereby convicting the appellant based on unsafe evidence; in failing to analyse and evaluate the evidence and make a finding that the prosecution did not lead evidence on the cause of death of the deceased; in failing to find that the prosecution did not dislodge the appellant's alibi defence and to thereby acquit the appellant; by holding that the death sentence was the only sentence available for persons found to have committed murder and thereby wrongfully did not consider the appellant's mitigation; by failing to find that the prosecution had at their disposal independent scientific evidence that they would have used to support the only and weak circumstantial evidence they led in court but opted not to use it without giving any explanation; by failing to find that crucial witnesses were not called by the prosecution to testify; and by failing to analyse and evaluate the evidence on record as a whole and arrive at a finding on each aspect of the evidence, leading to the appellant's wrongful conviction.

18. In support of his appeal, the appellant filed undated written submissions in addition to which his learned counsel, M/s. Wamotsa Wangila filed written submissions dated 18th April 2024 citing the cases of Sibo Mavoko vs. Republic [1997] eKLR where

this Court held that the prosecution must lay a basis for failing to call the maker of a document; and that it is trite law that if the maker of a document is not available, the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the *Evidence Act*; and Muruatetu & another vs. Republic; Katiba Institute & 4 others (Amicus Curiae) [2021] KESC 31 (KLR), submitting that a death sentence under section 204 of the Penal Code is not mandatory, but only the maximum provided for; and that a court is enjoined to consider mitigation and award the appropriate sentence. Counsel urged us to allow the appeal.

19. Mr. Amugo Alenga, Senior Prosecution Counsel for the respondent, filed written submissions dated 4th May 2021 citing the case of James Mwangi vs. Republic [1983] eKLR where this Court held that, in a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and

incapable of explanation upon any other reasonable hypothesis than that of guilt; and that, in order to draw the inference to the accused's guilt from the circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy that inference. The learned Senior Prosecution Counsel urged us to dismiss the appeal and uphold both the conviction and sentence.

20. We have 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 vs. Republic [1981] eKLR).

21. This being a first appeal, it is by way of a retrial and this Court, as the first appellate court, has a duty to re-evaluate, re- analyse and re-consider the evidence afresh and draw its own conclusions on it. However, when doing so, the Court should bear in mind that it did not see the witnesses as they testified and give due allowance for that.

22. 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 vs. 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."

23. This cautious approach has deep roots in comparative common law jurisdictions as demonstrated in the decision of the Supreme Court of India in Ganpat vs. State of Haryana (2010) 12 SCC 59, 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.

b. 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.

b. 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."

24. Having carefully considered the record of appeal, the grounds on which it is anchored, submissions and the law, we form the view that the appeal raises four main issues, namely: (i) whether the learned Judge correctly placed reliance on the medical evidence and post-mortem report; (ii) whether

the circumstantial evidence was sufficient to secure a safe conviction; (iii) whether the appellant's alibi defence was disproved by the prosecution; and (v) whether the death sentence imposed on the appellant was appropriate in the circumstances.

25. Turning to the 1st issue as to the propriety of the admission in evidence of the medical/post-mortem report on the deceased, learned counsel for the appellant submitted that the deceased's body was not properly identified; that none of the witnesses testified that he/she identified the body to the doctor/pathologist performing the post-mortem; that, even though PW6 testified that she escorted the body to the hospital and witnessed the post- mortem on the deceased, none of the other witnesses testified that they were escorted to the hospital for identification of the body before post-mortem; that the court did not properly analyse the evidence of PW4 and the post-mortem report; that the report did not disclose the cause of death, and that PW4's testimony that the cause of death was severe head injury was an opinion not supported by the report; that it cannot be ruled out that the deceased died of other causes, including natural ones; and that it was therefore not safe for the court to convict the appellant.

26. Counsel for the appellant submitted further that no evidence was led to explain why the maker of the report was not called to testify and that, therefore, the prosecution did not lay the foundation of its production by PW4; that the report did not bear the signature of the author, Dr Ruth Fondo, and nor is it endorsed with the stamp of the hospital from which the deceased was examined, and that its authorship and authenticity was therefore doubtful; that the report was therefore not safe to rely on; that PW4 having testified that he did not know Dr Ruth Fondo, this damning admission, should have led the trial court to find that the prosecution did not discharge the legal and evidential burden placed on them under sections 33, 72 and 77 of the *Evidence Act*; that the prosecution was under a mandatory duty to lead evidence showing that PW4 knew the author of the report and was familiar with her handwriting and signature; and that the admission by PW4 that he did not know Dr Fondo was an implied admission that he was not familiar with her handwriting or signature.

