IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CRIMINAL APPEAL NO. 12 OF 2016

BETWEEN

ENOCK APELE AKOKO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Migori, ***(Majanja, J.)*** dated 16th November, 2015 in **HCCRA NO. 68 OF 2014**)

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JUDGMENT OF THE COURT

On 20th September 2014, **JANET AWUOR PAULETTE** "the deceased" a student at Masai Mara University travelled to Migori town in the company of her boyfriend and spent the night with him at a hotel known as Highway Complex Lodge, "the lodge" situate in Migori town. On 22nd September 2014 in the morning, the manager of the Lodge **Beatrice Akoth Amimo, (PW1)** was on duty. Part of her morning chores included confirmation of the rooms that had been occupied the previous day and those which had not. After finishing the task she went to distribute soap and tissue paper to staff. On the way to her office, she was met by a foul smell emanating from one of the rooms. On reaching room 228, the foul smell became stronger. She also noticed flies on the door to the said room. She immediately called her colleague **Judith Adhiambo Otieno (PW2)** a receptionist thereat.

PW2 then told her that a man, who had only identified himself as **Otieno O**. had booked the room on 19th September 2014. PW2 peered into the room and noticed lady's shoes and a bag on top of the table. The smell was so overwhelming that forced PW1 to close the door without entering the room. She then called the watchman **Norbert Mwangi** who proceeded to the room and later told her that there was a dead body inside. It is then that PW1, PW2 and one **Monica Adoyo** entered the room. They saw the body of a lady on the bed covered up to the neck lying on her back facing the wall.

PW1 called the owner of the establishment, James Ngige who in turn contacted the Officer Commanding Migori Police Station, (OCS). When the police came later in the day, PW1 saw items being removed from the room including a black leather bag, a syringe and bottle of what looked like quinine. The black bag contained the identity card of the deceased. The police took away the body and bedding.

As already stated, PW2 was a receptionist at the facility. She was present when the deceased's body was discovered and when the police visited the scene. Part of her work was to receive customers and book them in to the rooms. She would normally register the name of the guest in full, the identity card ("ID") or passport number and phone number. She recalled that a man, whom she did not know, had booked room 228 on Friday, 19th September 2014 at about 8.00pm and identified himself as Otieno O. When asked for his identity card, he told her that he had forgotten it but he gave her the ID number as 1120123 and mobile phone number 0700956481. Otieno O. stayed in the room for 3 days and paid Kshs. 600/= for each day that he remained in the room. On Monday, 22nd September 2014 at about 7.30 am, Otieno O. told her that he was going out to look for money to pay for the day. However, he did not come back and she did not see him again. After he left PW1 came and they started cleaning the rooms with the other ladies. It is at this time that PW1 alerted them of a foul smell emanating from room 228. On 23rd September 2014 she was called by Migori Police Station to participate in an identification parade. She duly identified Otieno O. as the person who had booked room 228. That Otieno O. was none other than the appellant.

Solomon Otieno Agendo (PW3), the deceased's father claimed that the deceased was his daughter aged 19 years old and a student at Maasai

Mara University. On 19th September 2014, he tried calling her but the call never went through. On 20th September 2014 at about 4.00pm, his sister **Lilian Akoth (PW5),** who was residing in Migori at the time called and told him that the deceased had been seen in Migori. He tried calling her without success. On 23rd September 2014 at about 7.00am, he received a call from his brother **John Olang', (PW4)** requesting him to come to Migori Police Station CID Offices. When PW3 arrived at the station, the District Criminal Investigation Officer ("DCIO") asked him whether he knew the deceased. He was shown an ID bearing her name and he confirmed that it was his daughter's. He was told that she was found dead at the Lodge and that her body was at Migori Level 4 Hospital Mortuary. He went to the Mortuary and confirmed that fact. PW4 joined him at the mortuary. Both PW 3 and PW4 identified the body when the post mortem was conducted on 23rd September 2014. He further confirmed that he knew Otieno O. as the appellant. He remembered that some time back on 24th August 2014, he had found the deceased and the appellant at the home of appellant's father in Migori. PW5, who was a neighbor of the appellant saw them and called PW3 by phone. He took them to Migori Police Station because the deceased had left her four month child at home alone. He did not know the father of the child though. The police at Migori referred him to Awendo Police Station because he lived there. They went to Awendo Police Station on 24th August 2014 and since the deceased accepted to take care of the child and was over 18 years old, the appellant could not have been charged with any sexual offence. The deceased and the appellant remained at Awendo Police station until 25th August, when they were released and went home. The deceased stayed home until 9th September 2014 when he took her to Masai Mara University and left her there. He did not see her again.

The deceased's aunt, **Lilian Okoth Ngeng'o (PW5)** knew the appellant as they were neighbours in Migori town. In August 2014, she saw the deceased and the appellant. At the time the deceased had come to Migori town to collect her admission letter to the University and ended up staying with the appellant despite her intervention. After this, the appellant would talk loudly across the fence and insult her for trying to interfere in the relationship. Fearing for her safety and because the appellant was facing another murder charge, she relocated to another residence. On 22nd September 2014, she received a call from her former neighbour called **Linda** inquiring whether she knew that the deceased was in Migori Town. Linda told her that the deceased had been seen with the appellant over the weekend. She called the deceased's mother and informed her that the deceased was in Migori. The mother told her they talked on 19th September and that the deceased told her that she was in school. She also told her that the deceased's phone was off since 19th September after they had spoken. On the following day in the morning PW 5 was preparing to go to work when PW4 called her and asked whether she had heard about a body that had been found in the lodge where the deceased's ID was also found. She proceeded to Migori District Hospital Mortuary where she found a body which she confirmed to be that of the deceased.

Dr Jared Ndege, (PW9) conducted a post mortem on the body of the deceased on 23rd September 2014 at Migori District Hospital Mortuary. He noted a penetrative wound on the right anterior side of the neck, blood in the chest cavity resulting from a penetrative wound running oblique into the right lung cavity causing bleeding into the lung. He also noted that the uterus on dissection had pus in the ovaries and tubes. He certified the cause of death as severe bleeding in the chest cavity caused by a penetrating lung injury.

Dr Ndege also stated that the appellant was examined **by Dr. Wafula Nalo** on 23rd September 2014 who noted that he had normal mental function and that he had bruises on the anterior aspect of the scalp, upper limbs, and mid shaft of the right leg. He concluded that he was fit to stand trial.

Chief Inspector **Evans K Sang (PW10)**, the Deputy DCIO of Migori investigated the case. He recalled that on 22nd September 2014 while in the office, he received a report from the management of the Lodge that there was a decomposing body in room No. 228. Together with other police officers, among them the Scenes of Crime Officer, Corporal Benson Ingosi (PW7), they proceeded to the lodge where they were met by foul smell emanating from the room. After opening the room they found the decomposing body of a young girl lying in a pool of blood on top of the bed. They took the body to Migori District Hospital Mortuary for preservation and post-mortem.

PW7 on his part stated that he was a duly gazetted Scenes of Crimes officer. He confirmed that he accompanied PW10 to the crime scene at the Lodge where they found the decomposing body of a deceased woman in room 228. Inside the room were several items including used syringes, empty alcohol bottles and personal belongings of the deceased. On close observation of the body, he noticed a stab wound on the neck and traces of blood around the nose and the mouth. He advised PW10 to collect the items found in the room as exhibits and proceeded to take photographs which he processed and produced in evidence.

PW10 made inquiries from PW 1 and PW 2 and was told that the deceased checked into the room with a certain young man on 20th September 2014 who identified himself as Mr Otieno O. They found an assortment of items in the room including a black handbag which had personal effects. Inside the bag was a purse with an Identity Card in the name of the deceased. There were also two passenger tickets issued by Nolex Services for motor vehicle KBM 328M dated 20th September 2014 showing that they had travelled from Narok to Migori and the fare paid was Kshs.700/= There was also a note written on white tissue paper as follows ***"Pastor Moses Akoko, Migori Central SDA Church, Moses Akoko Dudi"*** .

After finding the note he immediately went to Migori Central SDA church. He found Pastor Moses Akoko in his homestead. The pastor confirmed that Otieno O was his son but that he was not in the house. The pastor told him that on the previous day, the appellant had brought a lady at home, had supper and thereafter left saying that they were going to spend the night in town. Whilst still at the home of Akoko, PW10 received information that the appellant's mother had come to the police station. At that time there was a lot of tension in town as boda boda riders were looking for the appellant. His mother Penina Akumu Akoko reported to the Migori Police Station that she knew where the appellant was. She led them to a house belonging to her friend. When they went to the house, they found the appellant sitting dumbfounded and intoxicated. He arrested him and brought him to Migori Police Station. He was taken to hospital where he was treated for his eyesight problem. He was also examined with regard to his mental status. The doctor concluded that he was fit to stand trial. He thereafter organized for an identification parade that was conducted by Chief Inspector **David Kemboi, (PW8).** PW2 identified the said Otieno O as the appellant. Otherwise the appellant's real name was **Enock Apele Akoko**.

This is the evidence that led PW10 to prefer an information charging the appellant with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars being that on the night of 19th and 20th of September, 2014 at Highway Complex Lodge in Migori Township in Migori Sub-county within Migori County in the Republic of Kenya the appellant murdered **Janet Awuor Paulette**.

The appellant in his defence elected to make a sworn statement. He testified that on 23rd September 2014, he went for eye treatment and thereafter went to his house in Migori town. However, police officers came to the house and informed him that he was wanted at Migori Police Station. He was handcuffed and taken to Migori Police Station. The next morning, his fingerprints were taken and he was asked to sign some papers whose contents he did not know. He was later informed that he had killed the deceased. He denied the commission of the offence. He admitted though that he knew the deceased as his fiancée. He recalled that the last time he was with her was in the month of August 2014 when her father, PW3, caused them to be arrested when he found them in his house. He brought them to Migori Police Station where they were interviewed by the OCS Migori Police Station who concluded that they were adults and since they wanted to marry he ordered their release. After release they proceeded home but on the way PW3 and two others came and had them arrested and taken to Awendo Police Station where he was locked in the police cells for two days while the deceased stayed for one day. The appellant stated that this was the last time he saw the deceased as soon thereafter he was released.

The appellant testified further that since he was suffering from an eye infection, he could not tell whether he was undergoing a police identification parade. That he was just removed from the cell and was never told that he was going for an identification parade. Although he knew where the Lodge was, he denied sleeping there at any time and definitely not in September, 2014. He stated that he had an identity card but was not in possession of the same at the time.

The trial court (Majanja, J.) having evaluated the case for both the prosecution and defence was convinced that the appellant had committed the offence. Accordingly, he convicted the appellant of the offence and sentenced him to death.

Aggrieved by the conviction and sentence aforesaid, the appellant proffered this appeal on grounds that the trial court erred in law in convicting the him; relying on the evidence of a single identifying witness; on prosecution evidence that was contradictory and inconsistent; when ingredients for the offence of murder had not been proved; when identification parade was not properly conducted; failing to take into account the alibi defence and finally that the sentence imposed was unconstitutional in light of the Supreme Court decision in the case of **Francis Karioko Muruateu & another v Republic [2017] eKLR**.

The appeal was canvassed by way of written submissions with no oral highlights. **Mr. Mshindi**, learned counsel for the appellant submitted that PW2 was the only witness alleged to have witnessed the appellant at the scene of crime. He also pointed out that the same witness identified the appellant at the police identification parade. However, her evidence was not corroborated. Referring to the case of **Maitanyi v Republic [1986] KLR 198**, counsel reiterated, the danger of convicting an accused person on the evidence of a single identifying witness. Counsel further submitted that PW2 was not only a single identifying witness but her evidence was also not credible. It was submitted that a look at the evidence on the record revealed contradictions and inconsistencies that the trial court overlooked and that had it considered them, it would have arrived at a different decision. There were doubts as to whether the deceased actually checked in the lodge with the appellant. With regard to proof of murder, counsel submitted that save for proof of unlawful cause of death as shown by the post mortem report, there was no evidence linking the appellant to the offence. That the appellant was convicted on mere suspicion. Relying on the case of **Joan Chebichii Sawe v Republic [2003] eKLR**, counsel submitted that suspicion, however strong, cannot provide a basis for inferring guilt of an accused person which must be proved by evidence.

On the identification parade, counsel submitted that the same did not meet the threshold for a proper police identification parade. Though PW2 identified the appellant on the parade, she had not given a prior description of the appellant to the police. That the appellant was not informed that he was going to participate in an identification parade nor was he asked to have a lawyer or friend present during the identification parade. There was also no evidence that all the people who were members of the identification parade were of the same age, height, general appearance and class of life. For all these submissions, counsel relied on **Ajode v Republic [2004] 2 KLR 81** and **Rex v Mwango s/o Manaa [1936] e EACA 29**.

Lastly, on alibi defence, counsel submitted that though the appellant advanced the alibi defence, the same was not discounted by the prosecution. That it was trite law that the burden of proving the falsity, if at all, of an accused defence of alibi lies with the prosecution. Counsel relied on the case of **Karanja v Republic [1983] KLR 501** for this proposition. According to counsel, the prosecution failed to do so in this case. For all these reasons counsel urged us to allow the appeal in its entirety.

Opposing the appeal, Mr. Muia, learned Prosecution Counsel submitted that the evidence adduced was sufficient to convict the appellant. Though the evidence was circumstantial, it irresistibly pointed to the appellant as the perpetrator of the crime. Counsel referred us to the case **Isaac Muiruri Wairimu & another v Republic, Criminal Appeal No. 64A & 64B of 2016 (ur).** Counsel submitted that malice aforethought was established by the extent of the injuries sustained by the deceased as confirmed by PW6 when he produced the post mortem report in which he had concluded that the cause of death was *"right haemothorax secondary to penetrating lung injury."* With regard to sentence, counsel maintained that though the mandatory nature of the death sentence was declared unconstitutional by the Supreme Court, it can still however be imposed in deserving cases. In this case the offence was committed in a gruesome and heinous manner and the appellant did not appear to be remorseful. Furthermore, this was a second murder charge that the appellant was facing. Counsel submitted that given the circumstances, the appellant should suffer the full force of the law which is the death penalty.

Regarding contradictions and inconsistencies in the evidence of the prosecution, counsel submitted that the evidence was consistent with regard to the appellant's relationship with the deceased, the tissue paper that had been found with the names of the appellant's father in the lodging next to the deceased's body, appellant was identified at the identification parade and that the fresh injuries found on the appellant due to fingernail scratches were probably from the deceased before she was killed. He therefore urged us to dismiss the appeal.

Where this Court acts as the first appellate court as in this case, it is statutorily required to analyze and assess the evidence tendered before the trial court afresh and come to its own conclusion which may or may not be in line with the court whose decision is the subject of the appeal. This Court's predecessor in **Okeno v R [1972] E.A 32** re-stated this principle thus:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination PANDYA V R [1952] EA 336 and to the appellate's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion SHANTALAL M. RUWALA V REPUBLIC [1957] E.A**

> **570. It is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts 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. PETERS –VS- SUNDAY POST [1958] E.A 424…"**

In convicting the appellant, the trial court expressed itself thus:-

> "The accused was the only person with exclusive control of room 228 where the deceased's decomposing body was found. While this court is left to speculate on the motive of this act, under **section 9(3)** of the **Penal Code** the lack of a motive is not necessary to prove murder though it may be useful in piecing all the circumstantial evidence together (see **Choge v Republic [19850 KLR 1** and **Libambula v Republic [2003] KLR 683**]. Having reviewed all the evidence, I am satisfied that all the evidence inextricably points to the accused.
>
> There could be no clearer evidence of malice aforethought than piecing the deceased's neck with a sharp instrument, likely the needles (Exhibit 14A and B) found in the room, penetrating into the lungs causing her to bleed in the chest cavity. Such an injury could only be inflicted with, "an intention to cause the death of or to do grievous harm to any person, whether that person actually killed or not," within the meaning of **section 206(a)** of the **Penal Code**.
>
> For the reasons I have outlined, I find the prosecution proved its case beyond reasonable doubt. I therefore find the accused **ENOCK APELE AKOKO** guilty of the murder of **JANET AWUOR PAULETTE** and I convict him accordingly.

The trial court was alive to the fact that there was no direct evidence linking the appellant to the crime. There was only circumstantial evidence! It bore in mind the hackneyed principle that has been emphasized by our courts over time that in order to justify, 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. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of his inference from facts to the exclusion of any other reasonable hypothesis of innocence is always with the prosecution, and always remains that way. It is a burden, which never shifts to the accused. The trial court made reference generally to **R v Kipkering Arap Koske & another [1949] 16 EACA 135** and **Sawe v Republic [2003] eKLR**. However, the observations of the Supreme Court of India in the case of **Navaneethakrishnan v Inspector of Police, Criminal Appeal Number 1134 of 3013** is apt. The court observed thus:-

> …. The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubt. The court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions. The court in mindful of caution by the settled principles of law and the decisions rendered by this Court that in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the accused, no one had committed the offence, which in the present case, the prosecution has failed to prove."

The elements of circumstantial evidence pieced together by the trial court as forming a chain so complete as to point to the appellant as the author of crime were, the fact that the appellant was in a relationship with and knew the deceased; he was with the deceased within the period she was murdered; that the appellant had booked room 228 at the Lodge where the deceased's body was found; that he had exclusive possession and control of that room; that the evidence found in the room pointed to the appellant as murderer, in particular when the room was searched, the police found a piece of tissue paper upon which was written *"Pastor Moses Akoko, Migori Central SDA Church, Moses Akoko Dudi."* It led PW10 to the home of Pastor Akoko who confirmed that the appellant was his son and that he had been home with a lady the previous night when they had supper and thereafter left for town where they claimed they were going to spend the night and that the appellant was picked in an identification parade by PW2. We may also add that the appellant and the deceased were seen in town by Linda. Further there were two tickets issued by Nolex Services for motor vehicle KBM 328M dated 20th September, 2014 indicating that the duo had travelled from Narok to Migori together on that day. We are satisfied that these pieces of circumstantial evidence taken together irresistibly point to the appellant as the author of the crime and the trial court cannot be faulted for reaching this conclusion on the basis of circumstantial evidence. In the face of all these, the appellant's contention that he could not have been in the room rings hollow.

Before us the appellant urged that the evidence of PW1 was that of a single witness, uncorroborated, inconsistent, contradictory and therefore unbelievable. There is no legal requirement that a conviction cannot turn on the evidence of a single identifying witness. Indeed, in the case of **Maitanyi** (supra) the court stated:

> **"1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.**
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> **2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available and whether the witness was able to make a true impression and description.**
>
> **3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the**

court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

Much as PW2 was a single identifying witness, her evidence was considered carefully and circumspectively. PW2 testified as to giving out the room to the appellant. She saw the appellant at least four times for the period he occupied the room. First, was when he took the room and thereafter whenever he came to pay. All these happened in broad daylight. The appellant too had not disguised himself at all on all these occasions as to make his identification difficult. Further, his arrest was so soon after the commission of the offence, such that PW2 could not have been unable to easily identify a person she had let the room to and who had since been in constant touch with her.

PW2 also identified the appellant in a police identification parade. Much as the appellant has criticized the manner in which the parade was conducted, we are nonetheless satisfied just like the trial court that PW2 never saw the appellant before the identification parade was conducted as he has claimed. There is no evidence on record to that effect. If anything, the appellant duly signed the police identification parade forms without raising a finger or expressing any misgivings as to the manner it was conducted. The other complaint is that PW2 did not provide a description of the appellant. In the case of **Ajode v Republic [2004] 2 KLR 81**, it was held that:-

> **"it is trite law that before such parade is conducted and for it to be properly conducted, a witness should be asked to give the description of the accused and police should then conduct a fair identification parade…"**

In this case though PW2 did not provide a description of the appellant, she actually knew him and could easily recognize him as she had interacted with him for four consecutive days whenever he came to book the room for the day, pay and leave. Further and as already stated, not much time had lapsed from the time she last saw the appellant to the time she identified him in the police identification parade. PW2 could therefore easily recognize the appellant since she had seen him over a long period of time as opposed to a person she had seen fleetingly. It is also in evidence that when PW2 attended the identification parade, she had been under arrest in a cell and that she had not seen the appellant prior to the conduct of the parade. In the case of **Nathan Kamau Mugwe v Republic – Criminal Case No. 63 of 2008 (Ur)**, this Court observed that the fact that the witness had not given to the police prior description of an accused before the parade did not necessarily render an otherwise valid parade worthless.

The appellant further complains that he was not informed that he was entitled to have a lawyer or friend present when the parade was being conducted. We think that this complaint is misplaced. Under intense cross-examination by counsel for the appellant, PW8 categorically stated:-

> "I informed the accused that he was entitled to have an advocate or a friend. This is set out in the parade form I have produced. The accused answered that the advocate was not necessary…"

Again looking at the parade form, these is an entry to the effect *"NOT NECESSARY"* which is signed by the appellant. This entry was in response to the appellant being *"informed that if desired, a friend or solicitor may be present, and replies thereto…"*

Another complaint with regard to the identification parade was that the appellant was not placed among at least 8 people as far as possible of similar age, height, general appearance and class of life as himself. There is no evidence on record that all the people who were members of the identification parade did not meet the above requirements. In any event, when the parade was over and the appellant was asked whether he was satisfied with the manner it had been conducted, he answered in the affirmative. In any event in the case of **Mwangi v Republic [1976] KLR**, this Court held that whether or not the conduct of an identification parade is so irregular as to necessitate its being dismissed is a question of degree to be decided in the light of the circumstances of each case. Having considered the record vis-a-vis the requirements of a properly carried out police identification parade, we are satisfied just like the trial court, that, the same was properly conducted and as a result, PW2 identified the appellant by touching him.

The appellant in his evidence advanced an alibi defence and also gave his name as **Enock Akoko Apele** and not **Otieno O** as indicated in the lodging guest register. According to the appellant he was nowhere near the scene of crime. Instead he had on 23rd September, 2014 gone for eye treatment and thereafter retreated home. It is trite that where an accused states that he was not at the scene of the crime, he has automatically raised an alibi defence and the burden shifts to the prosecution to rebut the same. The burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution. See **Karanja v Republic [1983] KLR 501**.

However, we doubt whether the appellant's alibi defence could hold in the face of such strong and credible circumstantial evidence marshalled against him by the prosecution. As already stated, the appellant and deceased were in a relationship; the appellant was with the deceased within the period she was murdered. Indeed, PW5 confirmed in her testimony that the appellant had been with the deceased in Migori town around the time she was killed. The fact of the appellant being in the company of the deceased was confirmed by the appellant's own father. Further, there were two passenger tickets issued by a transport company, Nolex Services showing that the two had travelled in motor vehicle KBM 328M on 20th September, 2014 from Narok to Migori. His own farther confirmed that the two had come for dinner and thereafter left for Migori town to spend the night there. His father confirmed that Otieno O and Encok Apele Akoko was one and the same person, the appellant. This then settles the claim by the appellant that he was Enock Apele Akoko and not Otieno O. Further, when called upon to produce his national identity card, he declined claiming that though he had it, he did not have it at the material time in court.

The other evidence that displaces the appellant's alibi defence is that of PW2. She testified that she booked the appellant in room 228. The appellant therefore had possession of the room from 19th September, 2014 up to the time the deceased's body was discovered. When PW2 demanded payment for the last day, the appellant left with the key promising to pay later. As correctly observed by the trial court, the fact that the appellant had the exclusive key to the room was confirmed by the testimony of PW1 and PW2 when they testified that they had to use the master key to force open the door to the room. Besides, since the deceased's decomposing body was found in the room, it means that none of the hotel employees or guests had access to the room prior to that time as they would have discovered the body much earlier. Thus, the appellant was the only person with exclusive control of room 228 where the deceased decomposing body was found.

The other piece of evidence displacing the appellant's alibi defence is that of PW2 which placed him in the lodge for about four days that is from 19th to 22nd September, 2014 both days inclusive. In addition, when the hotel room was searched, the police found a piece of tissue paper with *"Pastor Moses Akoko, Migori Central SDA Church, Moses Akoko Dudi."* This note led PW10 to the home of Pastor Akoko who confirmed that the appellant was his son and that he had been home with a lady the previous night when they had supper.

Turning to contradictions and inconsistencies in the prosecution case, it is the case of the appellant that a look at the evidence on record by the prosecution reveals contradictions and inconsistencies that the trial court overlooked. The inconsistencies alluded to include whether the deceased actually checked into the room with the appellant. This is with regard to the evidence of PW2 and PW10. The other inconsistency relates to whether PW10 and PW7 went to the scene of crime on 22nd September, 2014.

In the case of **Twehangane Alfred v Uganda, the Supreme Court of Uganda** held that:-

> **"…With regard to contradictions in the prosecution case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case. Therefore the court should consider the broad aspect of the case when weighing evidence …"**

We do not find contradictions and inconsistencies alluded to be so weighty as to affect materially the prosecution case. They were minor and never went to the root of the prosecution case.

Was the offence of murder proved in this case? The principle elements for the offence of murder are:-

a. The causing of death of another person.

b. By unlawful act or omission.

c. With malice aforethought.

d. That death occurs within a year and a day after the act or omission.

From the foregoing, we are satisfied just like the trial court that death of the deceased was not in dispute. Further, the unlawful cause of death was proved by the post mortem report produced by PW9 which showed that indeed the deceased died from "*right haemothorax secondary to the penetrating lung injury."* Much as the appellant claims not to have been responsible for the death, the circumstantial evidence led by the prosecution points irresistibly to the appellant committing this crime and nobody else. Thus, this was not a case of mere suspicion as claimed by the appellant. Yes, we are aware that suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. See **Joan Chebichii Sawe v R (supra)**. We are satisfied that the prosecution led cogent evidence that the death of the deceased was unlawfully caused by the appellant. How about malice aforethought? We can do no better than reproduce verbatim, the observation of the trial court on the issue *" -There could be no clearer evidence of malice aforethought than piercing the deceased neck with a sharp instrument, likely the needles (Exhibit 14A and B) found in the room penetrating into the lungs causing her to bleed in the chest cavity. Such an injury could only be inflicted with "an intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not "within the meaning of section 206(a) of the Penal Code…."* Malice aforethought was thus proved contrary to the submissions of the appellant.

On sentence, we note that the appellant was sentenced to death with trial court holding that:-

> "…As there is only one sentence prescribed by law, I hereby sentence **ENOCK APELE AKOKO** to death for the murder of **JANET AWUOR PAULETTE."**

In view of the decision of the Supreme Court in **Francis Karioko Muruateru (Supra),** it is now a notorious fact that the mandatory nature of the death sentence is unconstitutional. However, it can still be imposed in deserving cases. The appellant has urged us to review the sentence imposed. However, the State takes the position that considering the manner in which the offence was committed, the death penalty was deserved.

We have duly considered and pondered over these rival submissions. We have borne in mind the circumstances under which the offence was committed, the age of the appellant who was said to be 35 years, mitigation by the appellant which showed he was remorseful, period spent in custody which is about five years and the fact that he was a first offender. We think that the sentence that best commends to us is a custodial one. Accordingly, whereas we dismiss the appeal on conviction, we nonetheless allow the appeal on sentence. In lieu of the death sentence, the appellant shall serve imprisonment term of 25 years effective from 16th November, 2015.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.