



**Angasa v Republic (Criminal Appeal 110 of 2020)  
[2023] KECA 863 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 863 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 110 OF 2020  
MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA  
JULY 7, 2023**

**BETWEEN**

**BENIGNO KUBASU ANGASA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment of the High Court at Milimani  
Nairobi delivered on 10th July 2019 (J.Wakiaga, J.) in HCCRC No.57 of 2014)*

**JUDGMENT**

1. The appellant, Benigno Kubasu Angasa was charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The information stated that on July 2, 2014 at 9.00 p.m. at Kariobangi South, 56 stage within Nairobi County he murdered Sarah Kerubo (the deceased).
2. The prosecution called 9 witnesses and thereafter the appellant was placed on his defence and gave an unsworn statement. Upon considering the evidence, the High Court found the appellant guilty and convicted him for the offence and sentenced him to imprisonment for a period of thirty-five (35) years from July 14, 2014 when he first appeared in court and further ordered that he would only be liable for remission upon serving twenty years.
3. Aggrieved by the High Court's decision, the appellant filed this appeal on grounds that the learned judge; failed to find that the ingredients for the offence of murder were not established; convicted the appellant on the basis of circumstantial evidence which was displaced by co-existing factors; shifted the burden of proof to the appellant, and failed to have due regard for the appellant's defence; convicted the appellant on unsubstantiated claims, and failed to make an adverse finding where crucial witnesses were not called to testify; and imposing a sentence that was harsh and excessive, and improperly denying him remission until 20 years of his sentence had lapsed.



4. The appellant filed written submissions. When the appeal came up for hearing on a virtual platform, learned counsel for the appellant, Chacha Mwita highlighted the submissions in brief and submitted that there was no cogent evidence to demonstrate that the appellant caused the death of the deceased; that in the circumstances, the benefit of doubt ought to have been resolved in the appellant's favour. Counsel submitted that the prosecution failed to establish actus reus and mens rea against the appellant.
5. Furthermore, it was submitted, the prosecution's evidence was too scanty and insufficient to have returned a verdict of guilt; that the circumstantial evidence was weak and should not have been used as a basis upon which to convict the appellant. It was argued that the appellant's defence was consistent and corroborated by his conduct, and stood un-rebutted by the prosecution evidence on record; that the prosecution's failure to call as witnesses the people who were mentioned in the appellant's statement, should have led the court to infer that the evidence was prejudicial to its case.
6. Counsel further asserted that the sentence passed by the trial court was arbitrary and the order that he will only be entitled to remission after serving twenty (20) years was unfair and unjustified for a first time offender who pleaded for leniency and had demonstrated remorse; that the decision to deny the appellant the right of remission goes against the objectives of sentencing; that remission being a tool to promote the reform and rehabilitation of offenders as encapsulated under section 46 of the Prison Act Cap 90 and that it is to be exercised by the Prisons Department, and not the courts.
7. Counsel finally submitted that were this Court to find that the appellant could have contributed to the death of the deceased, then the Court should find that it was not premeditated, and the offence of murder should be substituted with a lesser offence of manslaughter and commensurate sentence for manslaughter be imposed on the appellant. Counsel urged that the period already served be considered as sufficient. In this regard, the Court was invited to consider the decisions in Republic vs David Mwiti M'Turuchiu [2018] eKLR, Republic vs Stephen Sila Wambua Matheka [2017] eKLR, Timothy Muthama Nzioki vs Republic [2019] eKLR; JOO vs Republic [2015] eKLR and Duncan Mayodi Asonji v Republic [2016] eKLR.
8. Mr. Okachi, learned prosecution counsel for the State opposed the appeal and submitted that the appellant was charged with murder of the deceased which was proved beyond doubt, and that all the elements of the offence were established. It was further submitted that the case concerned a love affair gone sour, and that after the appellant murdered the deceased, he attempted to conceal her death by obtaining a letter from the hospital specifying that the deceased had died from alcohol intoxication. Counsel stated that the trial court arrived at a fair and just decision, and since there was no remorse on the part of the appellant, this Court should not interfere with the conviction and sentence of the trial court.
9. We have considered the appeal and the parties' submissions. This being a first appeal, this Court is mindful of its duty as first appellate court. This duty was well articulated by this Court in the case of Erick Otieno Arum vs Republic [2006] eKLR as follows:

“It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of



seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same”

10. Guided as such, we consider that these issues fall for this Court’s determination, namely;
  - i. whether the offence of murder was proved to the required standard;
  - ii. whether crucial witnesses were not called;
  - iii. whether the appellant’s defence was taken into account; and
  - iv. whether the sentence meted out was manifestly harsh and excessive.
11. So as to address the issues raised, it becomes necessary to set out the facts that were before the trial court. On July 2, 2014 at about 9.30 p.m. while Joseph Wangonda Wamugunda (PW1) was in his house with his family at Stage 56 Kariobangi South, Millicent Akinyi Disio PW2 who lived on the 3<sup>rd</sup> floor, came to his house on the ground floor, and informed him that there was a lady crying on the 3<sup>rd</sup> floor as if she was fighting with her husband. She asked him to come and check what was happening. PW1 called another neighbour, Nganga, and together with his wife and PW2, they went up to the 3<sup>rd</sup> floor. They knocked on the door of one of the two houses on the 3<sup>rd</sup> floor, and a gentleman opened the door. He asked them what they wanted, and then closed the door. The next morning, PW1 went to work and in the evening at about 10.00 p.m. the police came to his house with PW2 and asked him to record a statement. He later learnt that the deceased had passed on.
12. At about 9.00 p.m. on the night in question, PW2 heard a lady crying in the neighbouring flat number 9 on the 3<sup>rd</sup> floor where she lived. Before that, at about 2.30 p.m., the deceased had gone into flat No. 9 after PW2 had opened the gate for her. At around 9.30 p.m., the appellant, who was the deceased’s husband came to the house and after a short time, she heard a commotion and noise as if items were being moved in the house. The deceased was asking her husband not to hurt her leg. PW2 also overheard the appellant demanding for money from her. The lady then produced a sound as if she was being strangled and was saying, “don’t strangle me”.
13. When the noise persisted, PW2 went down to call a neighbour PW1, and his wife who lived on the ground floor of the second block to come and check what was happening. Together with one Nganga, they went to the deceased’s house, and knocked on the door three times. The appellant opened the door slightly. When they inquired what was wrong, he said there was no problem and shut the door. Since the noise had stopped, they returned to their houses. She identified the person she saw at the door as the appellant.
14. The next day at 4.00 a.m., PW2 heard the grill being opened and the appellant left the house. At 5.00 a.m., she went to check on the deceased, but found the door locked with a padlock. She did not see the deceased again. At 10.00 p.m. she saw ten (10) police men climbing the stairs to their floor.
15. When they questioned her, she explained that the couple were fighting the previous night. She was asked to record a statement, and that was when she learnt that the deceased had passed on.
16. In cross examination, she confirmed that there were only two flats on the 3<sup>rd</sup> floor, one in which the appellant resided, and the one that she occupied; that she heard the deceased and the appellant arguing, and the deceased had pleaded with the appellant not to strangle her.
17. Dr. Charles Muturi(PW3) performed the post-mortem examination on the body of the deceased on 4<sup>th</sup> July 2014. He found that the deceased had sustained; multiple bruises and abrasion on the neck and face with nail marks on the neck; abrasions on the left knee and back; right eye lid was swollen;



bruises on the left rib cage and the small gut; and multiple bruises beneath the scalp. As a result of the examination, he formed an opinion that the cause of death was Asphyxia following manual strangulation. He further took the whole stomach contents, blood, whole kidney and liver fragment as Toxicology specimens. The body of the deceased was identified by Rebeca Kwamboka Nyasaye (PW5), her sister.

18. Sipora Moraa Nyasaye (PW4), the mother of the deceased testified that in 2009, the appellant had beaten the deceased causing injuries on her face and eye for which she took her to a clinic in Buruburu. The deceased who was a loving wife declined to make a report to the police. In 2011, there was a further allegation that the appellant had assaulted the deceased and thrown her out of the house whilst unconscious for which she was admitted at St. Mary's Hospital Nairobi for a period of five (5) days; that the matter was reported to the police, but the deceased once again went back to the appellant.
19. In 2012, the deceased left the appellant for her parents' home after he had once again assaulted her and caused her to loose her teeth.
20. PW4 stated that the deceased who had been living with them for the past one year was on 1<sup>st</sup> July 2014 called by the appellant, and she left to go to his house. On 2<sup>nd</sup> July 2014 at 6.00 a.m. she returned to PW4's house and then took the child to school. She stayed with PW4 until 7.00 p.m. when she went back to the deceased house's. PW4 stated that the deceased was in good health, and that was the last time she saw her alive as she did not return the next day to take her child to school; that it was the appellant who reported that she had died and her body had been taken to the mortuary. PW4 was suspicious as the appellant told her that the deceased had died together with another lady as a result of drinking alcohol with poison "kumi kumi". He gave the name of the dead lady as Lulu, who was alive and confirmed that she had seen the deceased on the July 2, 2014 buying food at Korogocho. PW4 went to the appellant's house to confirm that she was alive but found that he had left the house.
21. PC Aaron Koech, (PW6), was on duty on 3<sup>rd</sup> July 2014 at the report office of Buruburu Police Station when the appellant came to report that the deceased had died at home after drinking alcohol. He showed him a letter from Community Health Care Hospital of the same day. He issued the appellant with an admission letter to the mortuary. Later in the evening, the family of the deceased went to the station to report that the appellant had murdered the deceased.
22. PC Samson Mutinda, (PW7), accompanied the OCS and other police officers to Kariobangi South Area where they arrested the appellant who led them to his house which they found was in disarray. They recovered a blood stained bed sheet from the room, after which, they took the appellant to Buruburu Police Station. The appellant was identified by the relatives of the deceased.
23. Cpl Hezbon Otieno, (PW8), the investigating officer testified that on the material day at 13:45 hours, PW4 reported to Buruburu Police Station that the deceased had left home on July 2, 2014 and gone to her husband's place and had not returned on July 3, 2014 to take their child to school; that she later met the appellant who informed her that the deceased had died and her body was taken to the mortuary. When he checked the Occurrence Book (OB), he noted that a report made by the appellant stating that the deceased had died from heavy alcohol consumption and was pronounced dead on arrival at the hospital. As part of their investigations, he proceeded to the scene together with the OCS, PC Mutinda, PC Kipsang and PC Muthoka and interviewed the witnesses. He later visited Community Nursing Home where the deceased had been taken by the appellant on July 3, 2014 at 5.00 a.m. and confirmed that the deceased was pronounced dead on arrival.
24. It was his further evidence that the appellant was subsequently arrested and taken for mental assessment, and was found fit to stand trial. He confirmed that the body of the deceased was first taken to Total Nursing Home before being taken to the City Mortuary. He stated that the specimen taken to



- the government chemist for Toxicology produced negative results. He confirmed in cross-examination that the appellant was arrested in his house where blood stains were found on the bed sheet and that he recorded statements from one David Kaburu, a friend of the appellant who was with him when the news of the death of the deceased was given to the deceased's mother; that the appellant stated that the deceased was alcoholic and that they used to quarrel and assault each other, but would solve their issues and resume their relationship.
25. Benard Omwenga,(PW9), a clinical officer at St. Veronica Health Clinic Buruburu testified that he previously attended to the deceased who was brought to the clinic by PW4 on allegations of having been assaulted by a boyfriend who would kick and hit her and drag her on a rough road, causing her to sustain injuries to the cheeks, neck, stomach, legs and head. He had prepared a summary with which she could go with and seek legal redress from the police. He produced the medical records to support the allegations of assault on 12<sup>th</sup> September 2009.
  26. When placed on his defence, the appellant stated that he met the deceased in 2007 and were blessed with a son in 2008. Soon after his mother-in- law, PW4 started to mistreat the deceased causing her to move in with him which angered PW4. In early 2010, PW4 called the deceased to visit her together with their child and he expected them to return after two days but they did not. He was told that they had been sent to their rural home in Kisii and he should forget about the deceased and their son. It was not until 2013 when the deceased called to request for bus fare to return back to the city which he gave her. In December 2013, PW4 caused the deceased to be arrested and when called to the station, the OCS told him that PW4 wanted both families to meet. The deceased was subsequently released after he agreed to meet them.
  27. It was the appellant's evidence that in 2014, the deceased enrolled their child in a play school near her mother's house and on June 1, 2014, they moved into a house next to PW4. On July 2, 2014, he woke up at 9.00 a.m. to go for a job interview. On the material day, he informed the deceased that he was going to a workmate's party in Juja. When he asked the deceased to join them, she stated that she was going to meet a friend of hers called Lulu and her boyfriend Ken at Red Pub. At 9.00 p.m. she called and told him that Ken was trying to seduce her, and it was making her uncomfortable, so she decided to go home. She called him again at 9.30 p.m. to confirm that she reached home and then her phone went off so he thought that she had fallen into a drunken sleep. He returned home at 5.30 a.m. and found the door unlocked, and everything in the house was upside down, as if there had been a fight in the bedroom. The deceased was lying on the bed unresponsive. He then took her in a taxi to Total Nursing Home where she was pronounced dead.
  28. The hospital gave him a letter to take to Buruburu Police Station and the body was released to him to take to the mortuary. He called her two friends to help him break the news of her demise to her parents. Lulu had told him that she had not seen Ken since he escorted the deceased home. He was thereafter arrested and charged for an offence he did not commit. He stated that he did not kill the deceased even though they had normal relationship problems which they would usually resolve.
  29. Turning to the grounds raised, in order for the offence of murder to be established, the prosecution must establish three elements. First, the death of the deceased and its cause; secondly, that the death of the deceased was caused by an unlawful act or omission by the accused person(s); and finally, that the accused person committed the unlawful act or omission with malice aforethought.
  30. In the instant case, the fact of the deceased's death is not in dispute. A post-mortem report by Dr. Muturi who performed the post-mortem examination on the body on July 4, 2014, found that the deceased had sustained multiple bruises and abrasion on the neck and face with nail marks on the neck; abrasions on the left knee and back; right eye lid swollen; bruises on the left rib cage; bruising of



the small gut; multiple bruises beneath the scalp. He formed an opinion that the cause of death was Asphyxia following manual strangulation. It cannot therefore be doubted that the deceased died and the cause thereof.

31. As to whether the appellant's unlawful actions were responsible for the deceased's death, the learned judge, after analysing the evidence stated thus;

“On whether that said, death was caused by unlawful act on the part of the accused person, the following evidence tended (sic) before me stands unchallenged: - The accused had moved into a flat where he was sharing a floor with PW2 Millicent Akinyi Ndiso. PW1 Joseph Wangonda Wamugunda was also living in the same flat but on the ground floor. The deceased who had been living with her mother on the material day, informed her that she was going to the accused house and PW2 confirmed having opened the gate or burglar proofing of the floor at 7.30 pm for her. PW 4 the mother confirmed having spoken to her while at the stalls buying provisions for her house. The accused confirmed having moved into the said block. It is also not disputed that the accused took the deceased to Total Nursing Home where she was confirmed dead on arrival having found her in the house unresponsive.

The fact that somebody came into room 9 where the deceased was is confirmed by PW 2 whose evidence was that it was the accused who did so. Shortly upon his arrival she heard commotion and noise with the deceased stating that she was being strangled. PW1 confirmed that PW 2 sought his assistance to enable them contain the situation when the accused opened the door and closed it, thereafter PW 1 described the person who opened the door as a tall man. In the morning, PW2 confirmed that the door of room 9 was locked from outside though at 4.00 a.m. she heard the accused get out from the room. The accused in his defence confirmed having been in the said room at 5.30 a.m. when he found the deceased on bed unresponsive. This is contradicted by the evidence of PW2 who found the door locked at 5.00 a.m. I am therefore not persuaded by the accused account that he was not in his house on the night of the death of the deceased.

The accused having been placed at the house by PW2 and PW1 and having taken into account the evidence of PW2 that she heard the deceased state that she was being strangled which was confirmed through the scientific evidence of PW3 Dr. Muturi and the circumstantial evidence as analysed hereunder, I am satisfied that the death of the deceased was caused by the accused.”

32. The learned judge's conclusions were based on the circumstantial evidence that was tendered by the prosecution. Based on this evidence, the trial court reached a finding that the appellant was responsible for the deceased's death.

33. In setting out the nature of circumstantial evidence in the case of *Makau vs Republic* [2010] 2 EA 283, this Court stated;

“Circumstantial evidence is evidence of surrounding circumstances, from which an inference may be drawn as to the commission of a criminal offence. It has been held in previous decisions of this and other courts that such evidence may in some cases prove a fact with the accuracy of mathematics”.

34. The principles applicable to cases turning on circumstantial evidence are clearly outlined. They require that; the inculpatory facts must be incompatible with the innocence of the accused; they must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused; there



must be no other co-existing circumstances weakening or destroying the inference; and that every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution.

35. And in the case of *Aggrey Mang'ong'o Amugune vs Republic* [2020] eKLR, this Court cited the case of *Abanga alias Onyangongo vs Republic*, Cr. App No. 32 of 1990 which set out the conditions of the circumstantial evidence that are necessary so as to point to the accused person, as the perpetrator of the offence thus;

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

36. As to whether the circumstantial evidence adduced by the prosecution pointed unerringly to the appellant's guilt, to begin with, our re-analysis of the evidence of PW2 and PW4 placed the deceased in flat 9 on the 3<sup>rd</sup> floor on the night in question. According to PW4, the deceased's mother, the deceased who had a tumultuous relationship with the appellant, was to spend the evening with him in his house. She had left her child with PW4 and was to return the next day. She last spoke to the deceased as she went about buying provisions at the nearby market. On arriving at the appellant's apartment block, PW2 opened the burglar grill to let the deceased onto the floor where the appellant lived.
37. Second, the evidence of PW1 and PW2 also placed the appellant in the same flat at 9.30 p.m. when they went to check on the noise emanating from the appellant's room. Upon knocking at the door, the appellant opened the door and immediately closed it. PW2 confirmed that the appellant resided in flat number 9 and identified him as the person who was in the flat with the deceased that fateful evening.
38. Third, PW2 heard noise and commotion coming from the appellant's room. She also heard the deceased telling the appellant not to strangle her. The next day, the police informed her that the deceased had died. According to the post mortem report, the deceased had suffered multiple injuries, and died from strangulation. The cause of death in the report was indicated as asphyxia from manual strangulation which coincided with PW2's evidence that she heard the deceased pleading with the appellant not to strangle her.
39. Fourth, the witnesses who came to the crime scene all testified that the room was in disarray, hence pointing to the noise and commotion that PW2 heard coming from the room that evening.
40. Fifth, after she had died from the brutal assault, the appellant tried to conceal the fact that he had killed her when he reported at the police station and the hospital, that she had died from consuming poisonous alcohol. This was a blatant lie when the findings of the post-mortem report that specified that she had died from strangulation are taken into account. The fact of her strangulation was within his knowledge, more particularly since he was the last person to have been with her alone in the flat from 9.00 p.m. to 5.30 a.m. Hence, it was incumbent upon him to explain how she came to be strangled that night, as provided by section 111(1) of the *Evidence Act*, which he failed to do.
41. In the case of *Mwangi & another vs Republic* [2004] eKLR, this Court expressed;

“It may be asked: why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case, depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain



can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other, reasonable hypothesis except a hypothesis that the accused is guilty of the charge...”

42. Our above re-assessment of the circumstantial evidence, when pieced together, pointed to the chain of evidence that was so complete, the only conclusion that could be drawn was that the appellant killed the deceased in their flat on that fateful evening. The deceased suffered severe injuries, and was ultimately strangled to death by the appellant. As concluded by the learned judge, the evidence unerringly pointed to the appellant as the perpetrator of the murder of the deceased. And indeed, after our own re-examination of the evidence, we too adopt and uphold that finding.
43. As concerns the appellant’s claim that the prosecution failed to call Ken and Lulu who were crucial witnesses that were named in his statement. We begin by observing that, it is trite that the duty of the prosecution when calling witnesses is set out in section 143 of the *Evidence Act*, which specifies that no particular number of witnesses are required to prove a fact. The evidence tendered in the trial court by the prosecution witnesses, was, in our view, sufficient to prove that the deceased and the appellant were in the room on the night in question. Therefore, whether or not Ken or Lulu were called to testify would not have in any way advanced or displaced the prosecution’s case. We dismiss this ground.
44. On the allegation that malice aforethought was not proved, section 206 of the *Penal Code* defines malice aforethought as;
- “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.”
45. For malice aforethought to be established, the predecessor of this Court, East African Court of Appeal observed in the case of *Rex vs Tubere s/o Ochen* (1945) 1Z EACA 63, that;
- “In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”
- And in the case of *Hyam vs DPP* (1974) AC the Court held that;
- “Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”
46. By the time of her death the deceased had multiple injuries, and the cause of her death was asphyxia following manual strangulation. The appellant must have known that by strangling her in the manner



that he did he would cause death or grievous harm to her. As such, malice afore thought on the part of the appellant was proved beyond a reasonable doubt.

47. In seeking to dispel the prosecution's case against him, the appellant's alibi defence was that, on the material day, he went to a workmate's party in Juja, and that the deceased went to meet a friend called Lulu and her boyfriend, one Ken at Red Pub. She called him at 9.30 p.m. to confirm that she had returned home, and then her phone went off so he thought that she had fallen into a drunken sleep. When he got home at 5.30 a.m. he found the door unlocked. Inside, the house was in disarray, as if there was a fight in the bedroom. The deceased was lying on the bed unresponsive. He then took her in a taxi to Total Nursing Home where she was pronounced dead.

48. The learned judge dismissed his alibi defence thus;

“The offence as per the evidence placed before me took place inside the privacy of the house of the accused who has positively been placed thereat which therefore dislodges his alibi defence to the effect that he was not there until 5:30 a.m when he came back and found the deceased unconscious as a result of over consumption of alcohol, a fact which was only in the knowledge of the accused which raised a burden upon him under the provision of section 111 (1) of the *Evidence Act* to explain how and where the same got drunk which I find he failed to reasonably do which provided an additional link to the circumstances proved against”.

49. We agree and adopt the judge's reasoning as set out above. The prosecution witness' evidence that at all times the appellant was in his flat on the 3<sup>rd</sup> floor from 9.30 p.m. to 5.00 a.m. the following morning was not in any way discounted. But there was yet another reason why the trial judge did not believe the appellant's alibi defence. The appellant stated that he was out with his friends drinking throughout the night in Juja. In the judge's view, had this been the case, then the friends, whoever they were, would have come forward and said so. Since no such evidence was tendered in support of the assertion, we find the alibi to be disingenuous and implausible, and the learned judge rightly disregarded it.

50. As such, the ingredients for the offence of murder having been established beyond doubt by the prosecution, we uphold the trial court's decision, and dismiss the appeal against conviction.

51. With reference to the issue that the sentence of 35 years' imprisonment imposed on the appellant by the learned judge was harsh and excessive, and that the denial of remission until he had served 20 years was unfair and unjustified, under section 204 of the *Penal Code*, the sentence for a conviction of murder is death. In this case, after taking into consideration the appellant's extensive mitigation, and relying on the guidance set out in the Supreme Court case of *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR, the trial court concluded;

“The deceased must therefore had (sic) died a painful death and lonely as at the time. The conduct of the convict ought to be condemned in the strongest possible terms and since this court only has its sentence to do so, I have come to the conclusion that an imprisonment term of thirty-five (35) years would be the best way to tell all men and women alike that enough is enough...”

The court went on;

“So as to act as deterrence and while giving the convict an opportunity for rehabilitation in prison the convict shall serve imprisonment sentence for a period of thirty (35) years from



14<sup>th</sup> July 2014 when he first appeared in court. He shall be liable for remission upon serving twenty years (20) thereof...”

52. From the above considerations, it is clear that the learned judge exercised his discretion to impose a sentence of 35 years’ imprisonment instead of the mandatory death sentence. In the circumstances, we have no reason to interfere with the sentence which we consider to have been lawfully imposed.

53. With respect to the order on remission, in the case of *Daniel Kibet Mutai & 9 others vs Attorney General* [2019] eKLR this Court, after considering the circumstances under which remission can be granted under section 46 of the *Prisons Act*, surmised that;

“Our understanding of section 46 (1) is that except for prisoners sentenced to life imprisonment, or sentenced under section 296(1) or sentenced under the president’s pleasure all convicted prisoners may by industry and good conduct earn remission of their term of imprisonment, as section 46(2) indicates that each prisoner is to be credited upon admission with full amount of remission that he would be entitled to if he did not lose any remission of sentence. Subsection 3 and 4 lists the circumstances in which a prisoner may lose or be deprived of the remission.”

54. Since remission is governed by section 46 of the *Prisons Act* and is based on the conduct of a convict whilst in prison, we are of the view that it was not within the remit of the trial judge to determine when, or on what basis the appellant would be granted remission. As such, the order denying the appellant the possibility of remission before the lapse of 20 years was unjustified.

55. In sum, we dismiss the appeal and uphold the conviction and sentence, save to exclude the order on remission which will be governed in accordance with the provisions of the *Prisons Act*.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

**G.W. NGENYE-MACHARIA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**