27. According to the appellant, no reasons were given as to why the prosecution did not call a doctor familiar with the handwriting and signature of Dr Fondo to testify on her behalf. Counsel argued that the prosecution should have made an application to have PW4 produce the report; and that the trial court was under a mandatory duty under section 33 of the *Evidence Act* to inform the appellant of his right to insist on the maker to be called, and to object to the production of the report by PW4; that this was not done, and that the appellant was prejudiced by this fatal error. In counsel's opinion, even though the appellant did not object to the production of the report, this did not waive his right to have the prosecution comply with the mandatory provisions of the *Evidence Act*.

28. Notably, the prosecution counsel did not make any submissions on this issue. Be that as it may, we are enjoined to pronounce ourselves on the propriety of the prosecution evidence on the cause of the deceased's death.

29. We take to mind the fact that the appellant does not dispute the trial court's finding that the deceased was dead, that her lifeless body was found in their house the same night PW1 and PW2 came in to inquire from him as to the reason why the appellant's child was crying; and that the body lay in a pool of blood with a blood-stained stone lying nearby. His only grievance was the court's finding on the cause of death, the admissibility of, and the procedure adopted in the production of, the post-mortem report.

30. Section 77 of the *Evidence Act* deems as admissible official documents or reports prepared by government analysts and geologists without calling the maker. Such documents include post-mortem reports prepared by a medical practitioner. Section 77 of the Act provides:

    77. Reports by Government analysts and geologists.

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.

2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

3. When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

31. The above-mentioned documents are admissible without having to call the maker in any case where the trial court thinks it fit to do so. Otherwise, it may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

32. In [1985] eKLR, this Court held that:

> "... in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available, some other medical expert could give general evidence as an expert, on the basis of the report, as to whether the findings of the report are consistent with the case for the prosecution." [Emphasis added]

33. Section 33 of the *Evidence Act* cited by the appellant in support of his appeal relates to statements of admissible facts by persons who cannot be called by witnesses, and is not relevant to post-mortem reports that are admissible pursuant to section 77 of the Act without calling the maker thereof. A post-mortem report is a report by a Government expert to wit a medical practitioner. Its production and admission in evidence is unequivocally provided for in section 77 of the Act.

34. Be that as it may, we take note of the fact that, in the post mortem report form produced by PW4, the notes of the medical officer are slightly above the appropriate spaces in which the notes should have been placed (probably due to misalignment of the carbon copy). The result is that some of the notes are slightly illegible as they are interspersed with pre-existing content of the form. However, it is discernible with a measure of effort that the medical practitioner indicated that the cause of death was severe head injury, a fact testified to by PW1, PW2, PW3 and PW4, all of whom saw the deceased's body at the scene. In view of the foregoing, we do not agree with the appellant's contention that the post mortem report did not disclose the cause of death. In any event, the cause of death obvious and did not require a medical examination/post-mortem report in that regard – see Ndungu vs. Republic (ibid).

35. We also take note of the fact that, in the appropriate space for inserting the signature, the following handwritten words appear: "Dr. Ruth M. Fondo Medical Officer". To our mind, the officer's handwritten name can be taken as sufficient to authenticate the report to the same effect as would a formal signature. In any event, PW4's evidence constituted expert evidence, which confirmed that

the findings disclosed in the report were consistent with the prosecution's case with regard to the obvious cause of the deceased's death. In view of the foregoing, we find nothing to fault the learned Judge for admitting the post- mortem report in evidence, even though, in the worst-case scenario, its absence or impropriety in the procedure in its production would not have been fatal so as to displace the prosecution case.

36. On the 2nd issue as to whether the circumstantial evidence was sufficient proof of the charge against the appellant beyond reasonable doubt to sustain his conviction, his case was that the circumstantial evidence was not sufficient to secure a conviction as no one saw him kill the deceased, and that he was not at the scene when the body was discovered; that the prosecution squandered an opportunity to present independent scientific evidence that would have either connected or disconnected him to the commission of the offence; that the stone suspected to be the murder weapon had blood on it; that the mat on which the deceased lay and the sheet she was covered in had blood as well; but that no explanation was given by the prosecution for failure to subject the blood to forensic analysis to confirm whose blood it was; that the court erred by finding that the stone was the murder weapon; that the post-mortem report showed that the deceased sustained a bruise on the left eye and multiple bruises on the forehead, left forearm and wrist; that the report stated that there were other injuries, which suggested that there was a struggle between the deceased and her assailant before she was killed; and that this would further imply that the assailant may have left forensic evidence at the scene or on the deceased's body.

37. Counsel for the appellant submitted further that the investigating officer had an opportunity to have fingerprint dusting on the body, the mat the sheet and the stones, to take the appellant's fingerprints, and to have them subjected to forensic analysis; that the mattress in question was not produced as an exhibit thereby rendering the evidence of PW5 doubtful; that no explanation was given as to why they did not do so; and that it was fatal for the prosecution not to have investigated or led evidence on the scientific evidence aforesaid. According to counsel, the trial court ought to have made an inference that, had such evidence been led, it would have been adverse to the prosecution case.

38. On his part, the learned prosecution counsel contended that the prosecution had proved its case beyond any reasonable doubt; that the three ingredients of the offence were established, to wit, the intention to cause death; the unlawful act that caused the death of the deceased; and identification of the appellant as the perpetrator of the offence.

39. On the issue as to whether the circumstantial evidence was sufficient to sustain a conviction, counsel submitted that the prosecution had led evidence pointing at the appellant as the person responsible for the deceased's death.

40. The circumstances surrounding the deceased's death are clear from the testimonies of PW1 and PW2, who lived on the same compound with the appellant and the deceased, and who were at home on the night the deceased was killed. In summary, the evidence was that PW1 went to the appellant's house twice to find out why their infant child was crying; that it is the appellant who came to the door to answer and eventually handed the child to PW1 and went back in; that, on returning to the appellant's house, PW1 found the deceased's bleeding body lying on a mat on the floor with a blood-stained stone nearby; that the appellant had fled from the scene; that she called PW2, who witnessed the incident as did PW3; that the cause of the deceased's death was undoubtedly severe head injuries as confirmed by PW4; and that PW5, acting on a tip-off by members of the public, apprehended the appellant, who was hiding on top of a tree not far from the scene.

41. To our mind, the appellant, and no other person, was in the deceased's company when she met her death. The inculpatory facts as testified to by PW1, PW2 and PW3 are incompatible with the

innocence of the appellant, who had an altercation with the deceased four days earlier when the appellant alleged that the deceased had infected him with HIV, and that he had found her in possession of ARVs, an eventuality that pointed towards the motive to commit the offence. Indeed, the chain of events speak for themselves and point to the appellant's guilt.

42. Reliance on circumstantial evidence to sustain a conviction has been the subject of numerous pronouncements by this Court. In Joan Chebichii Sawe vs. Republic [2003] eKLR, this Court held that:

> " In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. 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 is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused." [Emphasis ours]

43. Turning to the appellant's submission that the prosecution's case could not stand on account of failure to carry out forensic examination of the blood stains on the stone found near the deceased's body, the body itself, the items found on the scene, and other scientific investigations to establish the identity of the assailant does not by any means affect the credibility of the prosecution evidence. In David Kahura Wangari vs. Republic [2016] eKLR, this Court held that:

> "DNA testing or forensic examination of a perpetrator of any offence is done in the course of investigations, but that is purely the choice of the investigating officers, and failure to do so particularly in this case did not affect the credibility of the evidence that was before the court."

44. With regard to the number of the prosecution witnesses called to testify at the trial, the appellant lamented that the prosecution had failed to call, inter alia, the persons who pointed out to the police his (the appellant's) hiding place, as well as the medical officer who conducted the post-mortem report. In addition, counsel submitted that failure to undertake forensic examination as aforesaid and to lead evidence in that regard undermined the prosecution case. We are not so persuaded.

45. With regard to the number of witnesses required to prove the charge against the appellant, section 143 of the *Evidence Act* provides that "no particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact." In effect, the prosecution remains at liberty to call any number of witnesses to testify to such facts as it considers necessary to prove a charge beyond reasonable doubt.

46. In Julius Kalewa Mutunga vs. Republic [2006] eKLR, this Court held that:

> "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 – see Oloro s/o Daitayi & others v R. (1950) 23 EACA 493."

47. In our considered view, the evidence of PW5 as the arresting officer, taken together with the evidence of PW1 as to when she last saw the appellant on the material night, was sufficient to establish the time, location and manner of the appellant's arrest. We form this view notwithstanding the fact that PW5, who testified how he arrested the appellant after being informed by members of the public that there

was someone hiding atop a mango tree with a mattress, was the only eye witness who testified on this aspect. No member of the public was called to testify for the prosecution, and none of their names were supplied to the defence or given in evidence. Be that as it may, we disagree with the appellant's contention that the trial court ought to have made an inference that, if the said members of the public were called to testify, the evidence they would have given would have been adverse to the prosecution case.

48. Turning to the 3rd issue as to the appellant's alibi defence, counsel for the appellant submitted that the prosecution did not discharge the burden of proof to dislodge the appellant's alibi defence; that the alibi was not investigated by PW6 nor any evidence led by the prosecution to displace it; and that the court misdirected itself when it disregarded the alibi in the absence of proof to the contrary.

49. In Erick Otieno Meda vs. Republic [2019] eKLR, this Court set out the principles to guide the Court when considering an alibi defence as follows:

> " (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
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> b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
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> b. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
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> c. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)"

50. In the same vein in R. vs. Sukha Singh s/o Wazir Singh & Others [1939] 6 EACA 145, the predecessor to this Court held that:

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped."

51. The appellant's alibi defence was to the effect that he was working at the quarry between 10:00pm and 6:00am when he was called by his friend Maisha informing him of the deceased's death, upon which the appellant went to his rural home to confide in his elder brother. This defence was not sufficient to dislodge the prosecution's case because, the evidence of PW1, disclosed that she saw the appellant in his house twice at around 1:00am, when he handed over the infant to her. Thereafter, when PW1 and PW2 returned to the house, the appellant had left, and the deceased was already dead. Additionally, PW5, arrested the appellant after he was sighted hiding atop a tree. When considered alongside the prosecution witness evidence, the appellant's alibi defence did not in any way rebutted or dislodge the prosecution's case. In our considered view, the appellant's alibi defence does not hold.

52. Finally, we turn to the 4th and final issue before us, the question as to whether the learned Judge correctly sentenced the appellant to death. Counsel for the appellant submitted that the trial court erred in sentencing the appellant to death; that the court misinterpreted and misapplied the provisions

of section 204 of the Penal Code when it held that the death sentence was the only sentence provided for the offence of murder; that, as a consequence, the court did not consider the appellant's mitigation when sentencing him to suffer death; that the pre-sentence report was favourable to the appellant; that he was a first offender, remorseful for what happened, had six children under the care of the deceased's parents, and that he was not out on bond since 2016; that the submission by the prosecution based on the report that the appellant's community needed time to heal from the appellant's actions implies that the community, including the appellant's family, are not for the appellant to be sentenced to death or to spend the rest of his life in jail; and that the appellant's family have been visiting him in jail, and are ready to welcome him back home, assist him to re-integrate with them and the community at large, and to fully support him should he be released.

53. According to counsel, the appellant is remorseful and has learned his lesson well while in prison since 2016; that he has undergone a rehabilitation and supportive programme while in prison and has reformed; that he undertakes to be a law abiding citizen and to never commit any crime should he be released from prison; and that, should the Court sustain the conviction, it should consider the mitigation and award the appropriate sentence in the circumstances

54. In rebuttal, the respondent conceded that the court did not exercise its discretion in view of the fact that the mandatory sentence was meted out before the Muruatetu case was determined. However, the court ought to uphold the death sentence as the same was not declared unconstitutional, and in view of the circumstances of the case. According to the prosecution counsel, the appellant committed a heinous crime and took away the life of a breastfeeding mother who had other children who depended on her, and without any proof that she had infected him with HIV.

55. According to the prosecution counsel, the learned Judge sentenced the appellant to suffer death on 31st October 2017 on the basis that it was the statutory sentence imposed for the offence for which he was convicted, and which was in accord with the jurisprudence of the day. In the circumstances, the learned Judge cannot be faulted for the death penalty imposed on the appellant.

56. We are mindful of the recent developments in our jurisprudence on mandatory sentences for murder as enunciated by the Supreme Court on 14th December 2017 in the case of Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR) where the Court declared that the mandatory nature of the death sentence for the offence of murder as provided under section 204 of the Penal Code was unconstitutional; and that courts were hence at liberty to exercise their judicial discretion in passing appropriate sentences on conviction for murder.

57. On the authority of the foregoing Supreme Court decision, the appellant faults the learned Judge for interpreting section 204 of the Penal Code to mean that death was the only sentence the trial court could impose upon his conviction for murder; and for taking the view that the sentence was mandatory, and that his hands were tied so to speak. We agree with the appellant that the trial court's position in that regards calls for reconsideration on appeal to this Court in accord with the Supreme Court Guidelines by which the Court espoused the principle that the mandatory nature of death sentence under section 204 of the Penal Code which, in its view, deprived the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases" – see Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions).

58. Mindful of the fact that the pre-sentence report was favourable to the appellant; that he was a first offender, remorseful for what he did, had six children under the care of the deceased's parents, and that he was not out on bond since 2016; that the appellant's family have been visiting him in jail, and are ready to welcome him back home, assist him to re-integrate with them and the community at large,

and to fully support him should he be released; that he has undergone a rehabilitation and supportive programme while in prison and has reformed; and that he undertakes to be a law abiding citizen, we are inclined to reconsider the death penalty imposed on him by the trial court, and instead substitute it therefore with a custodial sentence.

59. Having considered the record of appeal, the rival submissions of learned counsel for the appellant and of the prosecution counsel, the mitigating factors aforesaid, the cited authorities and the law, we find that the appeal partially succeeds. Accordingly, we hereby order and direct that:

    a. the judgment on conviction by the High Court of Kenya at Malindi (S. Chitembwe, J.) dated 25th August 2017 and delivered by W. Korir, J. on 21st September 2017 be and is hereby upheld; and

    b. the death penalty imposed on the appellant be and is hereby set aside and substituted for a term of imprisonment for thirty (30) years with effect from the date on which he was taken into custody.

    Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF SEPTEMBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR