Yokongwa v Republic (Criminal Appeal 101 of 2016)
[2022] KECA 897 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 897 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 101 OF 2016

DK MUSINGA, RN NAMBUYE & AK MURGOR, JJA

APRIL 28, 2022

BETWEEN

JOSEPH LOMONYI YOKONGWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the original conviction and sentence by the High Court of Kenya (R. P. V, Wendoh, J.) dated 17th November, 2016inMeru Criminal Case No. 6 of 2012)

JUDGMENT

1. This is a first appeal arising from the judgment of the High Court of Kenya at Meru in Criminal Case No. 6 of 2012 dated, signed and delivered on 17th November, 2016 (R. P. V. Wendoh, J.).

2. The background to the appeal is that the appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge were that on the night of 6th January, 2012 at Angaata area, Isiolo County, the appellant murdered Simon Natum Kokoi, hereinafter referred to as "the deceased". The appellant denied the charge, prompting a trial in which the prosecution tendered evidence through eight (8) witnesses to prove the charge against him, while the appellant gave sworn evidence and called one witness in his defence.

3. The prosecution evidence as gathered from the evidence of Monica Akai, PW1, Sarafina Ngori Ekitala, PW2, James Salamat, PW3, Paulina Kadogo, PW4, Stephen Ekiliu PW5, Dr. Stephen Kiluva PW6, CIP Alex Mwandawiro, PW7, and CPL Odera, PW8 is cumulatively that the deceased and his wife, Beatrice Eleman, had fled tribal clashes in Isiolo and taken refuge in PW4's house. On the evening of 6th January, 2012, PW4 was in her house with her children, the deceased, Beatrice, and others. They heard a gunshot at the gate. PW4 ran to hide under the bed. The hurricane lamp was on. PW4 saw the appellant's brother named Peter come to her house and pulled out the deceased followed by Beatrice.

She heard a second gunshot, Beatrice ran back crying and informed them that the appellant had shot the deceased.

4. Evidence of those who visited the scene of the murder namely, PW1, PW2, PW3, PW5 and PW8 either on the same night of the murder of 6th January, 2012 or the next day of 7th January, 2012 was that the deceased's body was lying on its stomach with both hands tied at the back. Near the body of the deceased were a radio and some body oil, allegedly stolen items. PW3 and PW5 heard two gunshots on the material night. Shortly, thereafter the appellant invited them to the scene where they found the deceased's body lying in a pool of blood with hands tied at the back. PW5 reported the incident first to Angaata Anti-stock Theft Unit and then Isiolo Police Station.

5. Police including PW8 visited the scene on 7th January, 2012 led by the appellant. PW8 interrogated witnesses, carried out a search and NYR Criminal Appeal No. 101 of 2016 Judgment of the Court Page 2 of 21 recovered two spent cartridges, one close to the body of the deceased while the second was recovered in close proximity to the body of the deceased. The appellant was disarmed of his rifle together with live ammunition and detained by police in connection with the murder of the deceased. The recovered exhibits were taken by PW8 to PW7, a ballistic expert, for forensic examination. PW7 carried out the forensic examination as requested of him. His report was that the empty cartridges recovered at the scene of the murder bore the same firing margin markings as those test-fired using live ammunitions recovered from the appellant alongside the rifle. PW7, therefore, concluded that both sets of empty cartridges were fired by the same rifle that was recovered from the appellant.

6. When put to his defence, the appellant's evidence as supported by that of his witness, Francis Ekai, DW2, was cumulatively that on the evening of 6th January, 2012 at around 8.00pm while at his house in the company of DW2 he heard a gunshot in the vicinity. He armed himself with his rifle and left for the scene in the company of DW2. There was moonlight. He also had a torch. About 80 meters ahead, he saw a group of 4 persons according to him and 7 according to DW2 headed in the opposite direction. The appellant inquired as to who they were. What they heard next was a gunshot the two believed was aimed at them. The appellant fired back. The group disappeared. On moving a few meters ahead, they came across the deceased lying on the ground injured.

7. The appellant took the deceased's shirt and tied the wound. He called for a boda boda to rush him to the hospital. With the help of others, they lifted the deceased up to the motorcycle but realized he had died and returned him to the ground. They left the scene to inform the deceased's people. On arrival, they met a hostile group of three (3) boys and two (2) women according to the appellant, and about fifty people according to DW2. The crowd wanted to snatch the gun from the appellant who fired in the air to scare them and then left. He too reported the incident to the Angaata area Anti-Stock Theft Unit and Isiolo Police Station. The next day he led the police to the scene of the murder. He was surprised when after escorting the deceased's body to the mortuary he was disarmed, placed in the cells, and subsequently charged with the offence of the murder of the deceased which he did not commit.

8. At the conclusion of the trial, the learned Judge analyzed the record and made findings thereon, inter alia, that the cause of death of the deceased was severe haemorrhage from damage to the heart and lungs from a bullet injury; and that there was no eye witness to the shooting of the deceased. The prosecution's case was therefore hinged on circumstantial evidence. Applying the test for sustaining a conviction founded on circumstantial evidence as enunciated by this Court in the case of Abanga alias Onyango v Republic, CA CR. A No. 32 of 1990 (UR), the Judge found the testimony of PW3 and PW5 truthful, especially when the appellant himself stated on oath that both PW3 and PW5 had no reason to tell lies about him. Their evidence, which according to the Judge was corroborative of each other, was therefore credible.

9. The Judge also found that the testimonies of PW1, PW2, PW3, PW4, PW5, and PW8 that they visited the scene and noted that the deceased's hands were tied at the back, saw alleged stolen items near the body of the deceased, was also truthful, having not been discredited by the defence.

10. Further, that after the appellant was disarmed, the G3 firearm was taken to PW7 a firearm examiner, who examined the exhibits and made findings that the firearm retrieved from the appellant was a firearm capable of firing 7.62x5.1mm caliber ammunition, the two empty cartridges recovered at the scene by PW8 were of the 7.62x5.1mm caliber ammunition. PW7 test-fired three of the live ammunition handed to him with the rifle and compared the firing margins marking of empty cartridges recovered at the scene with those recovered after test-firing the live ammunition recovered from the appellant and arrived at the conclusion that both sets of empty cartridges examined had been fired by the rifle that had been recovered from the appellant.

11. Turning to the defence, the Judge discounted it, having found it contradictory on account of the variance in the testimony of the appellant and DW2 as to what transpired on the material night. Secondly, for the failure of the appellant to explain the nature of the grudge PW4 had against him. Neither did he raise it during the cross-examination of PW4.

12. On the totality of the above assessment and reasoning, the Judge rendered herself as follows:

> " Having considered both the prosecution and the defence evidence, I am satisfied beyond any doubt that the accused is the one who shot the deceased and proudly went around telling people he had killed a thug or robber. The circumstantial evidence forms such an unbroken chain and unerringly points at the accused as the murderer. He was at the scene with the murder weapon, there is evidence that he fired ammunition at the scene from his firearm and his attempt to justify the shooting in the air is not at all convincing. I dismiss the defence as a sham and afterthought. The act of shooting the deceased, even if it was one shot, is itself evidence of malice aforethought because the use of a gun, a lethal weapon, was meant to do grievous harm or cause the death of the deceased.
>
> Although there are questions that still linger in my mind as to why Beatrice Eleman was not called as a witness and why Peter Erumu was not arrested along with the accused, which points at shoddy investigations, I find that there is overwhelming evidence on record pointing to the accused as the perpetrator of the offence. I find that the prosecution has proved its case to the required standard, beyond reasonable doubt. I find the accused guilty of the offence of murder as charged and convict him accordingly."

13. The appellant was aggrieved and filed eleven (11) grounds of appeal, subsequently condensed into six (6) in his written submissions dated 4th November, 2021 namely, whether: the presentation of a faulty first report and or a faulty investigation diary was detrimental to the prosecution case; prosecution witnesses presented any tangible evidence before the trial court to warrant the conviction of the appellant; the failure of the prosecution to present any key witnesses to testify during the trial was detrimental to the prosecution's case; the trial Judge relied on circumstantial evidence to convict the appellant; the trial Judge used the confession of the appellant to convict him; and lastly whether the trial Judge failed to consider the provisions of sections 200 and 201 of the *Criminal Procedure Code*.

14. The appeal came before this Court for hearing on 29th November, 2021. When called out, learned counsel Cedrick Magotsi appeared for the appellant while Victorine Kitoto, Principal Prosecution Counsel, appeared for the State. The appeal was canvassed virtually through written submissions filed and fully adopted by learned counsel for the respective parties in their presence and through oral highlighting.

15. Supporting the appeal on the first ground, the appellant relies on the case of *Mohamed Bin Alluli vs. Republic* [1943] EACA 72 for the proposition that: "The first report to the police should be put in the evidence so as to check whether or not the witness can identify the suspect and by what means"; and the case of Peter Ochieng vs. Republic, CRA Application No. 185 of 1987 for the proposition that "failure to make a prompt report and give the names of the assailant the first instance is detrimental to the prosecution case", and submits that failure to conduct an identification parade to link him to the offence was fatal to the prosecution's case.

16. On the second ground of appeal, the appellant submits that the evidence of the eight witnesses called by the prosecution to prove the charge against him was non-coherent and therefore unreliable and should not have been relied upon by the trial Judge as the basis for convicting him.

17. The appellant relies on the case of *David Mwingirwa vs. Republic* [2015] eKLR and invites this Court to adopt the position taken in the said case and vitiate the conviction handed down against him by the trial court for lack of evidence to prove the charge against him to the required threshold of proof beyond reasonable doubt.

18. The appellant relies on the case of *Martin Ndegwa Kabocho vs. Republic* [2014] eKLR and invites this Court to find that the prosecution's failure to tender the evidence of Beatrice Eleman, a crucial witness, was fatal to the prosecution's case. The appellant also faults the trial Judge for relying on circumstantial evidence as basis for convicting him, terming it both bad, non-flowing and non-corroborated which according to him failed to meet the threshold of the three tests required to be satisfied in law before circumstantial evidence can be relied upon as a basis for convicting an accused person.

19. The appellant relies on the case of *Pon v Republic* [2017] eKLR and invites this Court to vitiate his conviction for the reason that there were crucial missing links in the prosecution evidence which should have been resolved in his favour.

20. The appellant has relied on sections 25 and 25A of the *Evidence Act* Cap 80 Laws of Kenya on the mode of recording admissible confessions; and the case of *Ben Njiora Kasoa vs. Republic* [2019] eKLR and invites this Court to vitiate his conviction, which according to him was based on his alleged confessions to PW3 and PW5 which he asserts are inadmissible in law.

21. The appellant relies on section 200(3) and the case of *Mark Limo Chesire vs. Republic* [2018] eKLR and invites this Court to vitiate his trial for the incoming Judge's failure to comply with section 200(3) of the Criminal Procedure Code.

22. On sentence, the appellant relies on the case of *Benjamin Kashindi Changawa & Stanley Okoti vs. Republic* [2019] eKLR and invites this Court to reduce his sentence to the period served should the conviction be sustained.

23. Opposing the appeal, the State relies on section 379 of the *Criminal Procedure Code* and the case of *David Njuguna Wairimu vs. Republic* [2010] eKLR on the mandate of a first appellate court, section 203 of the Penal Code, the High Court decision in the case of R*epublic v Mohammed Dadi Kokane & 7 Others* [2014] eKLR, the evidence of PW6 and PW7 on proof of all the elements for the offence of murder which the State asserts were all established by the prosecution evidence as tendered.

24. The State further relies on Article 50(2) of *the Constitution*, section 206 of the Penal Code, the evidence of PW3, PW5, and PW8 and submits that all the above considered cumulatively demonstrate sufficient malice aforethought against the appellant to the required threshold because PW4's evidence was believable that the appellant was among the last persons to be seen with the deceased alive; the trial Judge properly appreciated the evidence tendered through the above named prosecution witnesses

which placed the appellant at the scene of the murder; the firearm that he was disarmed of was found to have fired the empty cartridges found at the scene of the murder; and the cause of death was a bullet wound.

25. The State relies on section 143 of the *Evidence Act* Cap 80 Laws of Kenya; the case of *Alex Lichodo vs. Republic* [2006] eKLR and submits that evidence of the witnesses tendered by the prosecution was sufficient to sustain a conviction against the appellant; and the failure of the prosecution to call Beatrice to testify was therefore not fatal to the prosecution's case as PW2 who was in the company of Beatrice when they reported the incident to Isiolo Police Station gave evidence.

26. The State relies on the case of Musili Tulo vs. Republic, Criminal Appeal No. 30 of 2013 in which this Court reviewed a wealth of case law on instances in which circumstantial evidence suffices as a basis for finding a conviction against an accused person and submits that the prosecution evidence tendered satisfied the threshold restated in the above case for sustaining a conviction based on circumstantial evidence. According to the State, PW4's evidence, that the appellant was among the group of persons who removed the deceased from her house and shortly thereafter she heard a gunshot and the deceased found dead with a gunshot wound on his chest, PW8's evidence that he recovered two empty cartridges, one near the body of the deceased and another in the vicinity to the scene, PW7 the firearm examiner's evidence that he examined the empty cartridges recovered at the scene and those test-fired using the rifle recovered from the appellant when he was disarmed and found these to have been fired by the rifle retrieved from the appellant all formed a complete chain pointing irresistibly towards the guilt of the appellant.

27. The State does not dispute that indeed the proceedings resulting in this appeal were conducted by two Judges with the first Judge, Lessit, J. (as she then was), having recorded evidence of seven (7) witnesses while the second Judge recorded evidence from only one witness. They however submit that at page 40 of the record, lines 14 and 15 there is clear demonstration that the incoming Judge was alive to this legal requirement and with the participation of the appellant through his advocate on record for him at the trial gave directions under section 200(3) of the *Criminal Procedure Code* that the case was to proceed from where it had reached. The appellant was therefore informed of his right to recall witnesses, which right he enjoyed and exercised through his advocate, who informed the succeeding trial Judge that the case should proceed from where it had reached.

28. On confessions, the State submits that no confession was recorded from the appellant. Neither is there any demonstration on the record that any was used by the trial Judge as the basis for convicting the appellant. The State, therefore, urges this Court to affirm the conviction handed down against the appellant.

29. On sentence, the State has no objection to this Court adopting the guidelines enunciated by the Supreme Court in the case of *Karioko Muruatetu & Others vs. Republic* [2017] eKLR to tamper with the mandatory death sentence, set it aside and substitute it with a commensurate sentence, bearing in mind not only the appellant's mitigating factors but also as did the trial court that the appellant took away the life of a young man aged 24 years. He also abused the trust placed upon him when entrusted with the use of a firearm.

30. This is a first appeal. Our mandate is as was aptly set out in the case of *Okeno vs. Republic* [1972] EA 32, namely: "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] E.A. 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] E.A. 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] E.A. 424.

31. We have considered the record in light of the above mandate, and the rival submissions set out above. The issues that fall for our determination are, whether: the ingredients for the offence of murder were established; circumstantial evidence relied upon by the trial court as a basis for convicting the appellant satisfied the threshold of proof beyond reasonable doubt; failure by the prosecution to avail crucial witnesses at the trial was fatal to the prosecution case; whether the trial court relied on any confession made by the appellant to convict him, and lastly, whether the trial court failed to consider the provisions of Section 200 and 201 of the *Criminal Procedure Code*.

32. Starting with the first ground of appeal, the court in *Republic v Nyambura & 4 Others* [2001] KLR 355 reiterated that there are three key elements for proof of the offence of murder namely, proof that: death of the deceased occurred; the death of the deceased was caused by an unlawful act or omission by the accused person; and lastly, that the accused in committing the unlawful act or omission possessed malice aforethought.

33. The threshold for proof of malice aforethought and which we fully adopt is that set out in section 206 of the *Penal Code*, namely proof of: 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; 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 even if that knowledge is accompanied by indifference whether death or grievous harm is caused or not, or even by a wish that it may not be caused; and lastly an intent to commit a felony.

34. In *Milton Kabulit & 4 Others vs. Republic* [2015] eKLR, and which position we fully adopt as the correct test to be applied, the Court expressed itself on this issue as follows: "49. In Bonaya Tututipu and Another vs. Republic [2015] eKLR this Court stated that "Malice aforethought" is the mens rea for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case. See Moris Aluoch vs. Republic Cr. App. No.47 of 1996) where the court went further and drew inspiration from a persuasive authority in the case of Chesakit vs. Uganda CR App. No. 95 of 2004 wherein the Court of Appeal of Uganda held thus:-"In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person." The court also drew inspiration from a decision of the predecessor of this Court in Rex vs. Tuper S/O Ocher [1945] 12 EACA 63 wherein, it was ruled thus;- "It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick..."

35. Considering the above threshold in light of the evidence of Dr. Stephen Kiluva, PW6, we are satisfied as did the trial court, that indeed the death of the deceased occurred; and that the only plausible inference to be drawn from the prosecution evidence on the effect on the life of the deceased of the gunshot wound from which the deceased succumbed as correctly found by the trial judge is that the person who inflicted that fatal wound intended to cause the death of the deceased. We, therefore, entertain no doubt in our minds, as did the trial Judge, that the element of malice aforethought was established.

36. On the issue of identification of the perpetrator of the death of the deceased, the prosecution case rested entirely on circumstantial evidence. The approach we take in determining whether the threshold for finding a conviction based on circumstantial evidence was satisfied is that taken by the court in *Milton Kabulit & 4 Others vs. Republic* [supra]. In *Rex vs. Kipkerring Arap Koske & 2 others* [1949] EACA 135 the principle laid was this: "In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

37. The appellant's attack on the trial Judge's finding that the circumstantial evidence tendered by the prosecution placed him at the scene of the murder was three-fold, firstly, want of holding of an identification parade to link him to the commission of the offence. Secondly, failure to call a crucial material witness thereby creating doubts in the prosecution case which should have been resolved in his favour; and thirdly, relying on circumstantial evidence as the basis for convicting him when it failed to satisfy the three tests necessary for sustaining a conviction based on circumstantial evidence.

38. On the identification parade, the predecessor of this Court in the case of Githinji vs. Republic [1970] 231 made observations therein that "once a witness knows who the suspect is an identification parade is useless". See also *Ajode v Republic* [2004] 2 KLR 81 in which this Court expressed itself on this issue as follows:

> "Once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition." (Emphasis added).

39. In light of the above exposition, PW3, and PW5 on whose evidence the trial Judge also acted to link the appellant to the scene of the murder knew him well. They were categorical that the appellant invited them to the scene. They went there and met him at the scene while armed. An identification parade would have been superfluous in the circumstances.

40. On failure to call a material witness, we agree that one Beatrice Eleman was a crucial prosecution witness, having followed the deceased after he had been frog-marched away from PW4's house by Peter, the appellant's brother. The law on witnesses was crystallized long ago. We take it from the case of *Bukenya Others vs. Uganda* [1972] EA 349 in which the predecessor of this Court was explicit that it is not in each and every instance that the court is required to make an adverse inference against the prosecution for the failure to call witnesses. First, by dint of section 143 of the *Evidence Act*, in the absence of a provision of law requiring a specific number of witnesses, no particular number is required to prove any fact. In *Suleiman Otieno Aziz v Republic* [2017] eKLR, it was held that it is only where the evidence called by the prosecution is barely adequate, that the court is entitled to draw an adverse inference from the prosecution's failure to call important and readily available witnesses. See also *Donald Majiwa Achilwa & 2 Others v Republic* [2009] eKLR, this Court stated as follows:

> "The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution with-holds a witness, the court, in an appropriate

case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case."

41. The record is explicit that the trial Judge took cognizance of the prosecution's failure to trace Beatrice Eleman and tender her as a witness but observed correctly so, in our view, that there was nothing on the record to suggest that the prosecution had any hand in Beatrice's failure to tender her evidence. We find no basis upon which the trial court could have drawn an adverse inference against the prosecution for failure to tender Beatrice Eleman as a witness.

42. On alleged trial Judges' reliance on confessions to convict the appellant, we find none on the record as laid before the trial court and now before this Court on appeal from the record that the trial Judge found that PW3 and PW5's evidence did not amount to confessions.

43. On alleged existence of contradiction in the prosecution's evidence, the position we take is that taken by the court in *Milton Kabulit & 4 Others vs. Republic* [supra] wherein this Court reviewed a wealth of case law on the issue and which we find prudent to highlight as follows:

> " "The role of a court of law when confronted with allegations of existence of contradictions, discrepancies and inconsistencies in the prosecution's case has long been settled. In Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993, the court ruled that:
>
> 'In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.'
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> In Njuki & 4 others v Republic [2002] 1KLR 771 the court went further to state that
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> 'Where discrepancies in the evidence do not affect an otherwise proved case against an accused a court is entitled to ignore those discrepancies.'
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> In Vincent Kasyula Kingo vs. Republic Nairobi Criminal Appeal No.98 of 2014 this Court ruled that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so an appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not. See Josiah Afuna Angulu vs.s Republic CRA. No.277 of 2006 (UR) where in, this Court sitting as a first appellate court reconciled discrepancies and contradictions that the trial court had failed to reconcile resulting in a doubt being created in the appellants' commission of the offence charged and proceeded to substitute conviction for the disclosed offence. Also the case of Charles Kiplang'at Ng'eno vs. Republic CRA. NO.77 OF 2009 (UR) in which this Court also sitting as a first appellate court reconciled contradiction's, discrepancies and inconsistencies in the prosecutions' case and found that these went to discredit the prosecution's evidence as they created doubts as to the appellant's commission of the alleged offence and allowed the appellant's appeal in its entirety."

44. We have applied the above threshold to what the appellant highlighted in his written submissions as contradictions in the prosecution's case. We find these relate to events after the murder. They had no relevance to the identification of the perpetrator of the murder. They did not, therefore, go to the root of the prosecution's case and were therefore rightly ignored by the trial Judge.

45. The last issue for our consideration is whether the circumstantial evidence adduced by the prosecution unerringly proved that it was the appellant, to the exclusion of any other person, who murdered Simon

Natum Kokoi. In *Makau & Another v Republic* [2010] 2 EA 283, this Court described circumstantial evidence as follows:

> " 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."
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> See also Musili Tulo v Republic, Cr. App. No. 30 of 2013.

46. To justify the conviction of an accused person based on circumstantial evidence, it is now trite that such evidence must satisfy several conditions designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In A*banga alias Onyango v Republic*, Cr. App. No. 32 of 1990, this Court identified the conditions as follows:

> " 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) those 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."
>
> See also *Sawe v Republic* [2003] eKLR.

47. The prosecution also is obliged to establish that there are no other co-existing circumstances that would weaken or destroy the inference of guilt. *See Musoke vs. R. [1958] EA 715* and *Dhalay Singh vs. Republic*, Cr. App. No. 10 of 1997. In the latter case, this Court expressed itself thus:

> " For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reason-able doubt and an accused is entitled to an acquittal."

48. As already highlighted above, the Judge was not only well aware that the prosecution case was hinged on circumstantial evidence but also of the need for the Judge to properly appraise, appreciate and apply the principles that guide a court of law in circumstances in which it may base a conviction on circumstantial evidence and if the threshold was found satisfied, give reasons. We have set out above and fully adopt the reasons as to why the Judge was satisfied that the evidence on the record unerringly pointed to the appellant as the perpetrator of the murder of the deceased and which were well-founded on the totality of the evidence tendered by the prosecution as assessed above.

49. As for the complaint against the sentence meted out against the appellant, we agree with the position taken by the respondent that they have no objection to the court not only adopting, but also being guided by the guidelines given by the Supreme Court of Kenya in the case of *Francis Karioko Muruatetu & Another v Republic* [supra].

50. This Court has already expressed itself on the mode of the procedure with regard to compliance with the above Supreme Court guidelines on resentencing in circumstances where the Court has affirmed the conviction, but found it prudent to tamper with the sentence handed down against an appellant, either by a trial court and/or affirmed by a first appellate Court, in instances where the death penalty is the only lawful sentence for the offence such as that which the appellant herein was convicted of. We find it prudent to highlight a few of such instances. It is sufficient for us to state that we adopt those

instances as set out in the case of Jared Otieno Osumba v Republic Criminal Appeal No. 110 of 2016 (UR) without replicating them herein.

51. Our take on the adopted instances is that the trend in the Courts' pronouncements on the issue of re-sentencing, is that the determining factor in deciding either to remit the matter to the trial court for resentencing or the court assuming that role and proceeding with the resentencing exercise depends on the peculiar circumstances of each case. In the instant appeal, the appellant was arrested on 7th January, 2012, a period of about ten (10) years ago. He was convicted and sentenced on 17th November, 2016 which is about a period of six (6) years. We appreciate the deceased, a young man of only twenty-four (24) years, lost his life in circumstances bordering cold blood.

52. It is observed from the record that at the time of sentencing him, the appellant had no previous record and was therefore treated as a first offender. When given an opportunity to mitigate, he said that he was a family man with two (2) children then aged eight (8) and three (3) years respectively. He was the sole breadwinner and his family had allegedly disintegrated. He was said to be remorseful.

53. Considering all the relevant factors herein, we are inclined to interfere with the mandatory sentence that was passed by the trial court. We have taken into consideration the appellant's mitigation, the circumstances under which the offence was committed, as already highlighted above, fully cognizant that sentencing is a trial court's function but, given that mitigation was taken and is on record, the interest of justice would demand that we should not remit the matter back to the trial court for resentencing. Instead, we should exercise that mandate ourselves.

54. In the result, and for the reasons given in the assessment, we dismiss the appellant's appeal against conviction. We hereby allow the appeal on the sentence, set aside the death sentence, and substitute it with a jail term of thirty (30) years from 30th November, 2015 when the appellant was convicted and sentenced.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR