



**Musimbi v Republic (Criminal Appeal 107 of 2020)
[2023] KECA 287 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 287 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 107 OF 2020
MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA
MARCH 17, 2023**

BETWEEN

BEATRICE MUSIMBI APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal against the Judgment of the High Court of Kenya at Nairobi
(Wakiaga, J.) delivered on 19th September 2017 In Criminal Case No. 24 of 2010)*

JUDGMENT

1. The appellant, Beatrice Musimbi, was charged alongside two others, with the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that, between 23rd and April 25, 2010 at Nanu Apartments in Kilimani area within Nairobi Province, murdered Luz Hines Rouffaer (hereafter “the deceased”). Following a protracted trial before the High Court, the appellant was found guilty of the offence convicted and sentenced to death while her co-accused persons were acquitted for want of sufficient evidence.
2. In total, the prosecution called 14 witnesses. PW1, Christian John Louis, a Swiss expatriate working with the International Community of the Red Cross (ICRC) lived with his wife, the deceased, in their rented apartment No 4 at Nanu Apartments on Chaka Road, Kilimani. The appellant was their house help who lived outside the compound. PW1 travelled to Uganda for official duties on April 18, 2010 and was constantly in contact with the deceased until April 22, 2010. On April 23, 2010, he called her but could not reach her since the internet was down. On April 24, 2010, he attempted to contact her severally in vain as her mobile phone was off the entire day. He called the hotline for ICRC security that evening and expressed his anxiety over his inability to reach his wife. He requested the head of security at ICRC to go to his residence and find out if all was well.



3. Meanwhile, on April 23, 2010, PW6, Sebastian Odembo Makio, a guard from Lavington Security Firm attached to Nanu Apartments, saw the deceased driving out alone in her vehicle at 12.55pm. He recorded this in a register maintained by the security firm at the gate of the premises for that purpose. According to PW2, Angela Controneo, a friend of the couple, the deceased arrived at her place on Dennis Pritt Road on the same day at about 12.55pm. They went to Monico Cafeteria in Valley Arcade Shopping Centre where they had lunch to celebrate the deceased's birthday, which had since passed.

After lunch, they went for grocery shopping then walked back to PW2's house where the deceased had left her car. PW2 helped her to load her groceries into her car, and then left with a promise to meet up the following week.
4. According to PW6, the deceased drove back into Nanu Apartments alone on the same day at 16.12pm. PW3, Martin Edward Worth and PW4, Ian Kirumba Ndung'u, both residents at the same apartments, saw her at the premises on the same day around the same time. PW4 saw the deceased inside her car speaking on phone while PW3 shared the elevator with her on their way to their respective houses, which were on different floors in the building. PW4 took the stairs while going to his house and heard two male voices conversing in a strange language from one of the floors. To him, it sounded as though one was giving instructions to the other. He got to the fourth floor and found the 3rd co-accused person in the trial scrubbing the rail right outside door number 4 which belonged to the deceased's apartment. PW4 considered it strange that the 3rd co-accused person spent a considerable amount of time cleaning a relatively small spot and there was only one person in sight yet he had heard two voices earlier.
5. According to the caretaker of the apartments PW13, Nicholas Mwendwa Maundu, on that day (April 23, 2010), the appellant's co-accused persons finished their allocated chores by 1.00pm. However, the building's external walls were being painted at the time and four painters had been hired to do the job. At some point between 4.00 and 4.30pm, PW13 saw the appellant talking to her co-accused persons who were cleaning a vehicle belonging to the landlady of the apartments PW5, Esther Mukuria. Shortly before 5.00pm, PW5 saw the appellant and another lady who was unfamiliar to her leaving the premises. The appellant shook her hand but the other lady seemed uneasy and kept looking down.
6. On the evening of April 24, 2010 upon being informed about PW1's situation, PW7, Paul Irungu Murwathania, the head of security at ICRC sent the Organization's duty security officer, one Collins Ngeywa, to go and check whether the deceased was in the apartment. Collins went there and knocked the door in vain. On Sunday April 25, 2010 around 9.00am, PW7 went to Nanu Apartments accompanied by the ICRC Head of Delegation and his deputy. They used a spare key to access the apartment and found the naked body of the deceased submerged in water inside the bathtub in the bathroom with water running from two taps. The deceased's head was in the direction of the tap and her legs were resting on top of the bathtub. There were visible injuries on the deceased's neck, left hand and both legs. PW7 also saw blood on the floor near the main door. He went to Kilimani Police Station and reported.
7. The DCIO instructed the investigating officer, PW14, CPL William Saiyanga of CID Kilimani (also referred to as PW8 in the trial court proceedings) to take over investigations. PW14 went to the scene accompanied by PC Karisa, CPL Kimani, PC Muturi, PC Wanyama, CPL Oyaro and a lady officer by the name Redemtor Nduku. Upon entry into the deceased's apartment, he saw blood on the floor, on a seat in the study room and on top of the bathtub where the body of the deceased lay and used cotton wool to swab the blood. The bed in the master bedroom was slightly unmade. In the kitchen, they found a note dated 23/4/2010 signed by the appellant herein to the effect that she had received Kshs 10,000/- as payment for the month of April 2010 and was to be paid a balance of Kshs 4,000/- later on. PW12, CPL Antony Mwangemi Njambo formerly of CID headquarters, Nairobi also went



to the scene on the instructions of the DCIO and took 16 photographs of the scene. The body of the deceased was then moved to Montezuma Funeral Home.

8. On April 26, 2010, PW7 went to Nanu Apartments and took the register maintained at the gate. He made copies of the entries of April 23, 2010 when the deceased was last seen alive and handed over the book to PW14. The appellant and her co-accused persons were arrested that morning upon reporting to work and detained at Kilimani Police Station. On the same day at 2.00pm, PW7, PW14 and 3 other police officers accompanied the appellant to her residence at Muthama Estate in Waithaka for purposes of conducting a search. While there, PW14 asked her to produce the dress she wore on Friday when she was last at Nanu Apartments and she pulled out a 3- piece kitenge outfit. The skirt had a bloodstain, which the appellant claimed was her leaked menstrual blood. He confiscated the outfit for forensic analysis.
9. On April 29, 2010, PW9, Dr Johansen Odiwour, a pathologist performed a post mortem on the body of the deceased at Montezuma Funeral Home. The body was identified by PW7 and Hugh Vandigo, a friend of the deceased. Externally, it had a contusion on the right side of the forehead with skin peeling from the same area as well as her left and right arms. It had a linear breeze on both sides of their neck, a bruise on the left arm, right leg, left jaw, below the knee and right foot. Internally, lungs were frothy; there was a filthy secretion from the trachea and bronchi; the stomach contained partly digested food, which meant that she may have died less than six hours after her last meal; there was hematoma on the capsule of the thyroid gland and on the posterior wall of the esophagus consistent with blunt force trauma. He formed the opinion that the cause of death was asphyxia due to ligature strangulation and drowning. He opined that the bruises on the arm of the deceased were consistent with defense or wadding off an attack from an assailant and it appeared that her head was submerged underwater while she was being strangled. He took some specimen from the deceased's body for further tests.
10. On May 5, 2010, PW10, John Kimani Mungai, a Government Analyst from the Government Chemist received the following items from PW14: the deceased's vaginal, anal and mouth swabs as well as nail scrapings and blood sample; blood stains on cotton swabs taken from various parts of the deceased's house being the entrance to the toilet, bath tub and outside of a window; a piece of white blood stained tissue; the appellant's skirt, blouse and head scarf; and, blood samples from the appellant and her two co-accused persons as well as their saliva swabs. Upon analysis, he concluded that the DNA profile generated from the blood stains from the cotton swab from the toilet, bath tub, appellant's skirt and head scarf, marched the DNA profile generated from the blood sample of the deceased with a probability of a match of 1 in 5.65×10^{15} . He also found that the DNA profile generated from the bloodstains in the white piece of tissue had a female origin (other than the deceased and the appellant herein).
11. PW11, Joyce Wairimu Njoya, also an analyst from the Government Chemist received the following exhibits from PW8 on May 5, 2010 Exhibit A - stomach, B - kidney and liver, C - blood, and D - urine all labelled in the name of the deceased. On analysis, apart from the alcohol in the blood of the deceased at a concentration of 128mg per 100 milliliters of blood, there were no other toxic chemical substances detected in the stomach, liver, kidney and urine samples. She opined that the amount of alcohol in the blood was capable of causing drowsiness on some people.
12. The appellant gave a sworn testimony of defence and called no witness. She denied committing the offence but admitted having been employed by the deceased as a house help. It was her testimony that on April 22, 2010, she reported to her place of work at 9.00am whereupon PW6 opened the gate for her then she signed in and proceeded to Apartment Number 4N where her employer lived. The deceased opened the door for her and they greeted each other then went to the kitchen together. The deceased made two cups of tea and went to the bedroom while she remained in the kitchen washing utensils.



- After a while, the deceased gave her Kshs 4,000/- and instructed her to go make a copy of a certain book for her as well as purchase groceries from the supermarket. She left the house at 12.07 p.m. for Yaya Centre before proceeding to Nakumatt Junction, where she made purchases and returned home but did not find the deceased's motor vehicle in the parking lot.
13. On entering the house, she found a note with instructions, which she carried out and left another note and the balance from the grocery shopping for the deceased. She left the house at 2.30p.m. and met PW5 whom she spoke to briefly before walking out of the gate. It was her evidence that she never worked on Saturdays and Sundays. When she reported to work on Monday April 26, 2010 at 9.00 am, she found a Red Cross motor vehicle at the parking and PW6 directed her to go there and find out what the occupants wanted. The driver of the said motor vehicle asked for her name and residence. He also enquired whether she was working for PW1 and if she was on duty on Friday, which she answered in the affirmative. Thereafter, she was arrested and taken to Kilimani CID office, where PW7 accused her of killing the deceased.
 14. She was interrogated and then escorted to her house where she was asked to hand over the clothes she had worn on Friday when she was last at work. She retrieved her three-piece kitenge outfit and the skirt had a blood stain which she explained was from her menstruation. They confiscated the clothes and her mobile phone then took her back to the police station. A female officer checked her and confirmed that she was on her menstruation. PW8 later forced her to sign a paper whose contents she did not know. She added that PW7 lied to the court when he said there was blood on the front part of her skirt yet PW5 and PW6 never saw the blood when they last saw her leaving the apartment. Further, she stated that her skirt upon being produced in court had a bigger spot of blood than what was initially on it and the headscarf had blood yet she never used it. Lastly, she claimed that PW5 and PW6 lied when they said she used the rear door when leaving the apartment.
 15. The trial court having considered and weighed both the prosecution and appellant's case, found that the prosecution had proved its case against the appellant beyond reasonable doubt. Aggrieved by both the conviction and sentence, the appellant has challenged the same in this first appeal raising 4 grounds that the learned trial Judge erred by; failing to hold that the reliance by the prosecution on the doctrine of "last seen with", failed to irresistibly point to the appellant as the person last seen with the deceased to the exclusion of any other hypothesis; finding that the circumstantial evidence on record placed the appellant at the scene of the offence whereas the co-existing factors in play weakened the whole prosecution case; failing to observe that the prosecution evidence was untenable, contradictory, inconsistent, false and lacked credibility hence did not sufficiently prove the element of intention; imposing a harsh, excessive and unconstitutional mandatory death sentence without considering her mitigation.
 16. When the appeal came up for hearing before us on a virtual platform on October 19, 2022, the appellant was represented by learned counsel, Mr Musyoka while learned Prosecution Counsel, Mr. Omondi represented the State. Both parties relied on written submissions which they briefly highlighted.
 17. The appellant contended that the prosecution failed to establish key elements of the offence of murder as it did not prove that she caused the death of the deceased. Her counsel argued that the fact that she was the deceased's house help was not a sufficient basis for inferring guilt on her part merely because she was the person "last seen with" the deceased. He reiterated that that assumption is erroneous as the appellant left the apartment before the deceased returned to her house. It was submitted that the circumstantial evidence tendered by the prosecution did not place her at the scene of crime. He faulted the prosecution for failing to consider that there were many other possible suspects at the scene of crime at the material time, namely fellow tenants, painters, workers and even friends of the deceased.



- He contended that the deceased must have had company in her house on the last day she saw her going by her behaviour of carrying two mugs of tea to her bedroom yet her husband was absent.
18. Further, it was the appellant's contention that the testimonies of PW3, PW4, PW5 and PW6 regarding the events of April 23, 2014 were incredibly false and meant to cover up the actual killer. It was argued that the prosecution did not adduce any evidence to show that she and the deceased were in the deceased's house together on the afternoon of April 23, 2010. That it is implausible that she could have murdered the deceased and left the scene in the condition it was discovered, yet the prosecution claimed that the deceased returned home at 16.12pm and she left the apartment between 4.00 - 4.30pm. We were urged to take note of the following exculpatory facts; that no one saw or heard any commotion from the deceased's house upon her return home that afternoon; that the appellant had no injuries that would have pointed to her as the attacker yet the deceased had been fighting off an attacker at the time she met her death; and, that nothing was found missing from the deceased's house and if there was, it was not linked to the appellant.
 19. The appellant further contended that the DNA evidence was procured in contravention of the guidelines set down under sections 122A (1) and 122C (1) of the *Penal Code*. She argued that the prosecution did not seek her consent before taking specimens from her and PW14 was a police officer of the rank of a Corporal below an Inspector, hence not empowered to extract specimens for DNA analysis before obtaining a court order. Furthermore, the DNA evidence failed to meet the requirements under section 78A of the *Evidence Act* since the measures taken to preserve the samples from contamination, as well as how they were transported to the Government Chemist, received, and stored prior to testing, were unknown. It was also contended that the DNA evidence was not produced in accordance with the requirements of section 106B of the *Evidence Act* consequent which it was inadmissible and should be disregarded by this Court.
 20. On malice aforethought, the appellant argued that nowhere in the prosecution's evidence was it demonstrated that she possessed the requisite intent to do any unlawful act that may result in the death of the deceased. It was her submission that it was clear from the testimony of PW1 that she related well with him and the deceased. Furthermore, her behaviour immediately before and after the incident did not portray her as a person with a guilty conscience or malice aforethought. She innocently reported to work the following Monday and did not resist taking the police to her house upon arrest and handing over to the police the clothes she had worn at work on Friday. It was immaterial that she was inaccessible on phone throughout the weekend as she never used to work on weekends and her phone had broken down.
 21. On sentence, it was submitted that, in the event the conviction is upheld, we remit the file back to the High Court for resentencing in line with the Supreme Court decision of *Francis Karioko Muruatetu Case* [2017] eKLR to enable her tender mitigation and be accorded an appropriate sentence.
 22. In opposing the appeal, Mr Omondi submitted that the available circumstantial evidence strongly pointed to the guilt of the appellant. He argued that although no eyewitness saw the appellant attack the deceased, the evidence of PW5 and PW6 placed her at the scene as they saw her and another lady leaving the apartment through the rear gate instead of the main one. Further, that the appellant failed to report on duty on Saturday and Sunday and in the interlude, changed her phone. Coupled with the fact that the DNA analysis linked her to the death of the deceased, through the blood stain found on her as well as the evidence pointing to the deceased trying to ward off her attacker as attested by the injuries on her hands, the appellant could not plead innocence. We were urged to uphold both the conviction and sentence.



23. We have considered the evidence, the rival oral and written submissions and the law. This is a first appeal and the duty of a first appellate court of re-evaluating the evidence has been settled. In the many enunciations, the Court has been warned that it is not a trial court and so must give regard to the fact that it neither saw nor heard the witnesses testify and so did not observe their demeanour for which due regard must be accorded. In the severally cited case of *Okeno v Republic* [1972] EA 32, the Court pronounced itself as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R*, [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M Ruwala v R*, [1957] EA 570). 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 findings and conclusions; 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, see *Peters v Sunday Post*, [1958] EA 424.”

24. We have demarcated the following as the issues arising for our consideration, whether; the prosecution proved beyond all reasonable doubt that it was the appellant who caused the death of the deceased; the DNA evidence adduced by the prosecution was admissible; the appellant had the necessary malice aforethought in causing the death of the deceased; and, the sentence meted out on the appellant was harsh and excessive in the circumstances.

25. Section 203 of the [Penal Code](#) defines the offence of murder as follows:

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

From this definition, the prosecution must prove key elements of the offence of murder which are; the fact and cause of the death of the deceased, whether the accused person is linked to the death of the deceased and if so, whether he or she had malice aforethought.

26. The fact of the death of the deceased is not in contestation, the body having been retrieved from a bathtub in her bedroom. A post mortem exercise followed and was conducted by PW9 who formed the opinion that the cause of the death was asphyxia due to ligature strangulation and drowning. During the exercise, the body was identified by PW7 and one Hugh Vandigo, a friend of the deceased.

27. As to whether the appellant was linked to the deceased, the summation of the evidence drives to only one conclusion, that there was no eye witness who could account of how the deceased met her death. To prove their case, the prosecution invoked the doctrine of the “last seen with” and in that regard, relied on circumstantial evidence. The principles applicable in criminal cases predicated on circumstantial evidence have been laid down in several authorities of this Court. For instance, in *Rex v Kipkerring Arap Koske & 2 Others* [1949] EACA 135, *Simoni Musoke v R* [1958] EA 71, *Abanga alias Ongango v Republic* Criminal Appeal No 32 of 1990 (UR), and [Joan Chebichii Sawe v Republic](#) [2003] eKLR. They are that; to justify the inference of guilt, the evidence must irresistibly point to accused as the perpetrator of the crime; inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his or her guilt; and, the chain of events must be so complete that it establishes the culpability of the accused, and no one else.



28. Regarding the “last seen with” doctrine, its applicability has been explained by various courts. For instance, in the Nigerian case of *Moses Jua vs The State* (2007) LPELR-CA/IL/42/2006 it was held as follows:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

29. In another Nigerian case of *Stephen Haruna v The Attorney-General of The Federation* (2010) 1 iLAW/CA/A/86/C/2009, the Court in considering the same doctrine opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

30. In the case of *Ramreddy Rajeshkhanna Reddy & Another v State of Andhra Pradesh*, JT 2006 (4) SC 16 the Court held:

“That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

31. The above cases accord with section 111(1) of the *Evidence Act* which states that:

“

“(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: -

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt to the guilt of the accused person in respect of that offence.”



32. In this case, the genesis of the doctrine of ‘last seen with’ is hinged on the evidence of PW6 and corroborated by PW5. According to PW6, the deceased was last seen alive on the April 23, 2014 when she drove back into Nanu Apartments at 16.12pm. He recorded this fact in the Register maintained at the gate and confirmed that he saw the deceased walking to the lift while carrying a flower pot. Shortly thereafter, around 4.30m, he saw the appellant leave with another lady through the rear gate instead of the front. PW5 corroborated this account of events by confirming having seen the appellant and her companion on the same day around the same time and was categorical that the appellant even greeted her by shaking her hand. To further corroborate the evidence that the appellant was the person last seen with the deceased, the prosecution tendered DNA evidence which placed her at the scene of the murder. The DNA profile generated from the bloodstain found on the clothes that the appellant wore at the time she was regarded to have been with the deceased matched the DNA profile from the blood of the deceased with a probability of a match of 1 in 5.65x 1/10¹⁵.
33. When placed on her defence, the appellant admitted to having interacted with the deceased on that day in her house but claimed that that happened earlier and she left at 2.30pm before the deceased returned home. Further, instead of offering a cogent explanation as to how the deceased’s blood came into contact with her clothes, she claimed that the bloodstain was her leaked menstrual period despite the conclusive DNA evidence to the contrary. She stated that the police could have stained her skirt to implicate her since it had a much bigger stain when it was produced in court during trial. Like the learned trial Judge, we have weighed the appellant’s defence against the prosecution evidence and we find that it did not pass the credibility test. The chain of events, more so from the account of PW5 and PW 6, coupled with the positive DNA analysis, dislodged the assertion that the appellant left the apartment before the deceased returned and that the blood on her garment was from her menstrual cycle. No other inference other than that the appellant had a hand in the death of the deceased can be conclusively drawn.
34. On the DNA evidence, the appellant contends it was illegally admitted in evidence in violation of sections 122A and 122C (1) of the *Penal Code*. The provisions deal with sampling for DNA identification and provide thus:
- “ 122A.
1. A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.
- 122C.
- (1) Nothing in section 122A shall be construed as preventing a suspect from undergoing a procedure by consent, without any order having been made:
- Provided that every such consent shall be recorded in writing signed by the person giving the consent.”
35. In *Paul Ng’ang’a Wanjiru v Republic* [2020] eKLR, this Court when analyzing the provisions of sections 122A to 122D of the *Penal Code* with respect to sampling for DNA identification held that:
- “ Our reading of the above provisions convince us that the order or consent are required when the DNA samples have to be obtained from the body of the suspect. The rationale, in our view, is to protect the dignity and bodily integrity of a suspect which is guaranteed by Article



28 of the Constitution. That provision recognises the inherent dignity of every person and guarantees him or her the right to have that dignity respected and protected. The kind of samples listed in section 122A entail extraction, by a medical practitioner, of samples from the body in a manner that is invasive or intrusive. The reference to resistance and use of reasonable force to obtain the samples further support the view we take of the matter.

In our view, the provisions were not intended to hamstring criminal investigations and prosecution of offence by rendering inadmissible DNA analysis of samples obtained, for example, in a scene of crime without violation of the bodily integrity of a suspect. In this case, the samples in question were not extracted from the appellant's body. Instead, the procedure in question entailed comparing the blood stains found on the appellant's clothes, on Muia's clothes and shoes, in the appellant's car, and on the ligature recovered at the scene, with the DNA profile of the deceased."

36. Just like in the case above, the samples that connected the appellant to the offence were not extracted from her body. The procedure entailed comparing the blood stains found on the cloth that the appellant wore on her last day at work in the deceased's house comprising the DNA profile of the deceased. In the premises, we find that the DNA evidence cannot be impeached on this basis. Further, we do not hesitate to state that the provisions of section 78A of the Evidence Act relating to admissibility of electronic and digital evidence and section 106B of the Act regarding admissibility of electronic records were not applicable to the DNA evidence admitted by the trial court.

37. In light of the foregoing, we are satisfied that the prosecution proved that it was the appellant and not any other person who caused the death of the deceased.

38. As regards to whether the appellant had malice aforethought, section 206 of the Penal Code provides that:

"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."

39. The post mortem conducted by PW9 revealed that the deceased died from asphyxia due to ligature strangulation and drowning. We find that there was malice aforethought since it is evident that the attacker's intention was to halt oxygen flow into the deceased's body which led to her unfortunate death.

40. On sentence, it is evident that the death sentence imposed predated the Supreme Court decision of Francis Karioko Muruatetu & Another v Republic [2017] eKLR which declared the mandatory nature of the death sentence for an offence of murder as unconstitutional. However, the Court did not outlaw



the death penalty, but held that it can be imposed as the possible maximum penalty in appropriate instances determinable by the circumstances of each case, taking into account the mitigating factors presented by an accused person.

41. During sentencing, the learned trial Judge called for a pre-sentence report in line with the provisions of section 216 of the *Criminal Procedure Code* and the *Judiciary Sentencing Policy Guidelines*, 2016. Upon considering the same alongside the objectives of sentencing, the learned Judge in imposing the death sentence, correctly stated that, where there are circumstances warranting the court to exercise compassion in the quest for justice, it can pass any other sentence other than death. We have now considered the circumstances of the case in line with the *Muruatetu* Case (*supra*). An innocent life was lost and the manner in which the murder was committed was cruel and inhuman. At the same time, the appellant was not a repeat offender, which compels us to find this an appropriate case to interfere with the sentence
42. Accordingly, we dismiss the appeal on conviction. On sentence, we set aside the death penalty and substitute it therefor with thirty-five years imprisonment to run from the date when the appellant was arrested which is April 26, 2010.

Dated and delivered at Nairobi this 17th Day of March, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

