Muriithi v Republic (Criminal Appeal 35 of 2019)
[2024] KECA 1528 (KLR) (25 October 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 35 OF 2019

P NYAMWEYA, FA OCHIENG & WK KORIR, JJA

OCTOBER 25, 2024

BETWEEN

CECILIA WARUGURU MURIITHI ..... APPELLANT

AND

REPUBIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Naivasha (C. Meoli, J.) dated 1st April 2019 in HCCRC No. 32 of 2015)

JUDGMENT

1. The appellant, Cecilia Waruguru Murithi, was convicted for the offence of murder contrary to section 203 as read with section 204 of the Penal Code and was subsequently sentenced to life imprisonment subject to review after 20 years. The information stated that between 30th June 2013 and 1st July 2013 at an unknown time at Kingori Estate in Maai Mahiu, Naivasha District within Nakuru County, the appellant murdered Susan Wanjiru Kihiu.

2. The appellant has moved this Court expressing her dissatisfaction with the trial court's judgment and sentence. In her memorandum of appeal dated 18th July 2019, the appellant has raised 27 grounds of appeal. We have however, condensed them into 7 grounds as follows:

> "a. That the evidence adduced was insufficient to sustain the appellant's conviction and the prosecution did not therefore discharge the burden of proof;
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> b. That the learned Judge erred in finding that the appellant's motive for killing the deceased was because of an alleged love affair between the deceased and the appellant's husband;
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> c. That the circumstantial evidence relied upon did not meet the legal threshold;

d. That the trial court relied on inconclusive telephone data and records to return a conviction;

e. That there was failure to produce the postmortem report and critical forensic evidence gathered during investigations;

f. That the appellant's alibi defence was not considered; and

g. That the sentence handed down was harsh and excessive and went against the jurisprudence on sentencing."

3. This being a first appeal, we are duty bound to consider the evidence afresh in order to arrive at our independent decision. John Kihiu Mwangi (PW1), was the father of Susan Wanjiru Kihiu (the deceased) and a neighbour to the appellant. They lived at Maai Mahiu. He testified that on 30th June 2013, the deceased failed to return home by the imposed curfew time of 7.30 pm. The next day, he left for work in Nairobi and asked his worker to inform him once the deceased returned. In the course of the day he inquired from his other daughters about the deceased and learnt that the appellant and Mercy (PW9) were the deceased's friends. He instructed the girls to head to Mercy's place to inquire about the deceased. In the course of the day, he received a call from his daughters informing him that the deceased's body had been found in a thicket behind his homestead. By the time he arrived, the body had been taken to the mortuary. He proceeded to the mortuary where he noted severe injuries on the body. He recalled that on 8th March 2013, he had received a text message from one Gathoni Wa Kaguku asking him to talk to the deceased to stop having an affair with the appellant's husband. It was further his testimony that he was a business associate of the appellant's husband and that the appellant would frequently visit his family. He further stated that the deceased worked in Maai Mahiu as a land agent before moving to Nairobi for her college studies.

4. Lucy Wangari Kihiu (PW2), testified that the deceased was her younger sister. She stated that on 30th June 2013, she attended church with the deceased and her other sisters, after which they went for lunch at GMT Hotel. While at GMT Hotel, the deceased informed them that she was heading to the appellant's home to check out some handbags. The deceased did not return home and their attempts to reach her on phone were not successful. The next morning, under the instructions of their father, they mounted a search for the deceased. Their intention was to start the search at the house of the deceased's friend. As they left for the assignment, they learnt of a body which had been found in a thicket by the road about 500 meters away. Upon viewing the body, they identified it as that of the deceased. She saw stab wounds on the neck and face. PW2 further testified that she was aware of a transaction done by the deceased which resulted in a criminal case in Naivasha. She also stated that while at lunch with the deceased, she was impatient and spent a lot of time texting and talking on phone.

5. Susan Njeri (PW3), testified that she was a domestic worker at the home of PW1. On 30th June 2013, she left for her Sunday mass at ACK Church. The deceased and her sisters went to the Full Gospel Church. Later at about 2.30 pm, she joined the deceased and her sisters at GMT Hotel for lunch. The deceased left for the appellant's home after lunch. Her attempts to reach the deceased on phone were unsuccessful. The next day, she woke up at 5.00 am and informed PW1 that the deceased did not return home. They later set off to look for the deceased at her friend's place. However, before they could go beyond the gate, they saw a crowd and learnt that a body had been recovered at a field nearby. Upon arriving at the scene, she discovered that the body was that of the deceased.

6. Police Constable Charles Njiru (PW4), testified that on 1st July 2013, he was instructed by his boss Chief Inspector Chelimo (PW8), the OCS Maai Mahiu Police Station, to accompany him to a scene of murder at Kingori Estate within Maai Mahiu. Together with Corporal Mweka, they proceeded to the

scene where they saw the body of the deceased lying on her back. He noted that the body had injuries on the upper face and chin and was half naked with a biker and a top. He also stated that the scene was not disturbed. They called scenes of crime personnel and later removed the body to the mortuary at Naivasha. He drew a sketch map of the scene and prepared a legend which he produced as exhibits. PW4 visited the home of the appellant twice in the course of investigations.

7. PW5 was Mary Nyambura, another sister of the deceased. She stated that on the material day, she went to church together with her sisters who included the deceased. After the service, they proceeded to GMT Hotel where they had lunch. Immediately after lunch, the deceased left them at the hotel informing them that she was going to meet the appellant. When they arrived home at about

5. 00 pm, she tried reaching the deceased several times but her calls remained unanswered. At about 7.00 pm, she realized that the deceased's phone had gone off. This prompted her to call the appellant who informed her that she had not seen the deceased. She then informed their father that the deceased had not returned home. The next day in the company of PW2 and PW3 they decided to go and look for the deceased at her friend's place. As they were leaving for the search, they noticed a crowd gathered where a body had been found. She drew close and identified the body as that of her sister. She noticed that the body was half-naked with loose teeth and burns on the torso. The appellant informed her that she did not meet the deceased the previous day. She also testified that the deceased and the appellant were good friends and that the deceased worked as a real estate agent before joining the university.

8. Peter Chege Kabura (PW6), on his part testified that he had employed the deceased at his company, Colplus Technical Services. His office was at Ridgeways in Kiambu. On 28th June 2013, the deceased was on duty and in the evening, he gave her a lift to Maai Mahiu. He testified that he had been introduced to the deceased by Simon Kibarabara when he wanted to purchase a piece of land. It was also his testimony that on 28th June 2013, he went with the deceased and Kibarabara to view a parcel of land in Maai Mahiu and later left the deceased with Kibarabara. He was later informed by Kibarabara that the deceased had been found murdered. It was also his testimony that he had entered into a land sale agreement brokered by the deceased and Kibarabara for Kshs. 2,000,000/=, but later learnt that he had been conned of Kshs. 1,000,000/= which he had paid as a deposit. As a result, Naivasha Chief Magistrate's Court Criminal Case (CMCRC) No. 1205 of 2013 was instituted against some suspects and the deceased was slated to be his witness.

9. Police Constable Simon Kibithu (PW7), witnessed the postmortem conducted on the body of the deceased on 2nd July 2013 at Chiromo Mortuary.

10. The next witness to testify was Superintendent of Police, Jacob Chelimo (PW8) who stated that on 1st July 2013 at about 8.30 am, he received a telephone call from the area Assistant Chief informing him that the deceased's body had been found dumped at a field near the Catholic Church. He proceeded to the scene where he observed the body lying on its back with a huge gash on the forehead and both temples. He also observed that the abdomen had skin peelings. There were also injuries on the lower limbs. A lady by the name Lucy Kihiu (PW3) who was present at the scene identified the body as that of her sister. Scenes of crime personnel took photographs at the scene. The telephone details of the phones of the deceased, the appellant and the appellant's husband were also secured. He visited the appellant's home on 4th July 2013 to conduct investigations before handing over the case to the Directorate of Criminal Investigations (DCI) officers at Naivasha. It was his testimony that he never saw the analysis report of the exhibits collected by the forensic personnel from the appellant's house.

11. Mercy Nyawira Mwangi (PW9), testified that on 29th June 2013, a Saturday, the deceased who was her friend visited her in Maai Mahiu where she worked for the husband of the appellant. They had lunch together before the deceased left telling her that she was going to the hairdresser, because she was

preparing to go back to college. On Monday she learnt that the deceased had been killed. She testified that she was not aware of a love affair between her employer and the deceased.

12. Daniel Khamisi (PW10), was a law enforcement liaison officer at Safaricom. He stated that on 8th July 2013, he received a request from the DCI at Naivasha for communication data between telephone numbers 0710 420 348 (appellant's), 0716 087 847 (deceased's) and 0722 592 535 (appellant's husband's) for the period between 20th June 2013 and 8th July 2013. He prepared reports which he produced as exhibits. PW10 pointed out that the appellant and the deceased talked and exchanged text messages between 25th June 2013 and 30th June 2013. In specific reference to the communications of 30th June 2013, the witness testified that the deceased texted the appellant thrice between 15.25 hours and 15.48 hours before the appellant replied to the deceased once at an undisclosed time. Further, that the husband of the appellant had a telephone conversation with the deceased lasting 77 seconds at 16.20 hours. The witness testified that the phones of the appellant and the deceased were located in the vicinity of the same tower.

13. Corporal Thomas Muriuki (PW11), was the investigating officer who took over the matter from PW8. He gave an account of how he conducted investigations and produced photographs of the scene as exhibits. He also testified that the forensic analysis of the samples collected from the house of the appellant had no bearing on the case as they all turned out negative. It was also his evidence that the deceased was his witness in a charge of obtaining by false pretence in Naivasha CMCRC No. 1205 of 2013. He further stated that at the time the deceased was killed, he had only arrested one suspect who was identified by the deceased but he later made other arrests.

14. When placed on her defence, the appellant gave sworn testimony and called four witnesses. She testified that she knew the deceased as a neighbour and a friend. The deceased visited her frequently. The appellant gave an account of the events of 30th June 2013 stating that she went to church and then to Wanjagi building to check on some repair work before proceeding for lunch at Gebuga Hotel. After lunch, she went to P.C.E.A. Church where she attended a pre-wedding function from 3.00 pm until 5.00 pm. She then proceeded home but before entering her compound, she bought diapers at the shop of Margaret Nduta (DW2). It was her testimony that she never left the house until the next day. She also testified that while at the pre-wedding, she noted a missed call from the deceased and she texted her back telling her that she would call her later. She, however, did not call back. She also stated that she had been requested by the deceased to procure a purse for her from her tenant, Naomi (DW1), and that she had informed the deceased on 28th June 2013 that the purse was ready. She also stated that on the material night, her husband had taken the expectant wife of William Kirungi (DW4) to hospital. They came back at about 11.00 pm. The appellant further testified that the deceased and her husband were engaged in real estate business together with PW6. She denied knowledge of an affair between her husband and the deceased and asserted that she had no hand in the death of the deceased.

15. Naomi Wambiu Njiraine (DW1), testified that in June 2013, she was engaged in beadwork business. She sold the appellant two purses and the appellant later informed her that a friend of hers wanted a similar purse. Later on, the appellant informed her that the customer who wanted the purse had been killed.

16. Margaret Nduta Njenga (DW2), on her part testified that she ran a kiosk across the road from the appellant's home. She recalled that on 30th June 2013 she was at the kiosk when the appellant called her to inquire whether she had diapers. She replied in the affirmative and at around 6.00 pm the appellant went to purchase diapers. The appellant also ordered greens. The items were later collected by Lucy (DW3) who lived with the appellant.

17. Lucy Wangari (DW3), was living with the appellant at the material time. Her testimony was that on 30th June 2013, the appellant left for church at 10.00 am. At about 3.00 pm, the appellant's husband took her (DW3) with a child out but sent her back home as she had the house keys. The appellant arrived home at about 6. 00 pm and sent her to collect greens from DW2. The appellant prepared supper which they ate at 8.00 pm. DW3 testified that after supper, the appellant's husband took the expectant wife of his friend to hospital. They retired to bed at about 9.00 pm only to learn the next day that the deceased had been found dead.

18. William Kiriungi Wanganga (DW4), was the friend of the appellant's husband. He also served as a milk vendor supplying milk to his clients within Maai Mahiu. On 30th June 2023, when he supplied milk to the appellant at about 7.30 pm, he found her at home. Later at about 8.00 pm, DW4 would seek the help of the appellant's husband to take his expectant wife to hospital at Kijabe. It was DW4's testimony that the appellant was at home at that time and so was she when they returned at 11.30 pm.

19. At the conclusion of the trial, the learned Judge found the appellant guilty holding that the circumstantial evidence adduced by the prosecution connected the appellant to the murder. Relying on the phone data, the learned Judge concluded that there was a love affair between the appellant's husband and the deceased. According to the Judge, the affair was the reason that drove the appellant to end the life of the deceased. The learned Judge further relied on the phone data to conclude that the appellant was placed at the scene of crime.

20. This appeal came for hearing before us on the virtual platform on 30th April 2024. Learned counsel Mr. Wandugi represented the appellant while Mr. Omutelema, Senior Assistant Director of Public Prosecutions, appeared for the respondent. They both highlighted their written submissions.

21. Learned counsel Mr. Wandugi commenced his submissions by urging that the principles guiding conviction based on circumstantial evidence were not properly applied thus occasioning a miscarriage of justice to the appellant. Counsel pointed out that there was exonerating evidence which the trial court failed to consider. According to counsel, the convergence of the communication gadgets as relied upon by the trial court was insufficient to link the appellant to the crime because the Judge failed to consider the fact that the two lived and worked in Maai Mahiu.

22. It was counsel's submission that the evidence on the record was scanty and did not link the appellant to the offence. Counsel urged that the failure to establish a nexus between the appellant and the offence through the circumstantial evidence should be construed in the appellant's favour. To this end, counsel relied on Kimeu vs. Republic [2002] eKLR to argue that the trial court could only rely on the circumstantial evidence if it irresistibly pointed to the guilt of the appellant and that this was not the case.

23. Turning to the second ground of appeal, counsel submitted that the failure to produce the postmortem report left the court uncertain as to the cause of the deceased's death. Counsel relied on Okethi Okale vs. Republic, CR Appeal No. 179 of 1964 to urge that the judgment and conclusions of the court must be based on the evidence on record. According to counsel, the court's conclusion as to the cause of death was speculative and not supported by evidence.

24. On the third ground of appeal, counsel submitted that not only was the appellant's alibi defence not considered but it was dismissed without justification. Counsel referred to the case of Erick Otieno Meda vs. Republic [2019] eKLR to highlight the principles underpinning the consideration of an alibi defence. According to counsel, the appellant's alibi defence was solid as she had testified on oath and was cross-examined. Her witnesses were also subjected to cross-examination. Counsel submitted that because the evidence was tested but never impeached, the trial court erred in shifting the burden

of proof to the appellant. According to counsel, the shifting of the burden of proof to the appellant contravened her right to a fair trial as guaranteed by Article 50 of *the Constitution*.

25. Turning to the fourth ground that the prosecution did not discharge the burden of proof, counsel referred to Sawe vs. Republic, CR Appeal No. 2 of 2002 for the proposition that suspicion however strong cannot lead to a conviction. According to counsel, the learned Judge did not make a finding that the matter had been proved to the required standard and that the evidence on record only demonstrated suspicion.

26. Turning to the fifth ground that the prosecution failed to produce vital exhibits and that the investigations were poorly conducted, counsel took issue with the failure to produce the text messages exchanged between the appellant and the deceased, as well as the results of the forensic analysis conducted on the exhibits and samples secured from the appellant's home.

27. Finally, counsel asserted that the life imprisonment imposed on the appellant was harsh and unjustified in the circumstances of this case.

28. For the respondent, learned counsel Mr. Omutelema submitted that the prosecution proved its case against the appellant beyond reasonable doubt. Responding to the appellant's assertion that the circumstantial evidence did not meet the threshold for returning a conviction, counsel submitted that the learned Judge properly appreciated the principles applicable to circumstantial evidence and correctly applied them to the evidence on record. Counsel referred to Chiragu & Another vs. Republic [2021] KECA 342 (KLR) to highlight the factors to be considered before circumstantial evidence can be used to convict an accused person. Counsel submitted that in a case based on circumstantial evidence, the evidence is not considered in isolation but in totality. According to counsel, the learned Judge adopted this approach and correctly concluded that the appellant lured the deceased to her death, and was thus a principal offender.

29. Regarding the failure to produce the postmortem report as an exhibit, counsel argued that witnesses saw injuries on the body of the deceased, and even without the report, there was no doubt that the deceased was killed. It was also counsel's submission that the judgment was proper as it complied with the requirements of section 169 of the Criminal Procedure Code.

30. Rejecting the appellant's submission that the learned Judge did not conclude that the case had been proved beyond reasonable doubt, counsel submitted that the learned Judge was in the process of analyzing the circumstantial evidence when she used the words "insinuating suspicion" and that the evidence led to the conclusion that the appellant was guilty of the offence as charged.

    To this end, counsel relied on Mibei & 3 Others vs. Republic [1993] eKLR and Peter Nyongesa Wanyonyi & 2 Others vs. Republic [2004] eKLR to buttress the submission that the circumstantial evidence is good evidence.

31. Concerning the appellant's assertion that her right to a fair trial was violated, counsel submitted that the issue should not be considered by this Court as it was only raised after the learned Judge had delivered judgment. Nevertheless, counsel asserted that the appellant was accorded a fair trial as she was present during the trial, examined witnesses, testified in her defence and was represented by counsel of her choice.

32. Turning to the appellant's contention that her alibi defence was not considered, counsel asserted that the appellant's defence was fully considered.

33. Finally, counsel urged that the sentence should remain undisturbed and were we minded to interfere with it, then we should impose a severe custodial sentence.

34. This is an appeal arising from the judgment of the High Court sitting as a court of first instance. That being the case, we are required to reconsider the evidence on record before arriving at our independent conclusion. However, in doing so, we remain alive to the fact that we did not have the benefit of hearing and observing the witnesses testify, and unlike the trial court, we are therefore not good judges on their demeanor. In that regard, it was held in Dickson Mwangi Munene & Another vs. Republic [2014] eKLR that:

> "This being a first appeal, this Court is obliged to re- evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is [not] supported by the evidence on record."

35. Having reviewed the record of appeal, as well as the submissions of the parties, we find that the key issue for determination in this appeal is whether the murder charge was proved against the appellant. The alleged harshness and excessiveness of the sentence will only be considered if the conviction is sustained.

36. As to whether the offence of murder was proved, it is imperative to recall that the ingredients of the charge are legislated in section 203 of the Penal Code as follows:

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

37. Therefore, in order to prove a charge of murder, the prosecution must establish the fact and cause of death, that it is the accused person's actions or omissions that led to the death, and that the accused person had malice aforethought. The necessity of proving the three elements has been reiterated in numerous decisions of this Court, including Roba Galma Wario vs. Republic [2015] eKLR where it was held that:

> "For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

38. The first issue for our determination relates to the fact and cause of death. The fact that the deceased died was never in dispute. PW1 and PW7 saw the deceased's body at Chiromo mortuary during post-mortem. PW2, PW3, PW4, PW5, PW7, PW8 and the appellant all saw the body at the thicket where it was discovered. The appellant does not dispute the fact that the deceased died. We therefore have no doubt in our minds that the deceased lost her life.

39. The point of departure between the appellant and the respondent relates to the cause of death. In this case, a postmortem was carried out. However, the postmortem report was never produced, nor was the doctor who conducted the autopsy called to testify. Whereas learned counsel Mr. Wandugi asserted that the failure to produce the postmortem report meant that the cause of death remained unknown and unproved, learned counsel Mr. Omutelema on his part argued that the evidence on record established the cause of the death of the deceased. According to Mr. Omutelema, since the case was hinged on circumstantial evidence, the testimonies on the nature of injuries was sufficient proof of the cause of death.

40. The parties did not cite any authority in support of their diverse positions. However, the Court has rendered itself on the issue in previous decisions. For instance, in Ndungu vs. Republic [1985] eKLR, the Court held as follows:

> " Where the body is available and the body has been examined, a post-mortem report must be produced, the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post- mortem examination report as a result of which the Medical Officer who performs the post-mortem examination is cross-examined. Here, no post-mortem examination report was produced. Very poor reasons were given for not producing it. The original report must have been lying in some hospital or police file. No adjournment was applied for to obtain the original report. The haste to produce the unsatisfactory copy is in the circumstances inexplicable and was unhelpful to the prosecution and to the judge."

41. The Court considered the holding in the Tanzanian High Court case of Republic vs. Cheya & Another [1973] E.A. 500 that the cause of death can be proved by evidence other than the medical evidence, and opined differently thus:

> " The judgment in Cheya gives no report of what injuries were sustained although there is a reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people.
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> That decision does not illustrate the proper application of the principle 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.
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> Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class.
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> To return to Cheya. It is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the judgment, that the judgment is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision."

42. Similarly, in Hillary Bwire Wafula vs. Republic [1999] eKLR, the Court in allowing the appeal held that in a murder trial, a postmortem report was vital in establishing the deceased's cause of death. In reaching that conclusion, the Court held that:

> " The appellant's complaint was not that the post mortem report was not properly produced. The contention was that the doctor was neither called to testify nor made available for the defence to cross-examine him if they so wished. In a criminal case as a rule the prosecution must take all reasonable steps to secure the attendance of any of their witnesses whom the

defence might reasonably expect to be present. In a murder trial the defence expects the doctor who performed autopsy on the body of the deceased to be present. The prosecution might not have intended to call the doctor. However, where the prosecution does not intend to call a witness whose evidence is material at a trial they (prosecution) nonetheless have a duty to ensure that that witness is present in court during the trial so that should the defence wish, they may call the witness. The only exception to this rule as to attendance of witnesses is if the witness is absent for reasons beyond the prosecution's control."

43. However, in Dorcas Jebet Ketter & Another vs. Republic [2013] eKLR, the Court after considering the decision in Ndungu vs. Republic (supra) and the Tanzanian case of Republic vs. Cheya & Another (supra) opined that:

> " That was in respect of cases where the body is available but because of the nature of injury the cause of death cannot be determined even after postmortem. It is however important that even in such cases the court recognized the principle that there are cases where death can be established without medical evidence...
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> We think, every case must be decided on its own merit but where evidence is overwhelming that the deceased has died at the hands of a suspect, then even in the absence of a postmortem report, the court can still convict. We are certain such cases are very few and far between. This is not to absolve the investigation machineries from their work."

44. We appreciate that in Dorcas Jebet Ketter & Another vs. Republic (supra) the Court was dealing with a situation where the body of the deceased had not been traced for postmortem purposes. However, in Cleophas Kipketer Keino vs. Republic - Eldoret Criminal Appeal No. 203 of 2020 where postmortem had been carried out but the postmortem report was not produced as an exhibit, the Court held that:

> "In this case, there were two deaths, that of Abel and Emmanuel. The prosecution was required to prove each count beyond reasonable doubt. In the case of Abel, there was no expert evidence to ascertain the cause of death. However, from the record, PW2 testified that he saw the appellant step on the deceased and cut him with a panga. PW4 on arriving at the scene witnessed the lifeless body of Abel. PW7 on his part testified that he identified the body of Abel for postmortem purposes and actually witnessed postmortem being carried out on the body. In any event, the fact and the cause of Abel's death was not contested by the appellant. Based on the evidence on record it is therefore safe for us to infer that Abel died as a result of injuries sustained on the material day."

45. From the foregoing authorities, it is clear to us that where the body of the deceased is available and postmortem has been conducted, the prosecution ought to produce the report for consideration by the court. We must emphasize that a postmortem report is important in assisting the court to reach the conclusion that it is the injury inflicted by the accused person that led to the demise of the deceased. In this case, it was clear from the evidence of PW1 and PW7 that a postmortem was conducted on the deceased's body by a Dr. Ndegwa on 2nd July 2013. Indeed, the prosecutor requested and was granted several adjournments to call the doctor to come and produce the postmortem report. The failure by the prosecution to call a witness to produce the postmortem report is inexcusable and courts should not condone such carelessness. Be that as it may, such failure should not be an escape route for criminals. As can be discerned from the cited authorities, the court can still convict without expert evidence where there is overwhelming evidence that the deceased died as a result of the actions or omissions of the accused person. However, where the cause of death cannot be discerned through the layman's eye, the prosecution will suffer loss where expert evidence has not been adduced to confirm the cause of death.

46. In respect to the appeal before us, PW4 identified photographs of the body of the deceased before the trial court. He talked of injuries on the chest, arm and face. He also saw stab wounds on the chin and forehead. PW5 testified about loose teeth and burns on the torso. Indeed, the postmortem report though not eventually produced was identified by PW7 who was present during the autopsy. The same was marked for identification as a prosecution exhibit. Other witnesses including PW1 and PW2 all saw injuries on the body of the deceased. The evidence on record is that the deceased was hale and healthy when she was last seen. The nature of the injuries as observed by the witnesses were caused by a human hand. In her judgment, the learned Judge concluded that:

> " The court must determine whether the Accused, of malice aforethought caused the deceased's death. The fact of her death is not disputed, and even though the autopsy report marked MFI 3 was not produced as exhibit, it is clear from the evidence by PW2, PW3, PW4. PW5, PW8 as well as the photographs of the deceased's body at recovery (Exhibit 1a-c) that the deceased died a violent death. The body bore stab wounds on the head/neck region and the torso what appeared to be extensive scaling from burns and corrosive substances. The body was half naked as only some fragments of her body clothing remained on the body. Whoever inflicted these injuries had clearly intended to cause her death."

47. We cannot fault the learned Judge for arriving at that conclusion. In short, we agree with the learned Judge that the deceased was killed by someone or some people.

48. The next issue is whether the appellant was implicated in the murder of the deceased. In this case, there was no eyewitness to the offence. It is therefore important that we restate the factors that should be considered before circumstantial evidence can be used to convict an accused person. This Court set the threshold for the use of circumstantial evidence to convict in Abanga alias Onyango vs. Republic (CR. App No. 32 of 1990) LLR NO. 3975 as follows:

> " It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:
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> i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
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> ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
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> 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."

49. Similarly, in Joan Chebichii Sawe vs. Republic [2003] eKLR, the Court observed that:

> "As we have already pointed out, the evidence in this case was entirely circumstantial. 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."

50. From the foregoing, it is important to appreciate that when dealing with circumstantial evidence, the cumulative set of facts must justify the drawing of an inference that it is only the accused person and no one else who could have committed the offence. The offence must, from the circumstances, be solely attributable to the accused person. From the record, the main evidence linking the appellant to the deceased was the phone records produced by PW10. It is these records that the trial court relied upon to convict the appellant. In considering this set of evidence, we agree with the trial court that the phone data showed an increased frequency of communication between the appellant's husband and the deceased. It is possible that this was because of a love affair. However, as will be seen later, there were other reasons that could have made the husband of the appellant and the deceased engage in increased conversation.

51. We also note that the phones of the appellant and the deceased converged at the same location on the date of the murder. However, this convergence was not without explanation. From the evidence on record, it was clear that the two were neighbours. Indeed, as per the testimony of PW2, the appellant lived two plots away from the home of the deceased. Upon review of exhibit 6, we note that ordinarily, the appellant's phone would be picked at either 639-02-00007-01694 (Mai Mahiu OUTN) or 639-02-00007- 05575 (Kijabe OUTN). It is also discernable that on the material day between 5.39 pm and 6.19 pm, there was an interlude between 639-02-00007-05575 (Kijabe OUTN) and 639-02-00007- 05571 (Kijabe OUTN) with the later serialized as a different base station. However, we note that both 05575 and 05571 shared a SUB LOC name of 557 Kijabe OUTN. On the other hand, the deceased's phone received a signal on the same 557 Kijabe OUTN between 3.26 pm and 4.15 pm.

52. PW10 explained that phones would be served by the nearest mast and in the event the mast exceeds its capacity, the phones would receive signal from the next available and nearest mast. There was no explanation tendered by the witnesses as to the distance between the various masts, specifically, 05575 and 05571. Neither was it established whether the two would also serve the locality where the appellant and the deceased lived. The appellant in her defence gave a detailed account of her afternoon of 30th June 2013. Her account was not tested by way of cross-examination against the telephone data produced by PW10. There was no attempt to show that any of the telephone masts in PW10's report did not cover the appellant's residence.

53. The learned Judge made a finding that the appellant had a motive to cause the deceased's death due to a love affair between her husband and the deceased. However, we are of the view that the learned Judge considered this evidence in isolation from the evidence of land dealings between the two and the existence of Naivasha CMCRC No. 1205 of 2013 in which the husband of the appellant and the deceased were scheduled to testify as prosecution witnesses.

54. Additionally, we also note that despite collection of samples by the investigators from the appellant's house, the outcome of the analysis of those samples was not tendered as evidence in court. Indeed, the investigating officer testified that the forensic analysis did not yield anything to link the appellant to the murder of the deceased. The evidence on record shows that the appellant's homestead was thoroughly combed by sleuths for evidence during the investigation. It was important for the prosecution to adduce the evidence in court. Although the prosecution retains the right to decide the witnesses and exhibits that would prove their case, such discretion must be exercised objectively and impartially. In this case, we are inclined to draw a negative inference from the failure to produce the forensic analysis report of the exhibits collected from the appellant's home.

55. In our view, there was no evidence that placed the deceased in the appellant's house, despite the deceased telling her siblings that she was proceeding to the house. It is also clear that the deceased was

a witness in Naivasha CMCRC No. 1205 of 2013 which arose out of a land deal they had brokered with the appellant's husband. The investigating officer admitted that although the accused persons in the criminal case were not within the location of the murder, they could have been complicit in the death of the deceased.

56. In addition, there was evidence that the deceased and the appellant's husband worked together in sourcing and selling land. It is intriguing that none of the witnesses who testified to this fact, save for PW1, alluded to the existence of a love affair between the appellant's husband and the deceased. Not even PW9, the deceased's friend who worked for the appellant's husband or the deceased's sisters knew of this alleged affair prior to the deceased's death. It is also important to note that after texting the appellant, the deceased communicated to the appellant's husband. Against the untied ends is the appellant's ironclad testimony of her movements on 30th June 2013. That evidence was backed by her witnesses.

57. Bearing in mind the facts and the unanswered questions we have highlighted, it is our view that the circumstantial evidence adduced before the trial court could not have led to the inevitable conclusion that it was the appellant and no one else who caused the death of the deceased. We cannot, in the circumstances, agree with the trial court that the appellant lured the deceased to her death in the absence of evidence to support this conclusion. Several areas that needed to be covered by the investigator were left unattended. There were unfilled gaps which can only lead us to the conclusion that the deceased may have been killed by some other person or persons. For instance, no reason was given as to why the text messages exchanged between the deceased and the appellant a few hours to the deceased's death were not extracted and produced in court as evidence.

58. In our view, all that the evidence established was that the deceased indicated that she was to meet the appellant on the day she disappeared. Whether they met or not is a matter of speculation. That evidence did not prove the appellant's involvement in the murder to the required standard. In that regard, we associate ourselves with the words of the Court in Joan Chebichii Sawe vs. Republic [2003] eKLR that:

> " The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira vs. Republic (Criminal Appeal No. 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence."

59. In the circumstances, we must vacate the finding of guilt by the learned Judge for the reason that the circumstantial evidence adduced at the trial did not conclusively point to the appellant, and no one else, as the killer of the deceased. The appeal against conviction must therefore succeed.

60. Considering that we have allowed the appeal against conviction, the appeal against sentence becomes moot and no longer requires our determination.

61. Our conclusion is that the appeal must be and is hereby allowed. The conviction is quashed and the sentence set aside. Consequently, the appellant is set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR