Odalo v Republic (Criminal Appeal 112 of 2018)
[2022] KECA 169 (KLR) (18 February 2022) (Judgment)

Neutral citation: [2022] KECA 169 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 112 OF 2018

W KARANJA, MSA MAKHANDIA & A MBOGHOLI-MSAGHA, JJA

FEBRUARY 18, 2022

BETWEEN

GODFREY OCHIENG ODALO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya in Nairobi (Lesiit, J.) delivered on 2nd March 2017 in H.C.CR.C. No. 100 of 2012)

JUDGMENT

1. Godfrey Ochieng Odalo alias Victor (the appellant) was presented before the High Court at Nairobi vide the information dated 4th December, 2012 charging him with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence were that on the 29th November, 2012 at Raila Decanting Site in Langata District within Nairobi County he murdered Martha Awino (the deceased).

2. He pleaded "Not Guilty" to the information and the matter proceeded to full hearing with the prosecution calling twelve (12) witnesses. The brief facts of the case as narrated by the prosecution witnesses was that the appellant and the deceased were living together as husband and wife in Langata Decanting Estate. On the night of 29th November, 2012 the appellant and the deceased had a quarrel and thereafter a fight ensued whose end result was the deceased's lifeless body landing with a thud onto the ground having dropped from the balcony of their house.

3. SA (PW1), a child aged 10 years in unsworn evidence testified that she was the daughter to the deceased and the appellant. She gave unsworn evidence after the Court conducted a voir dire examination and was satisfied that she understood the duty to tell the truth. She told the Court that on 29th November, 2012 at around 9.00 pm she returned home from buying cigarettes which her father had sent her for and found her parents fighting. She said that when she returned to the house she saw the appellant

strangle her mother. She then saw him tie a rope on her mother's neck and drag her to the bedroom where he closed the door behind them. She said that shortly thereafter, the appellant dragged the deceased to their balcony and threw her downstairs. She saw the deceased lying on her stomach on the ground outside their house.

4. Everlyne Kabeyeka (PW3) and Mbithi Kisilu (PW4) were neighbors to the appellant and the deceased as well as the block representatives in the estate where they resided. PW3 alerted PW4 of noises that she had heard at door No. 22, which was the appellant's house and together they proceeded to the house. PW3 knocked at the door and a young girl whom she knew as a daughter to the appellant and the deceased opened the door while crying.

5. These witnesses stated that the appellant came to the door and chased them away instructing them to return to their respective houses. Shortly thereafter, they heard some noises coming from downstairs and they rushed there. On getting outside the apartment, they saw the deceased lying on the ground. PW3 recognized the deceased as her neighbour who had been recently married to the appellant.

6. Pamela Akoth (PW9) was a neighbor who resided directly below the appellant's apartment. She stated that on 29th November, 2012 while headed to her kitchen, she heard footsteps of someone running in the appellant's house. Soon thereafter, PW9 heard a child scream twice from the same house. She moved to her balcony, shouted out in an attempt to enquire what the problem was but got no reply. PW9 was alerted by a neighbor from downstairs that a woman had fallen from upstairs and on getting to where this woman was, she found the deceased lying with her face downwards and recognized her as the appellant's wife.

7. She proceeded upstairs to the appellant's house where she met the appellant standing on the corridor saying "mtu akitaka kukufa wacha akufe tu" ("if somebody wants to die, let them just die"). PW9 went and held the appellant's hand and enquired from him where his wife was but he did not answer. PW9 together with the appellant proceeded downstairs to where the deceased's body lay. The appellant touched the deceased and walked away.

8. PW5 and other neighbors took the deceased to Kenyatta National Hospital in company of the appellant in a motor vehicle which had been brought by the appellant. While at the hospital, PW5 stated that the appellant stayed in the vehicle and that he appeared sad. They delivered the deceased's body to the hospital mortuary.

9. Karen Atieno Buore (PW2) and Yona Okeyo (PW6) were siblings to the deceased. They stated that on 30th November, 2012 after learning of the death of their sister from the appellant, they reported the incident at Langata Police Station. PW6 stated that they tricked the appellant to having him accompany them to the police station by lying to him that they were headed to the City Mortuary because they feared he would not cooperate if he knew they were heading to the police station.

10. PW12 the investigating officer stated that on 30th November, 2012, he interviewed PW2 and PW6 who had gone to the station to report about the mysterious death of their sister who had fallen off a balcony. PW12 stated that the appellant was also amongst the group that had gone to the police station to report the incident and together they proceeded to the alleged scene. PW12 later recorded statements from the witnesses and a statement under inquiry from the appellant which he produced as exhibit.

11. Dr. Njau Mungai (PW11) conducted a post mortem on the deceased's body on 4th December, 2012 after the same was identified to him by PW2 and PW6. His findings were that the deceased had several injuries caused by violence or a fight. He noted bruises on the head, face, knees, loin, legs and pelvic area. The doctor stated that the injury on the pelvic area was very severe, had caused hemorrhage and

that it was caused by trauma. His final conclusion was that the cause of death was hemorrhage as a result of trauma and pregnancy complications.

12. In his defence, which was tendered on oath, the appellant stated that on the said night he had arrived from work at about 9.30 pm. When he enquired from the deceased whether they were not having supper since she had not served him food and the eldest child had indicated to him they had not had supper either. The deceased started shouting and attacked him severally. The appellant requested the deceased to go with him to the bedroom so as to try and cool down, which they did. He said that after a short while he left the deceased in the bedroom and proceeded to the sitting room. While in the sitting room, he was informed by his neighbour one Mama Pamela, PW9, that his wife had fallen downstairs from the balcony. The appellant denied pushing the deceased off the balcony and indicated that the deceased might have jumped from the balcony because of the disagreements they had had.

13. The learned prosecution counsel, Ms. Wafula in her final submissions urged the trial court to find that the prosecution had proved its case against the appellant (then accused) beyond reasonable doubt; that since the appellant and deceased were living in that house with their minor children, it is only the appellant who could have pushed the deceased from the balcony, that PW1's evidence was corroborated by the neighbours to the effect that she was in the house when the violence was being meted out against the deceased by the appellant; that forensic evidence was not an exact science where conclusive evidence was possible and that explained why the pathologist came up with two possible causes of death; that the appellant's subsequent conduct proved a guilty mind since he did not report the incident of death to the nearest police station.

14. On his part, Mr. Madialo learned counsel for the appellant in his submissions urged the court to find that the prosecution had failed to prove their case as against the appellant, that the prosecution was relying on the unsworn evidence of PW1 who was a minor and as such it required corroboration; that PW11 the pathologist who conducted the post mortem had come up with two possible causes of death hence the cause of death was inconclusive and as such there were serious doubts which needed to be investigated so as to eliminate them; that what the court needed to determine was whether the prosecution had proved motive, whether the prosecution had established malice aforethought against the accused; whether the circumstantial evidence adduced by the prosecution meets the legal threshold required to infer guilt; whether the defence by the appellant is reasonable and plausible and what value should the court attach to the inconclusive evidence of an expert witness.

15. From the totality of the evidence, the trial court found these to be the issues for determination:

> "I. Whether the evidence of PW1 who was a minor met the legal requirement of being corroborated by other independent evidence?
>
> II. Whether the prosecution established it was the accused who caused the death of the deceased by an unlawful act?
>
> III. Whether the prosecution established the cause of death of the deceased?
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> IV. Whether the evidence of the pathologist was inconclusive and if so, what was the probative value of the same?
>
> V. Whether the malice aforethought was established?
>
> VI. Whether the prosecution proved motive?
>
> VII. Whether the defence by the accused was plausible and reasonable?"

16. On whether the evidence of PW1 met the legal requirement of being corroborated by other independent evidence, the court noted that PW1 was 8 years old at the time of the incident, and 10 years when she testified in court. She gave unsworn evidence after the court ruled that she did not understand the meaning of an oath, but was possessed of sufficient knowledge to testify and understood the duty to tell the truth. The court held that PW1 was a child of tender years both at the time she witnessed the incident, and also at the time she testified and it was thus important that the evidence of PW1 receive corroboration from independent evidence.

17. The court was satisfied that the evidence of PW1 received independent, ample and cogent corroboration from the evidence of PW3, PW4 and PW9. Their evidence confirmed that the appellant attacked the deceased that day and was aggressive and violent towards her causing a commotion which attracted the neighbours.

18. The court found that the evidence of the prosecution showed that the appellant was home with his wife and two kids, including PW1 and apart from the deceased, the appellant was the only other adult in that house.

    The prosecution had established that there was fighting going on in appellant's house. PW1's evidence that the appellant was beating her mother received corroboration from PW3 and PW4 who were chased away by the appellant when they went to answer the deceased and PW1's cries for help.

19. The court found that PW9 also corroborated that evidence having testified that she heard commotion and cries in the appellant's house just before the incident. The appellant's response to PW9 when she asked him where his wife was shows a person who was not interested in his wife's welfare. PW9 testified that the appellant's response was "mtu akitaka kukufa wacha akufe tu" "if somebody wants to die, let them just die."

20. The court noted that the evidence of PW1 that the deceased was beaten up that night received critical corroboration from the post mortem findings on the deceased body. PW11 the pathologist stated that externally he noticed some bruises and abrasions on the left orbital area and lateral right elbow, abrasions on linear right anterior forearm, congested conjunctiva, labial scar/hypo pigmented rash and bruises on both knees and right lower leg.

21. PW11 further stated that externally there were no deformities noted or any definite defense injuries, that internally the main findings were in the abdominal cavity where there was a lot of blood in the peritoneum cavity, a foetus of about 5 months in the uterus, blood within the gestational sac which was open. On the head areas PW11's main findings were clotted blood associated with injuries to tissues in the eyes and on the right and back of the head.

22. The court noted that PW11 further explained that the reason he had listed pregnancy complications as a possible cause of death was due to the blood he had noticed in the abdomen, uterus and the stained sanitary pad which meant there was over bleeding which was unusual in the 5th month gestation period. He classified the bleeding as acute which meant the loss of blood was fast and that it was the acute rate of loss of blood which he said was fatal.

23. On the possibility of blunt trauma being the cause of death, PW11 stated that the bruises on the abdomen, knees, pelvic areas, face and back of head led him to make that conclusion that the blunt trauma could also have been the cause of death. The doctor testified that the injury on the pelvic area was severe and caused acute loss of blood. He explained that if someone was involved in violence or a fight, it was possible for one to have the kind of injuries the deceased had. He however stated that the injury on the pelvis was not caused by a fall but by trauma through assault. PW11 stated that the

injuries he saw on the deceased were caused by a fracas, not a fall or accident except for the bruises on the knees which could have been as a result of a fall on a rough ground.

24. The court having considered the pathologist's evidence and opinion alongside the rest of the evidence found that the evidence that before the deceased died she had been violently assaulted by the appellant and then pushed over the balcony was all in tandem with the injuries PW11 found on her body.

25. The court found the cause of the bleeding, which the doctor said was acute and caused death was trauma caused by an assault on the deceased. The pregnancy complications he noted were bleeding evidenced by presence of a used bloody pad, and the open sac and a liter of blood in the uterus, all which were unusual in pregnancy of the age deceased had. The deceased was five months pregnant at the time but, the foetus was intact and in situ, meaning there was no abortion of the baby.

26. The court found the evidence and findings of the pathologist conclusive, clear, straightforward and in consonance with the prosecution case. The Court accepted that the findings clearly showed that as the witnesses testified, the deceased was assaulted physically by the appellant before she was pushed over the balcony where she landed two floors down. The injuries on the eyes, head, face, legs and in the pelvic areas were all caused by fracas, while the injuries on the knees were as a result of the fall.

27. The court held that the fall was also caused by the appellant. The violence by the appellant towards the deceased and pushing her down from a height were the substantive cause of the deceased death. The learned Judge thus found that PW11's evidence was conclusive and established the cause of the death as both pregnancy complications and blunt trauma.

28. As to whether the motive was established, the court noted that none of the neighbours or relatives of the deceased who testified in this case were able to tell the motive for the attack and held that motive need not be proved.

29. On malice aforethought the court found that the evidence adduced by the prosecution establishes without a doubt that the appellant took it upon himself to assault his wife on the material day; he did not entertain any outside interventions; his actions attracted many people who were his neighbours and those who were bold enough to confront him were met with wrath leading them to run out of his house in fear. The court found that the attitude of the accused to his neighbours showed the intention of the appellant, which was to cause harm to the deceased. By assaulting her and then pushing her downstairs from the second floor of the apartment where they lived, several feet below, was proof that the appellant had formed the intention to either cause grievous harm or death to the deceased.

30. The remarks made to PW9 when she asked the appellant where his wife was, was proof of accused indifference whether his action would cause grievous harm or death to the deceased. To PW3 and PW 4 he ordered them out of his house telling them to go mind the business of their own homes. The court found that these remarks were not those of a victim of aggression as the appellant stated in defence but were the words of a man who had formed an intention to cause harm to another irrespective of the circumstances.

31. As to whether the appellant's defence was plausible and reasonable. The court noted that the appellant denied the offence and stated on oath that it was his wife who was aggressive, had failed to cook food that day, and when he sought to know why, she attacked him, that PW1 was his wife's child out of wedlock, that the wife had just returned home from her rural home where she had gone to get documents for enrolling PW1 in a school in Nairobi, that the deceased had an issue with her brother, PW6 over his disabled child that he wanted the deceased to care for against her will. His conclusion was that the deceased had committed suicide by jumping off the balcony.

32. The learned Judge considered the appellant's defence but found that it was the appellant and not the deceased who was aggressive, and further that it was the appellant who had pushed the decease off the balcony. The learned Judge also found the allegation by the appellant that the deceased had an issue with her brother, PW6, an afterthought and disbelieved him.

33. Having considered the entire evidence adduced by the prosecution and defence, the court found that the prosecution had proved the charge of murder contrary to section 203 of the Penal Code against the appellant beyond reasonable doubt. The court found the appellant guilty of murder as charged and convicted him under section 322 of the Criminal Procedure Code and sentenced him to death on the basis that the death sentence was mandatory.

34. The appellant was aggrieved by this decision and filed the instant appeal challenging both conviction and sentence. From his amended grounds of appeal, the appellant complains that the learned Judge erred in law and fact by relying on suspicion to convict him; failing to find that essential witnesses never testified to establish basic facts surrounding the scene of crime; by relying on incredible witnesses whose evidence was contradictory and inconsistent; by convicting the appellant when relying on evidence of the prosecution that was not supported by cogent first report made to the police; by failing to note that the manner in which the appellant was arrested was not in accordance with the law and his defence was not considered and by failing to give him adequate time to prepare for his defence with hand written photocopies of the proceedings contrary to Article 50(2) (c) of *the Constitution*.

35. The appellant also filed supplementary memorandum of Appeal raising grounds, inter alia, that the learned trial Judge erred in law and fact; by convicting him on weak circumstantial evidence which did not meet the legal threshold; by failing to properly analyze and scrutinize the circumstantial evidence to the effect that the deceased would have jumped to her death; by finding, against the weight of evidence, that the prosecution had proved corroboration of PW1's evidence; by finding the appellant guilty of the murder of the deceased whilst ignoring to deal with the contractions and discrepancies and resolve them in favor of the appellant and by failing to adequately consider his defence.

36. There is on record submissions filed by Mr. Marube, learned counsel for the appellant dated 3rd February, 2020 which are detailed and very comprehensive in which he has expounded the grounds of appeal which we have summarised above. Equally, the respondent through Ms. Wan'gele Assistant Director of Public Prosecutions (ADPP) filed her submissions on 12th October, 2021 in which she has responded to the issues raised in the appellant's submissions. Both learned counsel also highlighted the said submissions during the virtual plenary hearing of the appeal.

37. We have carefully considered the record of appeal, submissions and the authorities cited by learned counsel and the relevant law. This being a first appeal, this Court is enjoined to re-evaluate, re-analyse and reconsider the evidence adduced before the trial court in its entirety by way of a re-trial and arrive at its own independent decision. As we do so however, we must caution ourselves that we neither saw nor heard the witnesses testify and give allowance to that fact. This duty was succinctly articulated by this Court in *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 analysed. 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 analyse 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. There are now a myriad of case law on this but the well-known Okeno v Republic (1972) EA 32 will suffice."

38. We discern the issues for determination to be whether:-

i. The appellant was convicted based on weak direct evidence of a child.

ai. The circumstantial evidence relied upon by the learned trial Judge to convict the appellant met the threshold for founding a conviction.

iii. There were contradictions and inconsistencies in the evidence of the Prosecution which would go to the root of the case.

39. On the first issue, it is trite law that the evidence of children of tender years requires corroboration. In the case of *James Wanjohi Kinyua vs Republic* [2003] eKLR, this Court held:

> " In dealing with the evidence of children of tender years the learned trial judge adopted the correct procedure as set out in the decision of this Court Johnson Nyoike Muiruri vs R [1982 - 88] 1 KAR 150 at p152.
>
> As we consider the evidence of the two children (PW1 and PW2) we bear in mind the decision of the predecessor of this Court in Kibangeny Arap Kolil vs R [1959] EA 92 in which it was stated pp 95-96;
>
> 'But even where the evidence of a child of tender years is sworn (or affirmed) then although there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it if uncorroborated, without warning itself and the assessors (if any) of the danger of so doing.'"

40. Learned counsel for the appellant submitted that the appellant was wrongfully convicted on weak direct evidence which was provided by a child of tender years; that the witness appeared to have been coached on what to say; that the evidence was not credible as the minor was being economical with the truth; that the major piece of evidence which the prosecution relied on was by PW1 (minor) and the trial court believed it.

41. The question we must consider, however, is whether the appellant's conviction was solely based on the evidence of the minor or the same was corroborated by other credible independent evidence. The learned Judge was fully aware of this legal requirement when considering the evidence before the court. She expressed herself as follows:

a. The evidence of PW1 received independent, ample and cogent corroboration from the evidence of PW3, 4 and 9. Their evidence confirmed that the accused attacked the deceased that day, was aggressive and violent towards her causing a commotion which attracted the neighbours.

b. That PW9 also corroborated that evidence having testified that she heard commotion and cries in accused house just before the incident. The accused's response to PW9 when she asked him where his wife was shows a person who was not interested in his wife's welfare. PW9 testified that the accused response was "mtu akitaka kukufa wacha akufe tu" "if somebody wants to die, let them just die."

c. That the evidence of PW1 that the deceased was beaten up that night received critical corroboration from the post mortem findings on the deceased body. PW11 the pathologist stated that externally he noticed some bruises and abrasions on the left orbital area and lateral right elbow, abrasions on linear right anterior forearm, congested conjunctiva, labial scar/hypo pigmented rash and bruises on both knees and right lower leg.

42. As can be seen from the above findings, it is evident that the learned Judge sought corroboration of the minor's evidence before she could place reliance on it. She found corroboration in the evidence of PW3, PW4, PW9 and PW11. We too find the evidence of these witnesses credible and independent. We appreciate the fact that these witnesses had nothing against the appellant or the deceased and were just acting as good neighbours. It is true to say that nobody else saw the appellant push the deceased off the balcony, except his young daughter. There was, however, no reason advanced as to why she could have lied against her father. As stated earlier, even as we reconsider this evidence, we must caution ourselves that we did not see the witnesses testify and the trial Judge therefore had an advantage over us in that she saw the witnesses and was able to assess their demeanor. We find no cause to depart from the findings of the learned Judge as far as the veracity of PW1's evidence is concerned.

43. We appreciate also that this case was not determined purely on direct evidence of PW1.There was also an aspect of circumstantial evidence involved. On circumstantial evidence, the law in this area is well settled and the principles to guide the court when considering circumstantial evidence have been crystallized and applied by this Court in numerous of its decisions as seen, for instance, in *Sawe vs Republic* [2003] KLR 364, *Wambua & 3 Others vs Republic* [2008] KLR 142; and in the more recent decision in *Peter Mugambi vs Republic* [2017] eKLR, in which the following guiding principles were enunciated: -

i. The inculpatory facts must be incompatible with the innocence of the accused.

ii. They must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused.

iii. There must be no other existing circumstances weakening or destroying the inference.

iv. Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution.

44. Even where the court is satisfied that the above threshold has been met, the Court is enjoined to exercise caution before applying the above threshhold to the facts before it. See *Teper vs R*. [1952] AC 480,489 as approved in *Simon Musoke vs Republic* [1958] EA 715 in which it was held that before drawing the inference of the accused's guilt from circumstantial evidence it is necessary for the court to be sure that there are no other existing circumstances which would weaken or destroy the inference.

45. We have applied the principles of law highlighted above to the evidence on record. As stated earlier, there is no dispute that the appellant assaulted the deceased, for whatever reason. There is also no contestation that the noise or fracas in the appellant's house was so loud as to attract the attention of the neighbours who even went to find out what was happening. The said neighbours were rebuffed by the appellant and sent away. Clearly, the appellant did not want to be stopped from completing what he had already started. We also note that as observed by the trial court, the appellant was the only adult in his house and no other person could have pushed the deceased off the balcony.

46. The court also noted that the remarks the appellant made to PW9 when she asked him where his wife was, was proof of the appellant's indifference whether his action would cause grievous harm or death to the deceased. He told PW9 that if someone wanted to die, let them die. To PW3 and PW4 he told them to get out of his house and to go mind the business of their own homes. The court found that these remarks were not those of a victim of aggression as the appellant stated in defence but were the words of a man who had formed an intention to cause harm to another irrespective of the circumstances.

47. In our view, if indeed the deceased had jumped over the balcony as stated by the appellant, the appellant would have reacted differently to try and save the deceased. Instead he just sat in his house unbothered as to whether the deceased had sustained any injuries from the fall. When the witnesses took the deceased's body to the mortuary, the deceased opted to remain in the motor vehicle instead of accompanying the body to the mortuary. All these circumstances read together clearly leave no room for any other hypothesis than that of the guilt of the appellant. We are not persuaded that the deceased jumped off the balcony as claimed by the appellant.

48. On whether there were inconsistencies in the prosecution's case, particularly on the cause of death, learned counsel for the appellant submitted that the pathologist's evidence was inconclusive as the net effect of his evidence was that the fall caused the death; that it did not link the appellant to the fall; that the doctor was of the view that the injuries on the deceased's knee was because of the fall; that the injuries were consistent with a jump and not someone who had been thrown off the balcony.

49. We have reconsidered the doctor's evidence at length. According to the pathologist, the cause of death was said to be blunt trauma as well as pregnancy complications. Both the trauma and the pregnancy complications were manifested by the blood that was found in the deceased's abdomen and in the uterus. The doctor went on to state that part of the bleeding was gynecological but the other was not. He clarified that the injury he noted on the pelvic area was severe enough to cause acute bleeding and the same could not have been caused by the fall. He clarified further that the injury in question could have been transmitted to the uterus and could start or exhilarate bleeding.

50. What we make of this evidence is that the bleeding in the stomach and in the uterus were the cause of the deceased's death. According to the doctor, these injuries did not result from the fall. It is therefore obvious that the same were as a result of the beating the deceased received from the appellant. Even if we were to assume that the deceased had pregnancy complications which could have contributed to her death, the deceased was alive and apparently healthy before the appellant assaulted her and so the immediate cause of death was not the pregnancy complications but the trauma caused by the beatings, more particularly the severe injury on the pelvic area. The testimony of the pathologist that the injuries on the deceased's knee was because of the fall and that the fall was the cause of death is not contradictory.

51. If we were to be very simplistic and give an explanation which any layperson can understand, we can say that the appellant went home on the date in question, picked a quarrel with the deceased, assaulted her viciously and by the time, he was done with her, her body lay lifeless on the ground two levels below their apartment. There was nobody else in the house with the appellant and the deceased apart from their two young children and they could not have contributed in any way to their mother's death. All the evidence therefore points to the appellant as the person who was solely responsible for the deceased's untimely departure from this world. If there were any contradictions in the evidence as posited by learned counsel for the appellant, then the same did not go into the root of the matter as they did not change these facts.

52. Ultimately, our conclusion is that the appellant's conviction was safe and the appeal against conviction is devoid of merit and is therefore for dismissal.

53. On the sentence, we note that there is no ground of appeal specifically challenging the sentence, nor were we asked to reduce the sentence in view of the jurisprudential paradigm shift in sentencing that happened after the appellant had been sentenced. We have noted that in her sentencing notes, the learned Judge took into consideration the appellant's mitigation but concluded that as the death sentence was mandatory the only sentence she could impose was the death sentence.

54. Subsequently however, the Supreme Court of Kenya in *Francis Karioko Muruatetu & Another vs Republic*, (2017) eKLR *(Muruatetu's Case)*, held at para 69;

> " Consequently, we find that section 204 of the *penal code* is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty." (Emphasis ours)

The death sentence is, therefore, no longer mandatory as it was when the learned Judge sentenced the appellant to death. Having considered the mitigation tendered by the appellant before the trial court, and given the unfortunate circumstances leading to the deceased's death, we set aside the death sentence and substitute therefor a sentence of 30 years' imprisonment. The appeal succeeds partially only to that extent, otherwise the appeal against conviction is hereby dismissed and the conviction upheld.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR