IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO P., M'INOTI & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 79 OF 2017

BETWEEN

COSMAS MULWA KITULYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Lesiit, J.) dated 6th October 2010

in

H.C.CR.C. No. 63 of 2010)

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JUDGMENT OF THE COURT

The appellant, Cosmas Mulwa Kitulya, an Administrative Police corporal deployed to provide security to Government build-ings at ***Kenyatta International Conference Center,*** was charged, convicted and sentenced to death by the High Court ***(Le-siit, J.)*** for two counts of murder. In the first count, the infor-mation stated that on 1st August 2010, at ***Boma Villa Bar*** in ***Syokimau Estate*** within ***Nairobi***, the appellant murdered ***Charles Ngugi Jane (Ngugi)***. In the second count, it stated that on the same day and at the same place, he murdered ***Samuel Kipkoech Maiyo (Maiyo).***

The prosecution anchored its case on the evidence of 10 wit-nesses whilst the appellant gave an unsworn defence and called no witnesses. The trial court invoked ***section 150*** of the ***Criminal Procedure Code*** and summoned 4 other witnesses. The sub-stance of the prosecution case was as follows.

On the material day, at about 2.00 pm the appellant, his lover ***Phyllis Kajuju (PW9)*** and Ngugi went to Boma Villa Bar and Restaurant in Syokimau Estate and sat at a table. The ap-pellant and PW9 had spent the night together in his house and were on a mission to restore beacons on a plot of land that PW9 had purchased in Syokimau through Ngugi as a broker. They were soon joined at the table by the owner of the bar, ***James Gitonga Muhuhu (PW3)*** and had lunch and alcoholic drinks. PW3 knew the appellant and PW9 as husband and wife and re-ferred to them as such in his evidence. The appellant was armed with his official ***Taurus TK 70350*** revolver, which was in his possession since 22nd June 2010.

PW3 left the group to attend a meeting at another part of the bar. The mission to visit the plot appears to have aborted and the appellant, PW9 and Ngugi continued drinking amicably. At 7.00 pm, Ngugi excused himself to go to ***Donholm***. PW9, whose house was on ***Jogoo road***, asked Ngugi for a lift as he was headed her way and the two walked out of the bar, followed by the appellant.

This turn of events appears to have angered the appellant and once outside the bar, he shouted in Kiswahili, *"Huyu ni ma-laya yangu. Bibi yangu ako nyumbani"* (this is my prostitute; my wife is at home). He set upon the PW3 and assaulted her until she fell down. Ngugi came to her rescue, assisted her to get up and they walked back to the same table they had just left. The appellant followed them inside the bar and started beating up PW9 once more. PW3 was attracted by the commotion and to-gether with Ngugi, they tried to restrain the appellant without success. PW3 then summoned Maiyo, one of his watchmen, who managed to get the appellant out of the bar. Shortly thereafter there was a loud blast outside the bar and PW3 found Maiyo lying down, having been shot. Maiyo told PW3 in Kiswahili, *"Ameniua, ameniua* (He has killed me, he has killed me). Maiyo was taken to Mlolongo Nursing Home and later to Kenyatta National Hospi-tal where he was admitted.

On 5th August 2010, the investigating officer, ***Paul Sonaok (PW10)*** visited Maiyo at Kenyatta National Hospital and Maiyo informed him that he was shot by a customer that he was at-tempting to remove from the bar for causing trouble. PW10 recorded Maiyo's, statement which Maiyo did not sign because he was in great pain. That statement was admitted by the trial court as a dying declaration. Maiyo died on 13th August 2010. The postmortem report indicated that he sustained an entry gun-shot wound measuring 5mm in diameter between the 6th and 7th ribs on the right on the anterior axillary line. The bullet went through the left lung to the 9th anterior space on the left side of the chest. The pathologist formed the view that the cause of Maiyo's death was chest injuries due to a single gunshot wound to the chest.

Back at the scene, after Maiyo was shot the appellant went back to the bar and asked in Kiswahili, *"Wapi huyu takata? (where is this rubbish)"*. Fearing for her life, PW9 rushed and hid behind the counter, from where she heard four blasts, as if from a gun. Pepping from behind the counter, PW9 saw Ngugi lying dead on the floor of the bar. Later, the police arrived and collected Ngugi's body and also rescued PW9 from behind the counter. They took her to ***Embakasi Police Station*** to assist with inves-tigations. As for the appellant, he fled and was not seen until 11 days later on 11th August 2010 when he surrendered to his sen-iors at ***Uhuru Camp, Madaraka Estate***.

The pathologist, ***Dr. Njau Mungai (PW7),*** testified that upon examining Ngugi's body, it had, externally, abrasive injuries on the right medial elbow and left lateral chest. There were gunshot wounds on the left side near the umbilicus, elbow, the ribs and on the left face by the jaw bone. There were two exit wounds at the back on the lumbar area. Internally there was blood in the chest cavity and a bullet was recovered in the posteria wall. In the head there were fractures of the bone lining the eye and the brain, from which another damaged bullet was recovered. In all there were four gunshot wounds and PW7 formed the opinion that the cause of Ngugi's death was head and chest gunshot wounds.

When he was put on his defence, the appellant gave an unsworn statement and called no witness. The substance of his defence agreed with the prosecution witnesses in material particu-lars. He confirmed that PW9 was his lover and that they had spent the night before the murders in his house. He further con-firmed that on the material day and time he was with PW3, PW9 and Ngugi at Boma Villa Bar and Restaurant, enroute to see the plot that PW9 had purchased through Ngugi. He agreed that he was armed with his official firearm, the ***Taurus TK 70350.*** He also agreed that they took lunch and alcoholic drinks at the Bar, with PW3 leaving briefly to attend a meeting and that ultimately the visit to the plot aborted and Ngugi excused himself to leave at about 7.00 pm, upon which PW9 and the appellant followed him out of the bar.

The main point of departure is what happened outside the bar. The appellant stated that he stepped aside to answer a call of nature whilst Ngugi and PW9 proceeded on. He rejoined them on Katani road towards the stage and suddenly he heard some-one ask in Kiwahili, *"Mnafanya nini na bibi yangu?"* (what are you doing with my wife?). A gang then confronted them and Ngugi and PW9 fled, leaving the appellant behind. The gang assaulted him until he fell down. When he managed to rise up, he decided to flee and that's when he heard gunshots behind him. He tried to reach for his gun, but found it missing. He continued running until he suffered an asthmatic attack and collapsed in a field where he found himself the next morning.

He walked to Mlolongo and met an unnamed friend to whom he confided about the attack the previous night and the loss of his gun. The friend advised him not to report the loss of the gun to avoid disciplinary action. The friend then took the appellant to an unnamed prophetess to pray for recovery of the gun. However, the prophetess's prayers did not bear any fruits and having failed to recover the gun, he reported its loss at the headquarters on 11th August 2010 where he was arrested and subjected to imag-inary murder charges.

The trial judge found the circumstantial evidence adduced by the prosecution pointed to the appellant, and him only, as the person who murdered Ngugi and Maiyo. Accordingly she convicted and sentenced him as we have already stated. Aggrieved by the conviction and sentence, the appellant preferred this ap-peal in which he has impugned the decision of the trial court on a hosts of grounds presented by his learned counsel, ***Mr Njanja***.

In the first ground, counsel submitted that the trial court erred by relying on Maiyo's dying declaration while the same was not clear as to who shot him and was neither written nor signed by Maiyo, nor witnessed by an independent person. He cited the decision in ***Stephen Mutura Kinganga v. Republic [2013] eKLR*** and submitted that it is unsafe to relying on a dying decla-ration without corroboration because it is made in the absence of the accused person and without the benefit of cross-examina-tion.

In the second ground of appeal, counsel submitted that the appellant was not properly identified because no identification parade was conducted. Counsel further urged that since the shooting of Ngugi and Maiyo took place in a public bar and there was a dispute as to who shot them, it was necessary to conduct an identification parade. He cited ***Wamunga v. Republic [1989] KLR 424*** and submitted that the trial court was obliged to exam-ine the evidence of identification closely to ensure that the appel-lant's identification was free from error.

Turning to the third ground, the appellant submitted that the learned judge was biased against him because she did not consider his defence which was not displaced by the prosecution. He argued that the trial judge ignored his defence that a gang robbed him of his revolver as he was leaving the bar with Ngugi and PW9 and that the same gang inflicted injuries on him as reflected in the P3 form that he produced in his defence. He contended further that the trial court misrepresented his evidence when it stated that he collapsed while running away because of his injuries whereas his evidence was that he collapsed because of an asthmatic attack.

In the fourth ground of appeal, the appellant complained that the prosecution failed to call relevant witnesses such as the patrons at the bar at the material time, the person who recovered his revolver, as well as Dr Ndung'u, who conducted the postmortem on Maiyo, thus denying him a chance to cross-examine the pathologist. He added that the revolver was produced in evidence irregularly and late in the trial and urged us, relying on ***Bukenya v. Uganda [1972] EA 549***, to make an inference that had those witnesses been called, their evidence would have been adverse to the prosecution case.

Next the appellant faulted the trial court for failing to hold that the ballistic evidence was inconclusive. He contended that the revolver and the fired cartridges were introduced in evidence late in the trial and under suspicious circumstances, and that the ballistics expert was not given the revolver until more than one year later. He added that the ballistic expert was not able to link the cartridges to the appellant's revolver and that the bullets recovered from Ngugi's body were so damaged that it was not possible to connect them with the appellant's firearm.

In the last ground of appeal the appellant submitted that the trial judge erred by ignoring inconsistencies and gaps in the prosecution case, which raised reasonable doubts whether it was the appellant who committed the two murders. He contended that there were contradictions between PW3 and PW9 on whether the appellant beat up PW9 after they returned to the bar with Ngugi. On the basis of the foregoing submissions counsel urged us to allow the appeal, quash the conviction and set aside the sentence meted to the appellant.

Ms Ngalyuka, learned counsel for the respondent opposed the appeal submitting that although the case against the appel-lant was based on circumstantial evidence, the prosecution proved its case beyond reasonable doubt. On Maiyo's dying dec-laration she contended that he did not sign it because he was in great pain. Nevertheless, she added, the statement was admissi-ble though unsigned. In any case, counsel submitted, the dying declaration was not the only evidence against the appellant be-cause PW2 also testified that Maiyo informed him that he was shot by a man who was quarrelling with his wife. Counsel added that the appellant was quarrelling with PW9 who was understood to be his wife.

As regards identification parade, counsel submitted that it was unnecessary because the appellant was well known to PW3 and PW9. She added that although PW9 was hiding at the coun-ter, she could identify the appellant through his voice as she was his lover and knew his voice well.

Turning to consideration of the appellant's defence, counsel submitted that the trial court properly considered and analysed the appellant's defence in the context of all other evidence and that there was no basis for accusing the trial court of bias. Coun-sel contended that the appellant did not deny having his firearm with him at the bar on the material day and time. She added that from PW5's evidence, the firearm had been issued to the appel-lant and as of the material day, he had neither returned it nor reported it stolen or lost.

Lastly on the ballistics evidence, counsel submitted that the court found it to be inconclusive but that was not the only evi-denced that the court relied upon to find the case against the appellant proved beyond reasonable doubt. Accordingly counsel urged us to dismiss the appeal.

As is the norm in a first appeal, we are expected to re-appraise the evidence on record, subject it to exhaustive evaluation and reach our own independent conclusion. In so doing, we are to make allowance for the advantage which the trial court had and which we are singularly lacking, that of hearing and seeing the witnesses as they testified. For that reason we are obliged to be slow to interfere with findings of the trial court based on as-sessment of the credibility of witnesses, unless no reasonable tri-bunal could have made such findings (See O***keno v. Republic (1972) EA 32)***.

The first issue that the appellant takes with the trial court is that it wrongfully admitted the dying declaration of Maiyo be-cause the statement was not signed, was inconclusive and unre-liable and may not have been made by Maiyo, because there was evidence that at the time he was in great pain and unable to speak.

Section 33(a) of the ***Evidence Act*** provides as follows regarding admissibility of dying declarations:

> *"33. Statements, written or oral, of admissible facts made by a person who is dead…are themselves admissible in the fol-lowing cases -*
>
> > *(a) when the statements is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case in which the cause of that person's death comes into ques-tion and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question." (Emphasis added).*

From the above provision, a dying declaration may be oral or written. In this case the evidence of PW10 was that he recorded Maiyo's statement on 5th August 2010 in which Maiyo stated that he was shot by a client whom he was attempting to remove from the bar for causing trouble. He added that Maiyo was not able to sign the statement because he was in great pain. We agree with the trial court that the statement did not require to be signed to be admitted as a dying declaration. It is enough that it was made by a person who is dead and relates to the cause of his death or the circumstances of the transaction that led to his death. The trial judge who heard and saw the witnesses testify believed that the statement in question was made by Maiyo and we do not think we have basis to conclude otherwise.

This leads to the appellant's contention that there was no evidence to corroborate Maiyo's dying declaration. In ***Choge v. Republic [1986] KLR 473***, this Court explained as follows regarding corroboration of a dying declaration:

> *"The general principle on which a dying declaration is ad-mitted in evidence is that it is a declaration made in extrem-ity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declara-tion need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying decla-ration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person." (Emphasis added)*

The importance of caution while relying on a dying declaration was re-emphasised in ***Philip Nzaka Watu v. Republic [2016] eKLR,*** where the Court stated:

> *Notwithstanding section 33(a) of the Evidence Act, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-ex-amination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a convic-*

tion, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe."

Having carefully re-evaluated the evidence, we are satisfied that there is no basis in the assertion that the learned judge convicted the appellant on the basis of an uncorroborated dying declaration alone. The learned judge was satisfied that Maiyo's dying declaration properly identified the appellant as the assailant because, from the evidence, the appellant was the only patron that Maiyo removed from the bar on the material day. The learned judge also found corroboration of Maiyo's dying declaration in the evidence of PW3 and PW9 as well the appellant's own defence which placed him, armed with a revolver, at the bar at the time Maiyo was shot dead.

She also found further support of the dying declaration in the evidence of PW3 and PW9 who testified that after the appel-lant started beating PW9, PW3 summoned his watchman, Maiyo, to remove the appellant from the bar and that Maiyo was shot shortly after removing the appellant from the bar. There is also the evidence of Maiyo's brother, ***Geoffrey Kibet Cheruiyot (PW2)*** who testified that on visiting Maiyo at Kenyatta hospital on 1st August 2010, Maiyo told him that he was shot by a customer who had disagreed with his wife. PW3 testified that the appellant had introduced PW9 to him as his wife and in his evidence he referred to the appellant and PW9 as husband and wife. We do not find any merit in this ground and accordingly, we reject the same too.

The next ground relates to identification of the appellant. Subject to what we shall say on the circumstantial evidence, we do not think there is any merit in this ground of appeal because this was a case of recognition rather than identification. The appellant was well known to PW9 with whom he had a love affair for about 10 months before the material day and had spent the previous night with. They came to the bar together in the after-noon, during daylight, and stayed there until the shooting at 7.00 pm. Similarly the appellant was no stranger to PW3 who testified that he had met the appellant and PW9 (who he described in his evidence as husband and wife), on three previous occasions. He was with the two of them at the same table the whole afternoon, during daylight, save when he stepped aside shortly to attend a meeting. The learned judge considered even voice recognition of the appellant by PW9 and cited ***Choge v. Republic*** *(supra)* on the principles governing admissibility of voice recognition. She satis-fied herself that PW9 was very familiar with the appellant's voice, that she recognised it, and that there was no possibility of a mis-take.

In these circumstances where the appellant was so well known to PW3 and PW9, it would have served no purpose to hold an identification parade, which would have been reduced to a mere formality. In ***Ajode v. Republic [2004] 2 KLR 81*** this Court explained that an identification parade is unnecessary in a case of recognition as apposed to identification. The Court stated:

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

(See also ***Githinji v. Republic [1970] EA 231).***

The next issue is the alleged failure of the trial court to con-sider the appellant's defence. A perusal of the judgment of the trial court shows that paragraphs 102 to 117 (pages 54 to 63) under the heading ***"As to whether the accused defence is plausible, reasonable and logical"***, are devoted to an exhaus-tive and thorough evaluation of the appellant's entire defence in the context of the rest of the evidence. The trial judge considered the injuries that the appellant claimed to have suffered in the alleged gang attack and found them minor superficial bruises rather than the injuries that could have been expected in the kind of gang attack that the appellant alleged he had suffered. On the alleged gang attack, the learned judge found it unlikely to have taken place because the appellant did not cross-examine PW9 on it while it was his evidence that she was also a victim. Again, the learned judge reasoned that if indeed there was a gang which committed the murders, PW3, who went to assist the shot Maiyo, could have seen it. As to the appellant's defence that he was sick and recuperating at home after the murders, the court found that to be implausible in the face of evidence that the police went look-ing for the appellant at his home, but could not find him. After considering all aspects of the appellant's defence , the learned judge delivered herself as follows, on paragraph 116:

> *"I have analysed the evidence adduced before this court and find the accused defence and the statements he has given by way of explanation incredible, unreasonable and false to the extent I have shown in this judgment. The evidence is clear that the accused shot the two deceased then ran away from the scene and hid for ten days. During the time of hiding, he had the sole opportunity to dispose of the revolver he had been issued. His defence that he lost it unawares at the scene is not true and I reject that explanation."*

In light of the foregoing, we are satisfied that there is no substance in the assertion that the learned judge was biased because she failed to consider the appellant's defence. The record shows that the learned judge carefully considered the appellant's defence, found it not credible, and rejected it.

The next compliant by the appellant is that the learned judge erred by failing to make an adverse inference against the prosecution for failure to call material witnesses. It is the appellant's contention that the prosecution should have called as wit-ness patrons in the bar at the material time, the person who re-covered the appellant's revolver and the pathologist who con-ducted the postmortem examination of Maiyo's body. We shall address the issue of the revolver together with the ground on bal-listic evidence.

As regards Maiyo's postmortem report, the same was pro-duced on 19th May 2015 by ***PW10*** as ***Prosecution Exhibit 8***. The postmortem was carried out on 18th August 2010 by ***Dr John Ndungu*** at Kenyatta National Hospital Mortuary. The trial court noted in the judgment that Maiyo's postmortem report was admitted with the consent of all the parties. The appellant was duly represented by counsel, and having consented to the pro-duction of the report, he cannot now be heard to claim that the report was irregularly admitted. In any event, we are satisfied that Maiyo's postmortem report was properly admitted under ***section 77(1) and (2)*** of the ***Evidence Act***. In ***Robert Onchiri Ogeto v Republic [2004] eKLR***, this Court, in finding that a postmor-tem report was properly admitted in circumstances similar to those in this appeal, stated thus:

> *"The postmortem on the body of the deceased was done by Dr. Ondigo Steven. The postmortem report was produced as exhibit at the trial by corporal Ambani under section 77 of the Evidence Act. One of the grounds of appeal is that the trial court erred in receiving the postmortem report which was inadmissible…Section 77 (1) of the Evidence Act allows such document under the hand of a medical practitioner to be used in evidence. By section 77 (2) of the Evidence Act, the Court is allowed to presume that the signature to any such document is genuine and the person signing it held the office and qualification which he professes to hold at the time he signed it. The appellant was represented by counsel at the trial who did not object to the production of the post-mortem report under section 77(1) of the Evidence Act and the Court did not see it fit to summon Dr Ondigo Steven for examination. Nor did the appellant's counsel ask for the calling of the doctor for cross-examination. In our view the postmortem report was properly admitted as evidence in ac-cordance with the law."*

We note too that throughout the trial, neither in the cross-examination by the appellant's counsel, nor in the defence itself, did the appellant suggest that Maiyo died from any other cause other than a single gunshot wound to the chest. There is ample evidence on record, in addition to the postmortem report, to show that the injuries from which Maiyo died were inflicted by a gun-shot. **PW2**, Maiyo's brother, testified that Miayo was shot and that he identified his body for purposes of postmortem on 18th August 2010 at Kenyatta National Hospital. This is the same wit-ness who also testified that Maiyo informed him that he was shot by a customer who had disagreed with his wife. The defence opted not to cross-examine ***PW2***. ***PW3*** also testified that Maiyo was shot outside the bar shortly after ejecting the appellant. ***PW10*** recorded Maiyo's dying declaration in which Maiyo stated that he was shot by a customer whom he had ejected from the bar. As we adverted earlier, the postmortem report, which we have found was properly admitted, shows that Maiyo died from chest injuries due to a single gunshot wound. In the circumstances of this ap-peal, we are satisfied that there was absolutely no doubt about the death of Maiyo or the cause of that death.

As regards the failure of the learned judge to make an add verse inference against the prosecution, as the decision in ***Bukenya v. Uganda*** *(supra)* makes clear, it is not in each and every instance that the court is required to make such an infer-ence. First, by dint of ***section 143*** of the ***Evidence Act***, in the absence of a provision of law requiring a specific number of wit-nesses, no particular number is required to prove any fact. (See ***Suleiman Otieno Aziz v. Republic [2017] eKLR)***. Secondly it is only where the evidence called by the prosecution is barely ade-quate, that the court is entitled to draw an adverse inference from the prosecution's failure to call important and readily available witnesses. In ***Donald Majiwa Achilwa & 2 Others v. Republic, Cr. App. No. 34 of 2006***, this Court stated as follows as regards adverse inference:

> *"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evi-dence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to es-tablish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution with-holds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case."*

In this appeal, considering the totality of the evidence that was adduced by the prosecution and the defence, we are not able to hold that it was barely adequate, so as to require the court to make an adverse inference.

The next ground of appeal relates to ballistic evidence. It is not clear to us what the appellant's precise complaint is because, contrary to his contention, the trial court found the ballistics ev-idence inconclusive and therefore did not rely on it. PW1 test-fired the appellant's firearm, the Taurus Revolver serial No. TK70350 and found it in good working condition and formed the opinion that it was a firearm within the meaning of the Firearms Act. However, the firearm was allegedly recovered, together with three live ammunition and 2 spent cartridges, by police from ***Kayole Police Station***, but the person who made the alleged re-covery was not called as a witness and as a result those items were not admitted as exhibits. In addition, three bullets recovered from the bodies of Maiyo and Ngugi were found to be too damaged that the ballistic expert could not make conclusive findings. For those reasons the trial judge opted not to rely on the ballistic evidence, which she found inconclusive and unhelpful.

This then leads to the question whether the prosecution could have proved its case against the appellant in the absence of ballistic evidence. The appellant does not dispute having been armed with the said revolver on the afternoon of the material day, only that he argues he was robbed of it as he was leaving the bar. There is also the additional evidence of ***Ibrahim Malava (PW5)*** who testified to having issued the Taurus revolver to the appel-lant on 22nd June 2010 and that the appellant had not returned the same as of the date PW5 testified in court, which was long after the two murders. As we have already stated, the trial court found the appellant's defence that he lost his firearm shortly be-fore the murders implausible and rejected it.

The learned judge relied on three previous decisions of this Court, namely ***Ekai v. Republic [1981] KLR 569, Ramadhan Kombe v. Republic, Cr App No. 168 of 2002*** and ***Karani v. Republic [2010] 1 KLR 73*** and concluded that failure to produce the murder weapon of itself is not fatal. We cannot fault the trial court in reaching that conclusion. In ***Karani v. Republic (supra)*** where on appeal the appellant's conviction was challenged on, among other grounds, irregular production of the murder weapon (a *panga*), this Court found that indeed the exhibit had been ir-regularly admitted. However, the Court explained that failure to produce the murder weapon was not necessarily fatal to a con-viction. The Court stated as follows at page 79:

> *"The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. <u>So long as the court believe, on the evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.</u> " (Emphasis added).*

(See also ***Kyalo Kalani v. Republic [2013] eKLR and Abdalla Hassan Hiyesa v. Republic [2015] eKLR)***.

Before we consider the last issue on circumstantial evi-dence, we shall dispose of the appellant's complaint that the trial judge erred by relying on prosecution evidence that was riddled with contradictions and gaps. It has been stated time and again that in evaluating discrepancies, contradictions and omissions, one cannot pick out a sentence and consider it in isolation from the rest of the evidence. It is

after consideration of the evidence in totality that the court is properly able to determine whether the contradictions are minor or go to the root of the prosecution case (See ***Philip Nzaka Watu v. Republic (supra)***. Accordingly, it is not each or every inconsistency in evidence that court frowns upon. Having carefully re-evaluated the evidence, we do not see any material contradictions or gaps that can undermine the judg-ment of the trial court.

The last issue for our consideration is whether the circum-stantial evidence adduced by the prosecution unerringly proved that it was the appellant, to the exclusion of any other person, who murdered Ngugi and Maiyo. In ***Makau & Another v. Republic [2010] 2 EA 283,*** this Court described circumstantial evi-dence as follows:

> *"Circumstantial evidence is evidence of surrounding circum-stances from which an inference may be drawn as to the com-mission of a criminal offence. It has been held in previous de-cisions of this and other courts that such evidence may in some cases prove a fact with the accuracy of mathematics."*

(See also ***Musili Tulo v. Republic Cr. App. No. 30 of 2013).***

To constitute the basis for conviction, circumstantial evi-dence must satisfy several conditions designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. So in ***Abanga alias Onyango v. Republic, Cr. App. No. 32 of 1990*** this Court identified the conditions as follows:

> *"It is settled law that when a case rests entirely on circum-stantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerr-ingly pointing towards guilt of the accused; (iii) the circum-stances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all hu-man probability the crime was committed by the accused and none else."*

(See also ***Sawe v. Republic [2003] eKLR)***.

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

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

The trial court was well aware of these principles on circum- stantial evidence. Indeed on page 63, the learned judge cautioned herself that the evidence before her was circumstantial and she even cited the judgments in ***Venanzio Naive v. Republic, CA No. 81 of 2003*** and ***Kimeu v. Republic [2002] 1 KLR 756*** for the proposition that before drawing the inference of guilt from cir-cumstantial evidence, the court must satisfy itself that there are no other co-existing circumstances which would weaken or de-stroy the inference of guilt. Nevertheless, she was satisfied that the evidence on record unerringly pointed to the appellant as the perpetrator of the two murders. The learned judge cited the fol-lowing evidence.

The prosecution evidence and the appellant's own defence placed the appellant at the scene of the murder from about 2.00 to 7.00 pm. The appellant was, while at the bar, armed with his official revolver, Taurus TK 70350. Maiyo was shot once, outside the bar shortly after he had ejected the appellant for assaulting PW9 and causing a fracas. While admitted at the hospital, Maiyo informed his brother PW2 that he was shot at the bar by a cus-tomer who had disagreed with his wife. The appellant had intro-duced himself to PW3 as the husband of PW9. PW3's evidence was that Maiyo was shot shortly after he ejected the appellant from the bar. PW3 heard one gunshot outside the bar shortly af-ter Maiyo had ejected the appellant. The postmortem report indi-cates that Maiyo was shot once in the chest. In his dying decla-ration to PW10, Maiyo state that he was shot by a customer whom he had ejected from the bar for causing a fracas. There was no evidence of any other patron at the bar who caused a fracas or was ejected on the material day and time. Ngugi was shot apparently because the appellant was unhappy that he had agreed to offer PW9, whom the appellant considered "his prosti-tute", a lift. PW9 heard the four gunshots that killed Ngugi while hiding from the appellant behind the counter and shortly there-after found Ngugi lying dead. The pathologist's report indicated that Ngugi was shot four times. Maiyo was shot while the appel-lant was outside the bar and Ngugi was shot while the appellant was inside the bar. During the murder of Maiyo and Ngugi, the appellant was extremely aggressive and agitated. After the mur-ders, the appellant fled and hid for a period of ten days. Lastly, the appellant did not report to the police the alleged loss of his revolver as he was obliged to do.

The appellant's act of fleeing and hiding for 10 days and failing to report the alleged theft of his firearm cannot possibly be consistent with his alleged innocence. In some circumstances, and we believe this is one such case, this Court has held that the conduct of an accused person may amount to corroboration. In ***Alex Wafula v. Republic, Cr. App. No. 7 of 2008***, the Court stated as follows:

> *"Some corroboration for that finding, if any was necessary, was found in the conduct of the appellant who had been escaping from the police for about one week and also ran away and had to be chased and arrested by the vigilante group led by Patrick Wepukulu (PW.4). It was not the conduct of an innocent person."*

(See also ***Mangala Somba Maricheni v. Republic [2014] eKLR).***

We are ultimately satisfied that the circumstantial evidence adduced by the prosecution pointed unerringly to the appellant as the perpetrator of the two murders with which he was charged and that there were no co-existing circumstances which could have weakened or destroyed the inference that he was the perpe-trator of the offences.

Having carefully considered this appeal, we are satisfied that the appellant's conviction on circumstantial evidence was safe and sound. We do not find merit in any of the grounds of appeal and the appeal is hereby dismissed in its entirety. It is so ordered.

Dated and delivered at NAIROBI this 24th day of July, 2020

W. OUKO, P.

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR