IN THE COURT OF APPEAL

AT KISUMU

[CORAM: NAMBUYE, OKWENGU & KANTAI JJ.A.]

CRIMINAL APPEAL NO. 41 OF 2019

BETWEEN

JOSEPHAT MANOTI OMWANCHA ....APPELLANT

AND

REPUBLIC ....RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya (E. N. Maina, J.) dated 25th January, 2019 ***in Nyamira HCCR No. 5 of 2016)***

JUDGMENT OF THE COURT

This is a first appeal arising from the Judgment of the High Court of Kenya at Nyamira (**E. N. Maina, J**.) dated 25th January, 2019, in Criminal Case No. 5 of 2016.

The background to the appeal albeit in summary form is that, the appellant and another were jointly charged before the High Court of Kenya at Nyamira 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 13th December, 2012 at Sambuti Farm in Borabo District within Nyamira County in the Republic of Kenya, jointly with others not before Court, they murdered **Tom Mokurumi**. The appellant denied the charge prompting a trial in which the prosecution tendered evidence through seven (7) prosecution witnesses to prove the charge against the appellant, while the appellant gave unsworn testimony and called one witness in his defence.

The brief facts of the case are gathered from the prosecution evidence tendered through **PW1**, **Damaris Kemunto (Damaris) PW2, Sagwe Osoro Anasi (Sagwe), PW3, Dr. Samuel Onchere (Dr. Samwel), PW4 Charles Omwancha Moibi (Charles), PW5 Ruth Mwikali (Ruth) PW6, Sgt Japheth Ngetich (Sgt Japheth),** and **PW7, SSP Grace Makhube (SSP Grace).** The deceased was at the material time employed by **Charles** as a herdsman. He lived alone on **Charles's** farm although appellant a son to **Charles** also occasionally stayed on this farm. On 13th December, 2012, the deceased took milk to **Damaris** at around 6.00 a.m. He was to collect payment for the milk at 11.00 a.m, but failed to show up to collect the money as earlier arranged. Meanwhile at around 11.00 a.m, a relative of the deceased called at **Ruth's** home 100 meters away from where the deceased resided and informed her that she had missed the deceased at his place. She had also noticed a lot of blood stains at the house. **Ruth** accompanied the lady to the scene whereupon missing the deceased and noticing a trail of blood stains leading from the house to a nearby pit latrine, they informed one, **Ongwae** from the neighbourhood who came to the scene and upon also confirming what the ladies had told him, reported the incident to the Area Chief who in turn reported to police.

In response to that report, **Sgt Japheth,** who was subsequently mandated to investigate the incident among other police officers accompanied **C.I Ndeti**, OCS Manga Police Station to visit the scene. Upon arrival at the scene they observed blood stains on the floor of the house with a trail leading to a pit latrine in the compound. Police gave orders for the pit latrine to be demolished, following which a body identified to be that of the deceased was recovered therefrom covered with blankets, with visible injuries on the head. It was removed and taken to the mortuary where a post mortem was carried out by a **Dr. Peter**, a post mortem form duly filled by him and subsequently tendered in evidence on his behalf by **Dr. Samwel**. The cause of death was determined as severe haemorrhage and severed spinal cord due to assault.

Investigations into the murder of the deceased led to the arrest of the appellant in Nairobi. He was subsequently charged jointly with another with the murder of the deceased. When put to his defence, appellant raised an alibi defence alleging that he was in Nairobi as at the time the alleged murder was committed against the deceased.

At the conclusion of the trial, the learned trial Judge analyzed the record, considered it in light of the ingredients for proof of the offence of murder as set out in **section 203** of the **Penal Code** and concluded that the death of the deceased arose from an unlawful act. The offence of murder had therefore been proved to the required threshold.

Turning to the issue of identification of the killers of the deceased, the learned Judge in the assessment of the record reasoned as follows:

> **"As I have stated there is no direct evidence of how the deceased was killed or who his killer (s) were. I am however satisfied beyond reasonable doubt that there is circumstantial evidence that the 1st accused participated in the crime. PW5 had seen him tilling the land with the deceased the previous day. She also stated that she had seen the 1st accused there a week earlier. Other than the deceased and the 1st accused nobody else was living in that farm. The 1st accused's father (PW4) attested to that fact. The fact that PW5 also saw him that morning places him in the scene of crime. I do not agree with Counsel's submission that PW5 gave inconsistent evidence. She was clear that she met the 1st accused at about 9am on the material day. She had also seen him the previous day and before that a week earlier. The 1st accused made a confession which was recorded by Senior Superintendent of Police Grace Makupe (PW7). The statement was made in English and it gives a very vivid description of what the accused and his accomplice did to the deceased. It could not have been made up. This and the evidence of PW5 renders the defence of the 1st accused and the evidence of his witness untrustworthy. PW5 knew the 1st accused very well. She saw him in broad day light. The circumstances prevailing could not have given rise to mistaken identity. They even spoke. It cannot therefore be true that on that day he was elsewhere other than at his home where this crime was committed. Grace Makupe SSP (PW7) did not know him before and therefore had no reason to frame him. I am satisfied that he confessed to the crime voluntarily without any inducement, coercion or intimidation. I am satisfied that he committed the offence of murder. The injuries inflicted on the deceased and the fact that his body was concealed in a pit latrine is proof that those who did it had an intention to kill him."**

It was on the basis of the above assessment and reasoning that the learned trial Judge found appellant guilty of the offence charged, convicted him accordingly and sentenced him to twenty-eight (28) years imprisonment.

Appellant is now before this Court on a first appeal raising eight grounds of appeal that have been condensed into four thematic issues, in appellant's written submissions which we paraphrased as whether:

> **(1) The impugned confessionary statement (impugned statement) taken from the appellant was admissible in evidence; and if the answer to the above is in the affirmative what is the probative value of the said impugned statement.**
>
> **(2) The evidence adduced satisfied the legal threshold for basing a conviction on circumstantial evidence.**
>
> **(3) There were material contradictions in the prosecution evidence, and if the answer to the question is in the affirmative, whether these were addressed by the trial court.**
>
> **(4) Appellant's alibi defence was ousted by the prosecution evidence.**

The appeal was canvassed through the Go-To-Meeting video platform (due to the current covid-19 pandemic challenges), through rival written submissions orally highlighted by learned counsel for the respective parties**. Mr. Onsongo,** appeared for the appellant while the State was represented by **Mr. Kakoi.**

Supporting the appeal, **Mr. Onsongo** relied on: the case of **Festus Mukati Murawa vs. Republic [2013] eKLR; Article 50(1)(a)** of the Kenya Constitution 2010 and a persuasive decision by the Supreme Court of Canada in **Republic vs. Lychus [1997] 3CR320** and submitted that the prosecution failed to prove the charge against the appellant beyond reasonable doubt as was required of them in law; the case of **Musili vs. Republic [2014] eKLR**, **Article 49(1) (b)** and **(d), 50 (2) (a)** and (**4), section 25A(1)** to **32** of the **Evidence Act** and **Rule 4** of the **Evidence (out of court confessions) Practice Rules, 2009 (out of court confessions Rules)** on the basis of which counsel faulted **SSP Grace's** mode of recording the confessionary statement from the appellant which according to learned counsel went contrary to the prerequisites in **Out of Court Confessions Rules** rendering the confessionary statement inadmissible in evidence. He faulted the trial court's heavy reliance on the said confessionary statement and urged that the conviction was unsustainable as it relied on inadmissible evidence.

Counsel also relied on the case of **Republic vs. Erusani Sekni & Another [1947] EACA 74**; **Joan Chebichii Sawe vs. Republic [2003] eKLR**; and lastly, **Musoke vs. Republic [1958] E. A 715** on the threshold for sustaining a conviction against an accused person based on circumstantial evidence, and faulted the learned Judge for erroneously terming the testimony of PW5 as circumstantial evidence. According to counsel, all that PW5's evidence amounted to was an opportunity for the appellant to commit an offence which in counsel's opinion was nothing more than mere suspicion not sufficient to satisfy the threshold for founding a conviction on circumstantial evidence as it failed the test of pointing irresistibly to the guilt of the appellant, nor was it incapable of explanation on any other hypothesis than that of appellant's guilt for the murder of the deceased. Moreover, the test that there were no other co-existing circumstances which would weaken or destroy the inference of guilt against the appellant was neither identified nor considered or conclusions drawn thereon by the trial court, before finding a conviction against the appellant for the murder of the deceased.

On appellant's alibi defence, counsel relied on the case of **Benson Mugo Mwangi vs. Republic [2010] eKLR**, in which the Court reiterated the threshold for sustaining an alibi defence in favour of an accused person, as expounded in **Republic vs. Johnson [1961] 3 ALL ER 969** and approved in **Kiarie vs. Republic [1984] KLR 739**, and submitted that appellant's alibi defence supported by an independent witness was not only plausible but well founded on the facts adduced on the record and should have been sustained by the trial court.

Lastly, on lack of proof of the charge against the appellant, counsel cited failure: to dust the slasher suspected to have been used in the murder of the deceased for any fingerprints that would have linked appellant to the commission of the murder of the deceased; ascertain from Safaricom who the mobile subscriber of mobile number 072729522 was to prove if appellant had any link to the same in connection with the murder of the deceased. According to counsel, in the absence of compliance with the above, all that the prosecution evidence amounted to was mere hearsay which in law is not sufficient to find a conviction.

On sentence, counsel invited us to temper with the sentence handed down against the appellant by the trial court should we ultimately sustain the conviction as in his opinion, a sentence of twenty-eight (28) years is too harsh considering that appellant is remorseful, has a young family and has been incarcerated since 2012.

In rebuttal, the State submitted that the impugned statement taken from the appellant is sustainable as **SSP Grace** substantively complied with the prerequisites for recording out of court confessions as stipulated in **Rule 4** of the **Evidence** (**Out of Court Confessions**) **Practice Rules, 2009**. There was also no objection by the defence either on the mode of recording or tendering the impugned statement in evidence. Neither was any request made by the defence for a trial within a trial to confirm if there were any procedural improprieties committed in the course of the recording of the said impugned statement. In counsel's opinion, in the absence of any objection having been raised by the defence either at the time the impugned statement was recorded or its production in court, this conduct on the part of the defence gave rise to an inference that it was not only procedurally recorded but also procedurally admitted in evidence. It was therefore safe and proper for the trial court to base appellant's conviction thereon and for this court to sustain that conviction.

On the alibi defence, it is the State's submission that the trial Judge cannot be faulted for rejecting it as PW2's testimony was explicit that she saw appellant and deceased on the 12th, a day before he was murdered, PW5 met appellant in the vicinity on the very day the deceased was found murdered, while PW6 traced the movement of appellant's phone number from Keroka the scene of the murder on the very day of the murder to Nairobi where he was subsequently arrested.

On sentence, the State submits that it was proportional to the offence committed and should not be interfered with.

This being 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 vs. 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."**

We have considered the above mandate in light of the rival positions herein.

The issues that fall for our determination are, whether:

1. Elements for proof of the offence of murder were established.

2. The circumstantial evidence relied upon by the learned trial Judge to convict the appellant met the threshold for finding a conviction based on circumstantial evidence.

3. Appellant's impugned confessionary statement was properly recorded and admitted in evidence.

4. Appellants alibi defence was ousted by the prosecution evidence.

5. There was any contradictions in the prosecution evidence and if the answer is in the affirmative what is their effect on the totality of the prosecution evidence.

On proof of elements of murder, this court and indeed as the learned trial Judge did at the trial has construed **sections 203** as read with **sections 204** and **206** of the **Penal Code** and considering these in light of the position taken by the court in **Joseph Githua Njuguna vs. Republic [2016] eKLR** as did the trial court and which position we have no reason to depart from are satisfied as did the trial court that elements of malice aforethought set out in **section 206** of the **Penal Code** were satisfied. Second, that the evidence on record left no doubt in the mind of the trial judge and now this court on appeal that from the nature and extent of the injuries inflicted on the deceased, the deceased was murdered. Third, that the fact that his body was wrapped in blankets and concealed in a pit latrine, was proof that the death of the deceased was not only unlawful but was also caused with malice aforethought.

On circumstantial evidence, the approach we take is that now forming a well-trodden path of this court in numerous of its decisions. We take it from **Sawe vs. Republic [2003] KLR 364** (supra)**; Wambua & 3 Others vs. Republic [2008] KLR 142; Mwendwa vs. Republic [2006] 1KLR 137, Kipkering Arap Koskei & Kirire Arap Matetu [1949] EACA 135)**, **Peter Mugambi vs. Republic [2017] eKLR,** and **Dorcas Jebet Ketter & Another vs. Republic** in which the following guiding principles were crystallized, namely:

(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.

In light of the above principles, it is our finding that the incriminating factors that the learned trial Judge took into consideration to place the appellant at the scene of the murder of the deceased are the evidence of PW2 who saw appellant the day before the murder and greeted him; the evidence of PW5 who testified that she knew the appellant very well before the incident and that she saw the appellant alone in the vicinity a week earlier, with the deceased on the day before the murder, both tilling the land; and, spoke to him at 9.00am while alone in the vicinity of the place of murder on the very day of the murder.

We have considered the above highlighted principles that guide the court in determining sustaining or otherwise a conviction based on circumstantial evidence on the above identified incriminating factors and find that all that the identified incriminating factors amount to in our opinion is evidence of opportunity to commit an offence. Put in another way suspicion in the commission of the murder of the deceased which case law assessed above explicitly states that suspicion alone is not sufficient basis for finding a conviction.

On the impugned confessionary statement recorded from the appellant by **SSP Grace**, all that this witness's evidence amounts to is that she recorded the statement from the appellant in English; that the appellant gave a very vivid description of the role he played with his accomplices in the murder of the deceased which in **SSP Grace's** opinion was incapable of being framed up by her as she did not know the appellant before and therefore had no reason to frame him.

Turning to production of the statement, the record indicates as follows: PW7 states: **"….. I wish to produce the statement. I too signed it."**

The Court on its part stated as follows:

> **"As there is no objection, the statement is marked ExBP 2. Statement was a confession."**

During cross-examination, PW7 stated thus on page 56 of the trial court's proceedings:

> **"Manoti told me how he committed the offence. The confession is in the statement. I am not aware that the accused has denied he made the statement.**
>
> **I am familiar with the rules for recording confessions. I am qualified to take confessions. I am a senior superintendent of police. By then I was an assistant superintendent of police so I was qualified.**
>
> **The accused said he did not want either a friend, advocate or kin to be present. He said he did not want anybody to know what he had done so he did not want anybody to be present.**
>
> **It is his right to have someone present but we cannot force him. I was seeing him for the first time so I did not know his signature or handwriting.**
>
> **The confession is handwritten and is what I have produced before this court. I have not heard you disputing me producing the statement.**
>
> **The signature is not disputed. We could not send the signature to an expert since it was not disputed..."**

Appellant does not contest that he neither raised objection to the mode of recording nor production of the impugned confessionary statement. His major contention is that failure on the part of the trial Judge to satisfy herself that it met the threshold for admission before relying heavily on it as basis for placing the appellant at the scene of the murder and therefore sufficient to find a conviction of itself rendered that statement inadmissible notwithstanding his own failure to object to the production of the said statement along those lines.

The provisions of law falling for consideration by the trial court and now this Court on Appeal with regard to the regularity or otherwise in the taking, production and admission of the impugned confessionary statement as evidence proving appellant's culpability for the commission of the offence faced at the trial are the **Constitution of Kenya 2010**; the **Evidence Act (Cap. 80);** the **Evidence (out of Court Confessions) Rules, 2009** and case law. **Article 49** of the Constitution guarantees an arrested person *inter alia* the right to be informed promptly, in a language that the person understands, of the reason for the arrest; the right to remain silent and the consequences of not remaining silent; the right to communicate with an advocate and other persons whose assistance is necessary and the right of not being compelled to make any confession or admission that may be used in evidence against him/her. Further, that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice (see **Article 49 (4)**). Similarly, **Article 50 (2)(1)** guarantees an accused person a right to refuse to give self-incriminating evidence.

Our take on the above assessed constitutional provisions is that as a general constitutional rule, confessions made by an accused person are not admissible in evidence unless if they are made strictly under the law.

Turning to the **Evidence Act**, **Section 25** defines a confession as follows:

> **"A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."**

Section 25 of the **Evidence Act** was amended by **Act No. 5** of 2003 and **Act No. 7 of 2007** by inserting into the **Act**, **Section 25A** which reads as follows:

"25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

The **Rules** envisaged under subsection (2) of **section 25A** are known as the **Evidence (out of Court Confessions) Rules, 2009**. **Rule 4**, relied upon heavily by the appellant as basis for inviting us to vitiate the admission by the trial court of the impugned confessionary statement provides, *inter alia*, that the Recording Officer:

a. Shall ask and record the Accused Person's preferred language of communication;

b. Shall provide the Accused Person with an interpreter free of charge where he does not speak Kiswahili or English;

c. Shall ensure that the Accused Person is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;

d. Shall ensure that the Accused Person is informed of his right to have legal representation of his own choice among others;

e. Shall ask the Accused Person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.

Section 26 of the **Evidence Act** which has also featured in the appellant's submissions provides as follows:

"A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

Section 25A of the **Evidence Act** [supra] introduced by **Act No. 7** of **2007** provides in part that: **"before a judge, a magistrate or before a police officer(other than the investigating officer) being an officer not below the rank of Chief Inspector Police, <u>and a third party of the</u> <u>person's</u> <u>choice</u>."** [emphasis ours].

We have considered the excerpt of PW7's evidence set out above in light of the applicable provisions of law highlighted above and our finding thereon is that it is explicit from the record that it was only **SSP Grace** and the appellant who were present throughout during the time the recording of the impugned confessionary statement took place. It is evident from the evidence of **SSP Grace** that after appellant declined to have a family member to be present during the recording of the statement for the reason that he did not want his family members to know what he had done, **SSP Grace** never asked him if he wanted any other person of his choice other than a family member to be present. This default on the part of **SSP Grace** renders the statement inadmissible for lack of compliance with the above prerequisites. It is our view that it was incumbent upon SSP Grace to ensure compliance with those prerequisites especially when it is explicit from the provision of law prescribing it that the requirement is mandatory. It is **SSP Grace** who was obligated in law to familiarize herself with the said prerequisite. Appellant may not have been aware of the said prerequisite especially when it is not explicit from the record that he was appraised of the existence of that mandatory legal protective requirement in the **Rules** which was to his advantage. Noncompliance is therefore fatal. The trial Judge therefore fell into error when she failed to properly appreciate and uphold the above prerequisite when determining the admissibility or otherwise of the impugned confessionary statement.

Turning to appellant's alibi defence, the position in law on the role of the Court at the trial and now this court on appeal in instances where an accused person raises an alibi defence is as has been crystallized by the predecessor of the Court and reiterated by this court in numerous decisions starting with the case of **<u>Leonard</u> <u>Aniseth vs. Republic</u> [1963] E. A 206**. At **pg 208, pr 9 Sir Ronald Sinclair, P**.:expressed himself on this issue as follows: **"…A prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer**

..." In **Saidi vs. Republic [1963] E. A. 6**. It was held *inter alia* that:

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law assume and burden of proving that answer and it is sufficient if an alibi introduces into the mind of the Court a doubt that is not unreasonable."

In **<u>Seketoleko vs. Republic</u> [1967] E. A. 531 at page 533 paragraph FG Sir Udo Udoma, C.J**.: had this to say:

"As a general rule of law, the burden of proving the guilt of prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else. The burden always rests on the prosecution.

> **In Republic vs. Johnson (2) the general principle of law applicable to an alibi defence was enunciated. It was laid down as a general rule of law that, if an accused puts forward an alibi as an answer to a criminal charge he does not thereby assume a burden of proving the defence; and that the burden of proving his guilt remains throughout on the prosecution."**

See the reiteration of the same principle by the Court in **Benson Mugo Mwangi vs. Republic [2010] eKLR**.

In light of the above threshold, it is our finding that the role of the trial court and now this court on appeal was and still is to weigh appellant's alibi defence against the totality of the prosecution evidence to determine whether it was ousted as asserted by the appellant and otherwise as asserted by the prosecution. We have done so. It is our finding that appellant's alibi was not ousted by the prosecution evidence. Our reason for reaching this conclusion is that the only prosecution evidence on the basis of which the alibi defence could have been weighed is the very evidence we have already discounted above as not meeting the threshold for sustaining a conviction based on circumstantial evidence as it merely amounted to evidence of opportunity to commit an offence which in law is evidence of suspicion. It is now trite that suspicion alone is not sufficient to warrant a conviction. Second, the impugned confessionary statement on which the trial Judge relied heavily to convict the appellant has been vitiated for noncompliance with the prerequisites stipulated in **Rule 4** of the **Evidence (out of court confession) Rules 2009**.

On alleged existence of discrepancies and inconsistencies in the prosecution evidence rendering it unworthy as basis for finding a conviction, the approach we take and which we fully adopt is as was reiterated by the Court in the case of **Stanley Mathenge Karani vs. Republic [2015] eKLR** thus;

> *KSM Criminal Appeal No. 41 of 2019 Judgment of the Court 16***"The role of a court of law when confronted with allegations of contradictions, discrepancies in the prosecution case has now been crystallized. See Joseph Maina Mwangi versus Republic CRA No.73 of 1993; Njuki & 4 Others versus Republic [2002] 1KLR 771, Vincent Kasyula Kingoo versus Republic Nairobi Criminal Appeal No.98 of 2014, all for the proposition that when confronted with such allegations an appellate Court should apply the guidelines set in Section 382 of the Criminal Procedure Code Cap 75 Laws of Kenya to determine whether such discrepancies, contradictions or inconsistencies are such as to cause prejudice to the appellant or that they are inconsequential to the conviction and sentence. Where these do not affect an otherwise proved case against an appellant, they should be ignored. In addition, an appellate Court has an obligation to reconcile these where the trial court failed to do so and determine the effect of that reconciliation on the appellant's conviction and sentence. See the case of Josiah Afuna Angulu versus Republic Nakuru Criminal Appeal No. 277 of 2006 (UR) and Charles Kiplang'at Ng'eno versus Republic Nakuru CRA No.77 of 2009 (UR), both of which this Court sitting as a first appellate court reconciled discrepancies resulting in the substitution of the appellant's conviction for the disclosed offence in the Angulu case and an outright acquittal in the Charles Kiplang'at Ng'eno's case."**

In light of the above exposition, it is our view that inconsistencies and or inadequacies in the prosecution case pointed out by the appellant are those relating to investigating officer's failure to involve scenes of crime officers to dust and link appellant to the slasher believed to have been the murder weapon and second, link appellant to either the ownership or use of mobile phone no. 0727297522 believed to have been used in the vicinity of the scene of the murder so as to oust appellant's alibi defence that he was in Nairobi as at the material time when the murder was committed. The record is explicit that these were neither explicitly identified, appreciated and or reconciled by the trial court. In our view, these were glaring inadequacies in the prosecution evidence going to the root of the prosecution case. Failure to address them by the prosecution in the first instance and the trial court in the second instance was and is still fatal to the prosecution evidence tendered in

KSM Criminal Appeal No. 41 of 2019 Judgment of the Court 17 support of appellant's conviction as in our view it falls short of proof beyond reasonable doubt.

In the result and in light of the totality of the above assessment and reasoning, we find merit in the appeal. It is accordingly allowed, conviction set aside, appellant directed to be at liberty unless otherwise lawfully held.

Dated and Delivered at Nairobi this 18th day of June, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

<u>DEPUTY REGISTRAR</u>