



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME AND KANTAI J.A

CRIMINAL APPEAL 100 OF 2017

BETWEEN

DAMARIS MUENI MUSAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Justice S. N Mutuku, J) dated 26th September 2017 in HCCRA. No. 24 Of 2015)

JUDGEMENT OF THE COURT

This is a first appeal arising from the Judgment of the High Court of Kenya at Nairobi, Criminal Appeal Number 24 of 2017 (**S.N Mutuku, J.**), dated 26th September, 2017.

The background to the appeal is that, the Appellant was charged before the High Court at Nairobi in the above Criminal Case, with the offence of murder, contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the Information being that, on an unknown date between 19th December, 2014 and 24th December, 2014 at Umoja One Estate, Buruburu division within Nairobi County, the appellant murdered **Raphael Matheka Nzembu**. The Appellant denied the offence prompting a trial in which the prosecution called fifteen (15) witnesses to prove the charge, while the appellant who gave sworn evidence was the sole witness in her defence.

The brief facts of the appeal are that, appellant and the deceased were married and had one daughter. The rental house they lived in in Umoja one Estate in Nairobi, belonged to **Beatrice Waringa** PW14. They owned house No. K60 in the same Estate which was rented out to a tenant. They also had a kerosene pump in the same estate where **David Mutinda Ndolo** (PW9), worked for them. On 18th December, 2014, the deceased went to the Kerosene Pump and asked PW9 for the proceeds of sale, and then left. The next morning of 19th December, 2014, PW9 sent KShs. 1,500 to the deceased through M-pesa as proceeds of sale after talking to him. He never saw him again alive.

On the evening of 19th December, 2014 at around 8.00pm, **Erick Kyalo Kisuna** (PW6), and **Johnstone Kimwele** PW7 met with the deceased in a hotel (Kiosk) next to Safe Life Supermarket. They were joined by **Johnstone Kimwele** (PW7). They had tea together and chatted for between twenty (20) to thirty (30) minutes and then left for their respective homes. From the evidence on the record, PW6 and 7 were apparently the last persons to see the deceased alive.

On the same night of 19th December, 2014, PW14 heard screams thrice coming from the upper floor of her building where the deceased and appellant lived. The screams were loud enough but PW14 could not tell whether they were from a woman or a man. Neither did she identify whose voice it was. She peeped through her window and saw a group of people on the road facing her house. She closed the window and slept. PW14 never saw the deceased again.

On 20th December, 2014, **Simon Mokaya**, PW12 a police officer then based at Buru Buru Police Station, received a murder report from street boys who had sported what appeared as human body parts stashed in two polythene bags at Kariobangi bridge, near Kariobangi along Nairobi River, where they were collecting plastic bags. PW12 in the company of the OCS and other police officers left for the scene. On arrival there, they were shown the two polythene bags. Upon examining them, PW12 confirmed the contents were of a human mutilated body. They contacted the scenes of crime personnel to come and photograph the scene. PC **David Kipchumba**, (PW11), visited the scene and took photographs which were subsequently produced in evidence as exhibits.

On 21st December, 2014, the appellant went to PW14, their Landlady and informed her that she wanted to move house because, the deceased had failed to pay rent for three months. PW14 advised her to tell the deceased to call her. PW14 on her own tried to call the deceased on his mobile phone but it went unanswered. PW14 later inquired from the appellant if the deceased had shown up, to which the appellant replied in

the negative. On 23rd December, 2014, PW14 decided to check on the deceased at his Kerosene pump. She went there and met two people whom she did not know before and from whom she inquired about the deceased. The two told her that they were also looking for the deceased as they had not seen him for three (3) days. She returned to the house and found two hand carts and a big lorry packed outside. Suspecting that the appellant wanted to move house, when the deceased had gone missing, she rushed and reported the incident to Umoja 1 Police Post. **Eli Ojwang** (PW8) received the report, booked it in the OB and accompanied PW14 to the house. On arrival, he found the appellant with two handcarts outside the house already loaded with furniture. Items in the house were already packed. PW8 interrogated the appellant who appeared ready to relocate. PW8 took appellant and PW14 to the OCS Buru Buru Police Station and after interrogation, the OCS directed the appellant not to shift house until the deceased was traced.

It transpired later that prior to 23rd December, 2014, when the report was made to PW8 by PW14 at Umoja 1 Police Post, that the deceased had gone missing, appellant and her daughter had on 20th December, 2014 sought accommodation from **Felista Mumbua Mwongela** (PW1), on allegation that the deceased had left for Mombasa without paying rent as a result of which PW14, their land lady had locked her out of their rental house. PW1 took them in. They stayed there till appellant's arrest on 3rd February, 2015.

Between 19th and 21st December, 2014, **Jeremiah Kyalo Mwanthi** (PW4) and **Erick Mumo Mutisya** (PW5), nephews to the deceased failed to get through to him on phone. On 22nd December, 2014, they went to appellant's house and inquired from her the whereabouts of the deceased. She informed them casually that the deceased had left for Mombasa over the weekend. On 24th December, 2014, PW4 and 5 filed a report of a missing person with Buru Buru Police Station after getting an okay from the appellant. On 25th December, 2014, they returned to the police station to find out the progress. They were referred to the City Mortuary to check on a body recovered by police at *Kariobangi* Bridge along Nairobi River on 20th December, 2014; which they did and identified the body parts in the polythene bags as those of the deceased from a mark on a toe on the left foot and clothes they had seen on the body which apparently the deceased wore on the 19th December, 2014, the very day he went missing.

On 20th December, 2014, appellant went to PW9 at the Kerosene pump and asked for 100/- for supper which PW9 gave. She went there again on 24th December, 2014 and took the keys from PW9 promising to get a technician to repair the faulty pump but never did so. On 27th December, 2014, PW9 came to the pump and found PW4 and 5 who informed him that the deceased's remains had been found at the city mortuary. He also found the pump missing.

On 30th December, 2014, **Dr. Charles Muturi** (PW13), a pathologist based at Mama Lucy Hospital Nairobi, carried out post mortem on the body of the deceased after it was identified to him by relatives. The findings were that, it had moderately decomposed with multiple slash wounds on the head, right forearms and near total decapitation of the neck with the head held to the body by the skin. The torso was amputated from the hip. There was near total amputation of right ankle joint and left ankle joint. As a result of the above findings, the Doctor formed the opinion that the cause of death was multiple injuries following sharp force trauma. PW13 signed the post mortem form which he produced in evidence as an exhibit. When cross-examined, PW13 stated that it was not possible to determine when the deceased died save for the information on the body from the police that the body was recovered on 20th December, 2014. The body was thereafter released to the relatives for burial which appellant did not attend.

On 17th January, 2015, the appellant who was still residing with PW1 informed her that she intended to sell their plot to raise fees for their daughter. After due discussion, PW1 tasked her son-in-law **Enock Musyimi Wambua** (PW2), to look for a buyer after PW1 introduced PW2 to the appellant as the seller of the property valued at close to five million shillings. PW2 who knew **Peter Mutua** (PW3) as a property agent got through to him and requested him to look for a buyer for a lady who was selling a property in Umoja. PW3 got through to PW7 a property agent and tasked him to look for a buyer. PW7 accepted the offer and asked for the requisite documents which were subsequently handed to him. Upon perusal, PW7 realized the documents related to a property belonging to the deceased, and reported the matter to Buru Buru Police Station without informing PW3.

P.C. Pharis Toya (PW10) booked PW7's report in the OB, mobilized other police officers to pose as buyers. Arrangements were made for the supposed buyers to meet with the seller in the office of the Advocate who was to prepare the sale agreement. After discussion between the seller and the buyer in the Advocate's office and upon being handed documents by appellant as proof of ownership of the property, they introduced themselves as police officers, arrested PW2, 3 and Appellant, took possession of all the documents the appellant had on her to facilitate the sale which were later produced in evidence as exhibits. On 16th February, 2015, the appellant was taken to **Dr. Joseph Maina** (PW15), attached to police surgery under the escort of police from Buru Buru Police Station for mental examination. PW15 found no injuries on the appellant whom he certified mentally fit to stand trial.

The appellant gave sworn evidence, alleging that, on 17th December, 2014, the deceased came home with PW6 and 7. They had lunch and the deceased escorted them out. It was on the same date that he told her that the trio were planning to take a trip to Mombasa on 19th December, 2014. On 19th December, 2014, the deceased had lunch and left informing her that he was going to pick PW4, 6, 7 and **Makumi**, with whom they had planned a trip. They parted ways, only for him never to return.

On 20th December, 2014, she spent the day at home. On 21st December, 2014 at 7.00 pm, PW4, 5 and 7 met her and asked her the whereabouts of the deceased and for his ATM Card and then left. On 22nd December, 2014, PW14 stormed the house demanding unpaid rent and took away some household items. When she decided to shift the remainder of the household goods to their house at K60 for safe custody until the deceased's return, PW14 rushed to Umoja one police post and came with PW8 who ordered her not to shift house until the deceased's returned.

On 24th December, 2014, she went to the Kerosene pump and took away two keys from PW9. When she returned to her house, she found it locked and that is when she decided to seek refuge in PW1's house. She learned later on that PW4 and 5 had carted away their household goods. On 3rd February, 2015, she escorted PW1 to meet her husband in town to buy wedding rings. On arrival, they found PW2. They were then joined shortly thereafter by four others among them PW3. She came to learn later that the other two were undercover police officers.

They produced and showed her documents relating to their plot K60, wedding certificate, cards and rings. She did not know how they had accessed those items. She told them she knew about the items. PW2 and 3 were arrested. She was told to accompany them to the police station. On arrival, at the police station, PW2 and 3 were released. She was locked up in the cells in connection with the murder of the deceased which the police were investigating. She denied ever wanting to sell the house. She also stated that she reported her husband missing on 7th January, 2015 and gave an OB entry for the said report and also denied the offence of murder.

When cross examined, the appellant reiterated that the deceased left home on 19th December, 2014, never to return; that she knew PW4,5,6 and 7 for close to ten (10) years; that PW1, who was her old friend lied to court when she said that she went to her house on 20th December, 2014 at 6.00a.m. seeking accommodation because, their land lady had locked them out. Neither did she tell PW1 that her husband had been hijacked at Mtito Andei. She conceded that although the deceased had not returned home as at 21st December, 2014, she did not call him on phone as there was nothing to alarm her so as to call him on phone. Maintained that PW14 demanded Kshs. 48,000 from them on 21st December, 2014, and returned the next day with the same demand. Also she maintained that she made a report of deceased's disappearance at Umoja 1 police post three (3) days after his disappearance. She was referred to Buru Buru Police Station where she filed the same report, but did not know why the reports had not been captured in the OBs of both police stations. She denied ever going to a lawyer's office with the intention of selling their house.

At the conclusion of the trial, the trial Judge analyzed the record, identified issues for determination and for reasons we shall revert to at a later stage of this Judgment, found the prosecutions' case against the appellant proved to the required threshold, found her guilty of the offence charged in the Information, convicted her and sentenced her to death.

The appellant was aggrieved and is now before this Court on a first appeal, raising a whooping litany of thirty-seven (37) grounds of appeal which are mostly repetitive. In summary, the appellant's complaint is that, the learned trial Judge failed to properly appreciate that: no prudent investigations were carried out by the police to identify the person (s) who murdered the deceased; police failed to arrest and interrogate the persons who were the last to be seen with the deceased while alive; crucial witnesses were not called to testify; the prosecution's evidence was full of gaps contradictions and discrepancies and therefore unreliable; PW7 was not a credible witness for the failure to explain why it took him two (2) years to record a statement with the police; evidence against the appellant was fabricated; there was nothing to show that the deceased was murdered in his house; circumstantial evidence relied upon by the trial court as basis for convicting the appellant for the offence charged did not satisfy the threshold for acting on circumstantial evidence as basis for finding a conviction; the appellant's plausible defence, submissions and authorities were not given adequate weight. The appeal was canvassed by way of oral submissions. Learned counsel **Mr. Oira Ratemo**, appeared for the appellant, while the learned Senior Assistant Director of Public Prosecution's (SADPP) **Mr. O'Mirera Moses** appeared for the State.

Supporting the appeal, **Mr. Oira** reiterated the contents of his litany of grounds of appeal, that no prudent investigations were carried out by the prosecution to identify the person(s) who murdered the deceased; that the prosecution failed to arrest and interrogate PW6 and 7 the persons who were the last to be seen with the deceased while alive; that evidence of PW4,5,6 and 7 created doubts in the prosecution's case as they were bent on concealing their role in the murder of the deceased by fabricating evidence against the appellant.

It is also **Mr. Oira's** submission that, there were glaring contradictions and doubts in the evidence tendered through PW7,10 and 12 as to how the appellant was arrested; that the Court should draw an adverse inference against the prosecution for the failure to call the advocate to tender evidence on proof of existence of an agreement executed by the appellant before her evidencing intention to sell the property. That the gaps in the prosecution's case were incapable of being filled by the evidence of PW2 and 3 both of whom had been arrested as suspects, booked in the OB only to be released and made prosecution witnesses against the appellant. Their testimonies were therefore discredited and should not have been relied upon by the trial court to support the prosecution's case against the Appellant.

It is also **Mr. Oira's** further submission that, the trial court failed to properly appreciate and address the discrepancy in the prosecution case through PW8, that it is appellant and PW14 who first reported to police about the disappearance of the deceased with that of PW4 and 5 who alleged that they were the first persons to report to police the disappearance of the deceased; that the fact that the deceased's remains were recovered in the same clothes he had on when he was last seen alive with PW6 and 7, coupled with the police's failure to interrogate and tender evidence from other tenants in PW14's plot, was a clear demonstration that the deceased never reached his home on 19th. PW4's, conduct of breaking into the deceased's house in the absence of the appellant to cart away household items was sufficient proof of his intention not only to conceal his involvement in the murder of the deceased but also to fabricate the offence against the appellant; that appellant's evidence that she was shown documents belonging to the deceased, was plausible especially, when police failed to state how they got possession of those items and which in **Mr. Oira's** view, was a clear demonstration that police colluded with PW4 to fabricate the prosecution case against the appellant; and lastly, that the prosecution's evidence did not meet the threshold in law for sustaining a conviction on the basis of circumstantial evidence which in **Mr. Oira's** view did not dislodge the Appellant's cogent defence that she was not involved in the murder of the deceased.

To buttress the above submissions, **Mr. Oira** relied on the cases of; **Ndurya versus Republic [2008] KLR 135; Sawe versus Republic [2003] KLR 364; Wambua & 3 others versus Republic [2008] KLR 142; Mwendwa versus Republic [2006] 1KLR 137 and Kipkering Arap Koskei & Kirire Arap Matetu [1949] EACA 135**; all on the threshold for sustaining a conviction based purely on circumstantial evidence; and the case of **Okoth Okelo and others versus Republic [1965] EA 555** on the weight to be attached to prosecution's evidence before using it as basis for finding a conviction. On the totality of the above submissions and authorities, **Mr. Oira** urged the Court to allow the appeal, quash the conviction and set the Appellant at liberty.

Opposing the appeal, **Mr. O'Mirera** submitted that both conviction and sentence handed down against the appellant by the trial court are safe as the High Court properly addressed its mind to the evidence tendered in support of the prosecution case; that the prosecution does not dispute that the deceased met with PW4,5,6, and 7 on the material day of 19th December, 2014, save that it was during the day and that the witness's evidence that the deceased could not be reached on his phone soon after parting with them was uncontroverted; the incriminating factors identified by the trial Judge against the appellant were in **Mr. O'Mirera** view sufficient demonstration that the appellant was involved in the murder of the deceased. The trial court was therefore in the circumstances entitled to draw an adverse inference against the appellant that on the face of the record, the appellant was privy to the circumstances under which the deceased disappeared on 19th

December, 2014 and his remains found a day later stashed in two polythene bags and dumped under a bridge at Kariobangi on Nairobi River; that there was nothing untoward regarding the conduct of PW4 and 5 as they clearly explained in their evidence that after they failed to get any useful information from the appellant regarding the whereabouts of the deceased and after failing to get through to the deceased on phone coupled with the appellant's indifference to the deceased's disappearance is what compelled them and their other relatives to report the disappearance of the deceased to police on 24th December, 2014. Lastly, that appellant's defence was rightly rejected by the trial court as the appellant was arrested while trying to dispose of property belonging to the deceased which in his view, amounted to a strong incriminating factor which was properly considered and accepted by the trial court as basis for finding Appellant's guilty.

In a brief reply to **Mr. O'Mirera's** submissions, **Mr. Oira** reiterated his earlier submission that PW7 was one of the last persons to be seen with the deceased. He was also involved in the alleged attempt to sell the deceased's property by the appellant and yet it took him close to two years to record a statement with the police. His evidence was therefore incredible; that since PW2 and 3 were arrested as suspects, their evidence should not have been used to support the prosecutions' case that appellant went to the advocate's office with the intention of selling the deceased's property. Failure of the prosecution to call the advocate to substantiate those allegations against the appellant left gaps in the prosecution case which were never reconciled by the trial court and were therefore fatal to the prosecution's case. And lastly that the evidence on the record did not point irresistibly to the appellant's guilt, but to the fact that there were other persons involved in the murder of the deceased whom police failed to bring to book occasioned by shoddy investigations they carried out on the matter.

This is a first appeal. Our mandate is as was aptly set out in the case of **Okeno versus Republic [1972] EA32**, in line with the principles enunciated in the **Okeno's** case (supra): -

“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.”

We have considered the record in light of the above mandate, and the rival submissions set out above, issues that fall for determination in our view are, whether:

- 1. The circumstantial evidence relied upon by the learned Judge to found a conviction against the Appellant met the threshold of proof beyond reasonable doubt.***
 - 2. There were glaring gaps, contradictions, inconsistencies and doubts in the prosecution's case inconsistent with the guilt of the Appellant.***
 - 3. The trial Judge should have drawn an adverse inference against the prosecution's failure to call crucial witnesses.***
- . police investigations were shoddy and evidence tendered did not meet the threshold of proof beyond reasonable doubt.***

On the first issue, it is our finding that the trial Judge upon assessing and evaluating the evidence on record before her, made observations thereon that, on a charge of murder it was the burden of the prosecution to prove elements for proof of the offence of murder which in the Judge's view and correctly so in our view, were identified as follows:

- (i) That death of a human being occurred.***
- (ii) That the death was caused by an unlawful act or omission by the accused person.***
- (iii) That the accused in committing the unlawful, act or omission possessed malice aforethought all of which have to be proved beyond reasonable doubt.***

See also the case of **Joseph Githua Njuguna Versus Republic [2016] eKLR**, wherein, it was stated, *inter alia*, that:

“25. One of the elements of the offence to be considered is malice aforethought.

This is set out in section 206 of the Penal Code to include:

- “(i) 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.***
- (ii) 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***
- (iii) An intent to commit a felony.”***

On proof of death, the trial Judge relied on the evidence of PW12 who recovered the body at Kariobangi Bridge on Nairobi River on 20th December, 2014 following a report from a street family who were collecting polythene bags near the scene; PW11 a scenes of crime police officer who photographed the body after the same had been retrieved from the river; PW13, the Doctor who carried out postmortem on the body of the deceased and whose findings we have already highlighted above when assessing the evidence of PW13 and find no need to rehash it here; and PW4, who in the company of another relative identified the body of the deceased to PW13 during postmortem and concluded and correctly so in our view that the element of “unlawful death” of the deceased had been proved to the required threshold

On the identification of the perpetrator, the Judge made observations on the evidence and correctly so in our view, firstly, that, there was no direct evidence to guide the court as to what happened between the time PW6 and 7 parted with the deceased on the night of 19th December, 2014 and the time his body was found dumped in Nairobi River near Kariobangi Bridge; and second, that the prosecutions’ case therefore rested solely on circumstantial evidence.

Turning to the principles that guide a court on the threshold for relying on circumstantial evidence as basis for finding a conviction, the Judge took into consideration the holding in the case of **Republic V. Taylor Weaver and Donovan [1928] 21 CR**. Appeal as approved and applied in the case of **Neema Mwandoro Ndurya versus Republic** (supra) and which holding we shall revert to at a later stage of this Judgment and applying it to the evidence analyzed evidence, made observations thereon that, the appellant was not concerned about the disappearance of the deceased; she made no effort to report to police that her husband had been hijacked at Mito Andei as there was no such evidence on the record. The Judge therefore believed the evidence of PW14, that it was she who reported the disappearance of the deceased to the police when the appellant wanted to move house in his absence, and lastly, that the appellant contradicted herself when she said that she had reported that the deceased was missing only for her to change that she had reported that the deceased had gone on *safari*.

On the test to be applied before relying on circumstantial evidence as basis for finding a conviction, the Judge took into consideration the proposition in the case of **Teper versus Republic [1952] AC 489** and applying that threshold to the record, made findings that the appellant did not seem bothered about the deceased’s disappearance. Her conduct was therefore suspicious especially when she said nothing about the difficulty the family faced after the deceased’s disappearance. She also kept on giving contradictory evidence about the disappearance of the deceased. She lived with PW1 from 20th December, 2014 up to time of her arrest. Her phone was also not reachable by the relatives of the deceased. Neither did she bother to look for the deceased or his relatives and the police to assist her trace her husband; that although there was evidence that PW6 and 7 parted with the deceased on the night he went missing, there was no evidence that the deceased reached home that, PW14’s evidence that she heard screams from the deceased’s house did not assist much as she was unable to tell whether the screams were of a man or woman. Neither did PW14, identify whose voice it was. The next day PW14 went to check on what may have transpired in the deceased’s house the previous night, only for her to find it locked. Further, that the fact that the deceased’s remains were found on 20th December, 2014 clothed in the same clothes he was in when he parted with PW6 and 7 on the night of 19th December, 2014, when he went missing, in itself gave rise to an inference that either the deceased never reached home that night and or if he did, then he did not have a chance to change clothes before he met his death.

In light of the above observations, the Judge ruled that the appellant could not feign ignorance of the whereabouts of the deceased because; they lived together as man and wife. Her conduct of failing to report the deceased’s disappearance to the police, switching off the phone after her husband’s disappearance; failure to contact the deceased’s family over the issue or co-operate and participate in the search for the deceased; contradicting herself that she reported to police that the deceased had disappeared only for her to change and say that she had reported that he had gone on *safari* and her attempt to sell the house without bothering to find out the whereabouts of the deceased were all incriminating factors that left no doubt in the trial Judge’s mind that the appellant was privy to both the disappearance and subsequent murder of the deceased.

Turning to the appellant’s defence, the Judge found the evidence contradictory. The Judge instead believed the testimony of PW1 and PW2 and then concluded thus:

“Given her behavior throughout the period in reference 20th December, 2014 to 3rd February, 2015 when she was arrested, the accused seemed to have something to hide. This is further exacerbated by accused’s denial that she did not take the documents in respect to the sale of their house to the advocate’s office and that the documents were brought by the police when there is ample evidence to show that she is the one who went to the advocate’s office with the documents.”

On the appellant’s culpability for the commission of the offence, the Judge reiterated the factors outlined above as incriminating factors and opined and correctly so in our view, that the circumstances of the case had to be gauged through the lens of the decided authorities on the threshold for relying on circumstantial evidence as basis for sustaining a conviction. The Judge took into consideration the holding in the case of **Republic versus Kipkering Arap Koskel & Another** (supra), and applying the threshold therein to the record, the Judge concluded as follows:

“with these authorities in mind and having painstaking analysed and considered the evidence as captured by this court and the law, it is my view that the circumstances from which an inference of guilt is sought to be drawn in this case have been cogently and firmly established; these circumstances are of a definite tendency unerringly pointing towards guilt of the accused; and that the circumstances taken cumulatively, 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. I have stated that she may have had accomplices to this murder. The conduct of the accused after the deceased went missing is not compatible with her innocence.”

On the issue as to whether the appellant was the sole perpetrator of the offence she faced, the Judge observed and correctly so in our view that, on the evidence assessed, there was no way the appellant could have committed the offence alone. It was therefore an error that the charge was not framed to include the words “**jointly with others not before court.**” The Judge however found and also correctly so in our view that the said omission was not fatal to the prosecution’s case and was therefore curable under **Section 382 CPC**, especially when the appellant suffered no prejudice for the said omission.

The Judge construed **Section 20** of the **Penal Code**, and applying it to the record ruled that the purpose of the provision is to ensure that:

“everyone who takes part in committing an offence no matter what role he/she played is held accountable and must take responsibility for committing offence.”

It was on the totality of the above assessment of the evidence on the record, identification of issues for determination and reasoning on the issues identified for determination that the Judge rendered herself as follows:

“In conclusion, it is my view that circumstantially, the accused participated in the murder of her husband. She has lied to this court and this court must as a consequence reject her defence. I am satisfied that all the circumstantial evidence availed to this court point to the accused as having participated in whatever plan that may have been made to murder her husband. The manner in which he was killed, the killers must have had malice aforethought as defined under section 206 of the Penal Code. In my view, I am satisfied that the evidence, though circumstantial proves beyond reasonable doubt that all the ingredients of murder have been proved beyond reasonable doubt against the accused. I find Damaris Mueni Musau guilty. Consequently, I enter conviction against the accused for the murder of Raphael Matheka Nzembu. It is so ordered.”

It is against the above assessment and reasoning of the Judge that, we now proceed to determine the issues we have identified above for determination. On the first issue, we affirm the Judge’s finding that there was no direct evidence with regard to the circumstances under which the deceased met his death and that the case either stood or faltered depending on the weight the trial court attached to circumstantial evidence tendered by the prosecution in support of the charge. The principles of law that this Court is obligated to apply in the determination of this issue on appeal now fall within a well-trodden path. They are the same as those applied by the trial court when finding the appellant culpable for the murder of the deceased on the one hand, and the appellant’s assertion on appeal that the threshold for sustaining her conviction on the basis of circumstantial evidence had not been satisfied. The approach we take and which we fully adopt is as was restated by both the predecessor of the Court and which have been reiterated in numerous cases, namely: **Ndurya versus Republic [2008] KLR 135; Sawe versus Republic [2003] KLR 364; Wambua & 3 others versus Republic [2008] KLR 142; Mwendwa versus Republic [2006] 1KLR 137 and Kipkering Arap Koskei & Kirire Arap Matetu [1949] EACA 135**. We find it prudent to distill these principles as follows: in order to justify a conviction founded on circumstantial evidence.

- (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 the guilt of the accused.**
- (iii) There must be no other existing circumstances weakening the chain of circumstances relied upon.**
- (iv) Every element making the unbroken chain of evidence that would go to prove the case must be adduced by the prosecution.**
- (v) Circumstantial evidence is often the best evidence of surrounding circumstances which by intensified examination was capable of accurate proving of proposition.**
- (vi) It must however be narrowly examined to ensure that there were no other co-existing circumstances which would weaken or destroy the defence.**

See also the case of **Peter Mugambi Versus Republic [2017] eKLR**, for the reiteration of those principles as follows:

In the case of R. Versus Taylor Weaver and Donovan [1928]21 CR.APP. 20 which has been cited with approval severally the principle laid down is that, circumstantial evidence is often the best evidence of surrounding circumstances. The parameters for considering such evidence were set out in the locus chassicus case of Kipkering Arap Koske versus R. [1949] 16 EACA 135, thus:

- (a) The incupatory facts must be incompatible with the innocence of the accused.**
- (b) The facts must be capable of no other conclusion or explanation except the guilt of the accused.**

See also *Dorcas Jebet ketter & another versus Republic (supra)*.

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

Applying the above threshold to the findings of the trial Judge highlighted above, with regard to the identification of the incriminating factors linking the appellant to the murder of the deceased beyond doubt, we find no reason to fault the Judge on those findings which we find were well founded both on the facts and the law, we therefore affirm them.

The second issue is whether the prosecution’s case was full of contradictions, inconsistencies and doubts which were never reconciled by the trial court rendering the prosecution’s case inconsistent with the guilt of the appellant.

In the case of **Pius Arap Maina –Vs- Republic [2013] eKLR**, the Court stated *inter alia* that:

“It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution’s case raising material doubts must be in favour of the accused.”

In **Joseph Maina Mwangi vs. Republic [2000] eKLR**, the Court held *inter alia* that:

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”

In **Njuki vs. Rep [2002] 1 KLR 77**, the Court held *inter alia* that:

“In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused... however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused”.

The manner of dealing with alleged existence discrepancies and inconsistencies in the prosecution’s case on appeal has been crystalized by the Court in numerous pronouncements. See the case of **Samuwel Wambua Muthoka versus Republic [2017] eKLR**. Where in, the Court stated as follows:

“The position in law on such alleged existence of inconsistencies, contradictions and discrepancies in the prosecution case is as was stated in the case of Njuki & 4 others versus Republic [2002] 1KLR 771, namely, that where such allegations are raised, the obligation of the Court is to determine as to whether the said discrepancies, contradictions and inconsistencies are of such a nature as would create doubt as to the guilt of the accused. Where they do not, then they are curable under section 382 of the Criminal Procedure Code.”

The discrepancies, inconsistencies, contradictions and doubts pointed out by **Mr. Oira** are those that related, firstly, as who was the first to report to police as between PW14 on the one hand and PW4 and 5 on the other hand. Second, to the manner the documents evidencing Appellant’s intention to sell the deceased’s property, were recovered, with the prosecution asserting that they were recovered from the Appellant, while in the Advocate’s office where she had gone to transact the sale as against the Appellant’s assertion that, they were taken from their house by PW4 and others when they broke into the house and carted away household goods and used them to fabricate the charge against her. Third, those that related to conduct of the prosecution witnesses” and appellant after 19th December, 2014.

Applying the above threshold to the above complaints, we find no contradiction, discrepancies or doubts demonstrated on the record as to who between the prosecution’s witnesses and appellant reported the disappearance of the deceased. There is no doubt that PW14 did so as well as PW4 and 5. The trial court found rightly so in our view that, appellant contradicted herself with regard to the issue of reporting by alleging that she had reported that the deceased had gone missing only to change that she had reported that he had gone on *safari*. This was rejected by the trial court because, there was no entry made of the same at the police stations where the appellant alleged to have filed the report. There was no reason for the police to fail to record it. It was rightly rejected.

As for what transpired in the advocate’s office, the trial court assessed the appellant’s evidence and weighed it against that of PW2 and 3 and believed the evidence of PW2 and 3 it as truthful and rejected that of the appellant as untruthful. The trial court was in a position to assess their demeanor. They had no reason to tell lies about appellant whom they did not know before. The trial court was entitled to reject appellant’s evidence in favour of that of PW2 and 3. Turning to the evidence of PW4 and 5, we find no basis for them to fabricate the charge against the appellant, as it is on record that they tried to solicit her support to assist them trace the whereabouts of the deceased but was indifferent, and second, she gave them an okay to go ahead. This complaint is therefore also rejected.

On the issue as to whether crucial witnesses were not called, **Section 134** of the Evidence Act, is explicit that no particular number of witnesses, in the absence of any provision of law to the contrary is required to prove any fact. In **Mwangi versus Republic [1984] KLR 595**, the Court held *inter alia* that, as to whether a witness should be called by the prosecution is a matter within the discretion of the prosecution, and the Court will not interfere with that discretion unless it is shown that the prosecution was influenced by some oblique motive to withhold such a witness from Court. In the case of **Michael Kinuthia Muturi versus Republic [2011] eKLR**. It was stated as follows:

“There will be instances, of course, when the failure to call some witnesses will attract adverse inference and that is when the evidence on record is barely sufficient to prove the case. In Bukenya & Others versus Uganda [1972] EA 49, the predecessor of this Court stated:

“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Second, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

See also the case of **Beumazi Ngoro Chaila versus Republic [2016] eKLR**, wherein the Court also stated *inter alia* as follows:

“ In Bukenya & others versus Uganda [1972] E.A. 49, the former East Africa Court of Appeal held that, the Prosecution has a

duty to call all witnesses necessary to establish the truth even through their evidence may be inconsistent; that the court itself had a duty to call any witness whose evidence appears essential to the just decision of the case; and that where essential witnesses are available but are not called, the court is entitled to draw to the inference that if their evidence had been called, it would have been adverse to the prosecution case. This proposition which we agree with entirely was, however, espoused in the context where the evidence was barely adequate. This propositions must also be seen in light of section 143 of the Evidence Act which provides that, in the absence of any requirement by provision of the law, no particular number of witnesses shall be required for the proof of any fact. In this case, there was no paucity of evidence.”

Applying the above threshold to the appellant’s complaint on this issue, it is our finding that the witnesses the appellant complained were not called were **Caroline Kibiwott Chirchir**, the Advocate before whom the appellant had gone to execute the agreement of sale, the tenants in W14’s plot to confirm that there was commotion in the deceased’s house on the night of 19th December 2014. On the trial court’s finding that the appellant intended to sell the deceased’s property, the trial Judge relied on the evidence of PW1 that appellant had made this suggestion to her and requested her to look for a buyer; that it was following that request that PW1 tasked PW2 her son-in-law to look for a buyer who was traced through PW3; that police were drawn into the arena through PW7 who knew the deceased very well. The trial court appreciated that. Indeed, PW2 and 3 were arrested together with the appellant, but that they exonerated them, released and made them witnesses because, there was no evidence linking them to the murder of the deceased. The trial Judge therefore believed and rightly so in our view that, there was a genuine sale transaction which aborted, especially when no incriminating factors attributed to them were pointed out either before the trial court or before us on appeal.

As for the tenants, no adverse inference could be drawn against the police for the failure to call them because, the prosecution’s evidence did not rest on evidence that the deceased was murdered in his house. All that PW14 heard were screams and which she stated that she never identified as to whether they were those of a woman or man. Neither did she identify the voice of the person. There were no blood stains in the house. Disturbance of items were as a result of packing to shift house and not as a result of struggle. Lastly, the conviction was based mainly on the factors that went to prove the incriminating conduct of the appellant as sufficiently linking her to the murder of the deceased. It is therefore, our view that, the evidence of those uncalled witnesses would have had no probative value to either the prosecution or the defence cases, and its exclusion caused no prejudice or miscarriage of justice to the appellant.

On the last issue as to whether the investigations were shoddy, all that **Mr. Oira** pointed out was the failure of the police to arrest and interrogate PW6 and 7 who were the last persons to be seen with the deceased while alive and PW4, 5 and their relatives conduct of breaking into the deceased’s rental house and carting away household items. Also the issue of whether the appellant filed a report with the police with regard to the disappearance of the deceased. We have considered those complaints against the record. We find that there was nothing untoward on the conduct displayed by PW6 and 7, that could have led the trial court or this Court on appeal to link them to the murder of the deceased. The record is explicit that they teamed up with PW4 and 5 and their relatives to search for the deceased. If PW7 had anything to do with the death of the deceased, he would not have alerted police about the intended sale of the deceased’s property. Indeed, he took two (2) years to record a statement but he explained that he was known to both the appellant and the deceased. That is why he did not want to give a statement, an explanation accepted by the trial court. The breaking in and carting away of household goods from the deceased’s house was explained by PW4 and 5 as because, appellant was not available to open for them, a fact proved by the evidence of PW1 that she hosted appellant and her daughter in her house from 20th December, 2014 to the date of appellant’s arrest. We therefore find nothing to suggest that evidence used by the prosecution was insufficient to prove the charge laid against the appellant.

Turning to sentence, the position we take is what was taken by the Court in the case of **John Gitau Gachiri versus Republic [2019] eKLR**, where in, the Court stated as follows:

“19. As regards sentence, the trial Judge sentenced the Appellant to death. counsel for the Appellant has urged the Court to reconsider this sentence in light of the Supreme Court decision in Francis Karioko Mwaruatetu & another versus Republic & 5 others (supra). In that decision, the Supreme Court declared the mandatory aspect of the death sentence as provided under section 204 of the Penal Code, to be unconstitutional. What this means, is that a Judge who finds an accused person guilty of murder, has the discretion to impose any sentence, death penalty being the severest sentence that can be imposed.”

In light of the sentiments expressed by the Court in the **John Gitau Gachiri’s** case (supra), whether the Court of Appeal will interfere with the trial court’s exercise of discretion to award a death sentence is not automatic. It depends on the circumstances of each case. It therefore has to be considered on a cases to case basis.

In the above **John Gitau Gachiri’s** case (supra), where the attack on the deceased with a *panga* and fork *jembe* was vicious and uncalled for, the Court of Appeal sustained the death sentence handed down by the trial court. See also the case of **Anne Waithera Macharia & 5 others versus Republic [2019] eKLR**, in which family members were involved in killing the deceased, mutilating his body and throwing it into a river, the Court of Appeal also sustained the death sentence handed down by the trial court. Having considered the circumstances under which the offence was committed as well as the appellant’s defence, we find no reason to interfere with the sentence meted against the Appellant.

In the result, we find no merit in this appeal. It is hereby dismissed.

Dated and Delivered at Nairobi this 22nd day of May, 2020.

R.N. NAMBUYE

JUDGE OF APPEAL

M.K. KOOME

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR