



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & SICHALE, JJ. A.)

CRIMINAL APPEAL NO. 84 OF 2019

BETWEEN

ANTOINETTE UWINEZA Alias MICHELINE UWABABYYI....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (**Lesit, J.**) delivered on 1st November, 2018 in **H.C.CR.C. NO. 45 OF 2013**)

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JUDGMENT OF THE COURT

[1] On 18th February 2013, the lifeless body of **Winnie Uwambaye Colpitts** (Winnie) a Rwandese national was found in room No. 417 at Saharan Lodge within Nairobi County. For two days Winnie had been missing from her residence in Westlands, where she was cohabiting with her British national boyfriend, Simon James Smith (Simon). Following investigations, **Antoinette Uwineza alias Micheline Uwababyyi** (appellant) and 2 others, were arraigned before the High Court for the murder of Winnie.

[2] During the trial, 16 witnesses testified on behalf of the prosecution. In brief, the prosecution case was as follows: on the 16th February, 2013, Simon had left Winnie at their Rhapta Road Apartments residence. At about 1.30 p.m., Simon received a text message from Winnie informing him that she would go to meet some friends but would be back in time for dinner. At about the same time, at the request of his colleague Daniel Kihara Kimani (**Daniel**), John Mbugua Wangethe (**John**) a taxi driver, picked Winnie from the car park of Rhapta terraces apartment. Apparently, Winnie had wanted Daniel to pick her but Daniel was not available. On Winnie's instructions, John drove her to a place in town near Kampala Coach parking bay where she paid John and alighted, informing John that she was meeting a friend. According to John it was about 2.40 p.m, when Winnie alighted.

[3] On the same day, at about 3.00 pm, Edmond Okangu Wekesa (**Edmond**) was on duty at Sahara Lodge, along Duruma Road where he was then working as a receptionist. He left his duty station briefly to go to buy some tissue papers, leaving one James Mwangi Wairagu (**Wairagu**) to hold fort for him. As he was going down the stairs from the reception, he met a lady and a man whom he described as "a brown lady and a short man" going up the stairs. (The brown lady according to the prosecution witnesses was said to be the appellant which is the gravamen of this appeal).

[4] As Wairagu was at the reception, a man carrying a black suitcase and a lady carrying a hand bag and whom he described as "fair skin, brown, with a tattoo on the left hand," arrived at the reception and asked for a room. It was the lady who asked for the room as the man did not speak. Wairagu took them to room No. 417 which was on the second floor and which was going for Kshs. 1,000. The lady remained in the room while the man accompanied Wairagu back to the reception where he paid for the room using his passport which had the name 'Jeane Claude'. Wairagu issued a receipt to the man. Shortly thereafter Edmond came back and Wairagu informed him that he had leased out room 417 and showed him the receipt book.

[5] Edmond recalled seeing the same lady whom he had seen that afternoon and who had taken room No. 417, talking on the phone on the corridor on the second floor. At some stage, the lady also came downstairs while speaking on the phone and remained on the phone for over 40 minutes. Edmond noticed that the lady who was wearing a sleeveless blouse had a tattoo on the left shoulder. He completed his 24 hour shift the next morning at 8.00 am and left having handed over to Erastus Nyaga (**Erasuts**), who reported for his 24-hour shift that morning i.e, 17th February 2013.

[6] Erastus claimed that during his shift he never received the key to room No 417 as the occupants never checked out. On the morning of

18th February 2013, Edmond reported on duty for his shift. The cleaner asked him for the key to room No 417, and since the key had not been returned by the customer, they tried several other keys and managed to open the room at about 11.00 am. Edmond and the cleaner were shocked to find Winnie's lifeless body on the bed with a paper bag around her neck and her face covered with a bedsheet.

[7] The matter was reported at Central Police Station. Police officers including PC Patrick Muiruri (**PC Muiruri**) and PC Obed Balesa (**PC Balesa**) visited the scene. PC Balesa took several photographs of the scene including the body and the room after which the body was moved to the City Mortuary.

[8] In the meantime, on 16th February, 2013 Simon who had not seen Winnie by 5 p.m. sent Winnie a message but she did not respond. At around 12.30 am, Simon received a message from Winnie's phone telling him not to worry as she had left for Nakuru with friends in a last minute arrangement. Simon immediately called Winnie's number and the phone was answered by a lady who identified herself as Susan and claimed to be with Winnie in Nakuru. Susan explained that Winnie was in another room but had left her phone charging in that room. Simon became alarmed when he failed to reach Winnie that night despite calling her number several times. Simon realized that there was something wrong when he received a message from Winnie's sister that she had also tried unsuccessfully to reach Winnie.

[9] On Sunday 17th February 2013 Simon was at Kileleshwa Police station reporting Winnie as missing when he received a call from a lady who identified herself as Juliet and a friend to Winnie. Juliet claimed that Winnie had been arrested in Nakuru. Simon gave the phone to a police officer who also spoke to Juliet and she repeated the same message, and it was agreed that she would find out which station Winnie was being held and why she had been arrested. Juliet never called back again and the number she used which was **0787740788** remained switched off.

[10] Simon continued with his efforts of tracing Winnie. He got the registration number of the taxi which had picked Winnie from their residence, and managed to trace John who confirmed that he had dropped Winnie at Kampala Coach parking bay. He went through Winnie's things in an effort to get her contacts. He obtained eight different numbers which he called but most did not bear any positive results. The number which bore a positive result was **0725435796** which was answered by lady who identified herself as Antoinette (appellant). She claimed to have talked with Winnie several times on that fateful Saturday, and claimed that they were due to meet but did not meet. Antoinette later called and claimed that one Collins had seen Winnie that Saturday evening. She gave Simon the number of Collins. Simon called Collins several times but Collins declined to talk on phone insisting that they meet. Simon finally met with Collins and Collins changed his story saying he was not sure whether he actually saw Winnie on the fateful night but thought that the person looked like her. Collins advised Simon to stop further police investigations as the police would not help him. Simon gave the information to the police and Collins was later arrested. On 26th February 2013, Simon having enlisted the help of a private investigator, went to the City mortuary together with Winnie's sister Vivian, and they were shown a dead body which they identified as that of Winnie.

[11] Subsequently the body of Winnie was identified to Dr. Johansen Oduor, a police pathologist by Laetitia Uwimbabazi and Simon James Brudon. Dr. Oduor performed an autopsy from which he formed the opinion that the cause of death of Winnie was asphyxia due to strangulation.

[12] On 14th March, 2013, PC Benson Chebor (PC Chebor) and other officers were assigned to trace the phone of Winnie which was apparently still in use. Through Safaricom, the location of the phone was identified as Kayole and details of the sim card of the person using the phone identified as Alexander Mutie (Alexander). Alexander who was arrested while in possession of the handset, was the 2nd accused during the trial. He explained that he had bought the phone from one OD at Eastleigh while in the company of his cousin, one Joseph Mbuvi Makau (Mbuvi). Alexander and Mbuvi took the officers to the house of OD but OD managed to escape through the back door.

[13] On 9th July, 2013, PC Joshua Kipkemoi Langat (PC Langat) accompanied by PC Ratemo proceeded to Eastleigh where Mbuvi identified OD as the person who sold the phone to Alexander. OD was arrested and charged as the 3rd accused person during the trial.

[14] IP Simon Bitole (**IP Bitole**) who was working with the Criminal Intelligence Unit and based at Safaricom offices as Liaison Officer produced extracts of records and statements from Safaricom showing that the subscriber for mobile telephone number **0725435796** was registered as Micheline Uwabeyi ID No. 07180600 while that of mobile phone No. **0706140492** was registered as Winnie Uwambaye, ID No. 11972700. He testified that the record shows that on 16th February, 2013, there was communication between the two lines at 12.30 hours. At that time, the location for line No 0725435796 (Micheline) was in Ngara, while the one for line No 0706140492 (Winnie) was in Westlands. At around 3.05 p.m., both numbers were in the same area along Duruma Road. After 17.41 hours, there was no communication between the two subscribers. At around 21.45 hours, both numbers were in Ngara area. The witness produced an extract of the data for the phone records.

[15] On 13th March 2013, IP John Gichuki (IP Gichuki) of flying squad Nairobi took over the investigations. Upon interviewing Simon and examining the records from Safaricom, IP Gichuki concluded that the appellant was the registered subscriber for line number 0725435796 which was in the name of Micheline Uwababbyi. On the same night he received information acting on which he proceeded to Laico Regency Hotel where he arrested the appellant who was identified to him by an informer. Upon interrogation, the appellant explained that her Safaricom line, 0725435796 had crashed and that she had given her phone which she was using for that line to her brother.

[16] The next day, IP Gichuki was with Edmond, when another officer arrived with the appellant who had been removed from the cells. Edmond identified her as the woman who had hired room 417 at Saharan Lodge. IP Gichuki also called Wairagu to the station and arranged for an identification parade which was carried out by Chief Inspector Robert Owino (C. IP Owino), who confirmed that Wairagu was able to identify the appellant. Details of the passports which was used to hire the room were obtained from the Rwanda High Commission, and the owner of the passport was identified as Kafurama Wilson and a photograph of the holder was also availed. However, when Edmond and Wairagu were shown the photograph, they both claimed it was not of the man who had paid for the room. The appellant and her co-accused were subsequently charged with the offence.

[17] When put to her defence the appellant gave a sworn statement and called 3 witnesses. These were: Innocent Mudahinuka, a business

man who claimed that the appellant was his girlfriend between 2008 and 2012 and that they continued to be friends even after parting; Micheline Uwababyyi, a friend to the appellant who explained that she had used her passport to register a sim card used by the appellant, and who testified that she knew Winnie as a great friend of the appellant, and maintained that there had been no disagreements between them. Rukunda Fabrice who is a younger brother to the appellant swore that the appellant and Winnie were great friends. He explained that the appellant had given him her nokia phone which he used until the police questioned him.

[18] In her sworn statement, the appellant denied having murdered Winnie. She explained that Winnie was a great friend whom she had known for a long time. They were both commercial sex workers, and Winnie had confided in her that her boyfriend Simon was not aware about this. Winnie was pregnant and although she had informed Simon that the pregnancy was his, the appellant was privy to the fact that Winnie was worried that the pregnancy could belong to her other boyfriends, who included Jean Claude from Rwanda and Allan also from Rwanda.

[19] On the material day, that is 16th February 2013, the appellant testified that she received two missed calls and messages from Winnie asking her to call back. She later spoke to Winnie who informed her that she wanted to go to Rwanda and had informed Simon that she was going there for the purpose of divorcing her former husband. Winnie wanted the appellant to corroborate her story should Simon call her. The appellant maintained that they did not meet with Winnie on that day but only spoke on the phone, and that Winnie informed her that she was going to meet someone in town and that when she finished that business she would send the appellant Kshs. 2,000 which the appellant had asked for. The appellant called Winnie again at 4.00 pm. and at 7.00 p.m. and on both occasions Winnie promised to get back to her but never did. The appellant who was not amused, sent Winnie a text message telling her she did not want child play. The appellant denied having met Winnie on that day, or having gone into Saharan Lodge or having booked a room there. She stated that she only came to know of Winnie's death at the CID headquarters after her arrest.

[20] She conceded that Simon had called her asking about Winnie and she had told Simon that she was aware that Winnie was travelling to Rwanda to pursue her divorce. Simon later called her again and informed her that Winnie was not in Rwanda. She called two of Winnie's boyfriends, Collins a Nigerian, and Jean Claude a Rwandese, to ask whether they were aware of Winnie's whereabouts. Claude said he had not seen Winnie and wanted nothing to do with her. Collins said he had seen her at 680 Hotel with a man he did not know, and that he did not talk to her. The appellant passed the information to Simon and also gave Simon the number of Collins. Later Simon called and asked the appellant to meet with him but the appellant declined because a lady who claimed to be Winnie's sister from Rwanda warned her not to do so.

[21] About a month later the appellant was arrested by the police from Grand Regency Hotel. She was taken to Kilimani police station where she spent the night. The next day she was taken to CID Headquarters where she was interrogated by several officers. It was only when her boyfriend one Innocent came to the station, that she learnt from him that she was arrested because Winnie had died. She cried because she was shocked by the news of Winnie's death. She was questioned about her passport but she explained that she had lost it and had a letter from the police. She was eventually charged with the murder of Winnie. She maintained that she never disagreed with Winnie nor did she have any grudge against her. She denied having murdered her.

[22] At the conclusion of the trial, the learned Judge considered the evidence and found that Winnie was murdered; that there was no eye witness to the murder; that on the 16th February 2013, the appellant and Winnie were in constant communication within the same area where the body of Winnie was recovered; that the body of Winnie was found in room No. 417 two days later; that Winnie died as a result of asphyxia due to strangulation and that the manner in which Winnie died showed that there was malice aforethought as the injuries were intended to cause her death; that the appellant was identified by Wairagu as having been to Saharan lodge on the 16th February 2013 whilst in the company of the man who booked room No. 417; that although the evidence was circumstantial, it was sufficient to lead to the conclusion that the appellant was responsible for Winnie's death.

The learned Judge therefore acquitted the appellant's co-accused but convicted the appellant of the murder of Winnie contrary to section 203 as read with section 204 of the Penal Code, and sentenced her to life imprisonment.

[23] The appellant who is dissatisfied with her conviction and sentence, has lodged an appeal before this Court challenging the judgment of the High Court. In her memorandum of appeal, the appellant has raised 7 grounds faulting the learned Judge for erring in law and fact: by accepting the prosecution case as proved beyond reasonable doubt while the prosecution had not discharged the burden of proof; by relying on evidence that was not admissible and which did not meet the evidentiary threshold; in failing to find that the identification process was unsafe; in failing to find that material witnesses were not called; in failing to find that the trial Judge relied on discordant testimonies of the prosecution witnesses; in failing to find that the appellant's defence was not considered; in failing to take note of the fact that the chain of circumstantial evidence was broken and could not hold; and in relying on extraneous facts in reaching her decision instead of relying on the evidence adduced.

[24] In support of the appeal, the appellant relied on written submissions which were filed and highlighted during the hearing by his counsel Mr Siwaka. The appellant submitted that the evidence adduced by the prosecution did not meet the evidentiary threshold as it was neither safe to rely upon nor sufficient to prove the prosecution case to the required standard. The appellant identified several flaws in the evidence. First, she singled out the evidence of identification maintaining that the identification parade was not conducted in accordance with the Police Standing order, that the appellant was the only one in the parade who had a tattoo, and that it was exposed so it was easy for a witness to pick her out; and that the learned Judge did not comply with the caution given by this Court in **Wamunga vs Republic [1989] KLR 424** of the need to examine the evidence of identification carefully in order to confirm that the identification was free from error.

[25] Secondly, the appellant faulted the prosecution for failing to call material witnesses to testify. These included Winnie's sister Vivian who allegedly conversed with Winnie and Simon on the date Winnie disappeared, and also identified Winnie's body; the private investigator who was engaged by Simon and who led to the recovery of the body; and the man who accompanied the appellant to Saharan lodge. Relying on **Bukenya and others vs Uganda [1972] EA 549**, the appellant submitted that the prosecution had a duty to call all necessary witnesses to establish the truth; and **R vs George Anyang [2016] eKLR** for the proposition that where the evidence called is barely adequate the court may infer that the evidence of the uncalled witnesses would have been adverse to the prosecution case.

[26] In addition, the appellant urged that that the trial Judge failed to discharge her duty to reconcile inconsistencies and contradiction in the prosecution evidence. She cited **Vincent Kasyula Kingo vs Republic, Nairobi Criminal Appeal No. 98** of 2014 and **Josiah Afuna Angulu vs Republic, Criminal Appeal NO. 277 of 2006 (UR)** for the proposition that a trial court has a duty to reconcile discrepancies where any exists and that where there is failure to do so, an appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not. She identified the evidence of Simon and Edmond as inconsistent and contradictory, and argued that had the learned Judge properly considered the discrepancies she would have found that they created a doubt in her favour.

[27] Finally in regard to circumstantial evidence, the appellant cited several authorities on the test that such evidence should satisfy before it can be relied upon. These included **Rex vs Kipkering Arap Koske & 2 others (1949) EACA 135**; **Abanga alias Onyango vs Republic, CR App No 32 /1990(UR)**; **Dhaley Singh vs Republic, Cr Appeal No.10 of 1997(UR)**; **Sawe vs Republic [2003] KLR**; and **Mwenda vs Republic [2006] 1 KLR 133**.

[28] The appellant maintained that the circumstantial evidence relied upon by the prosecution did not meet the required threshold as it did not lead irresistibly to her guilt. This was because her sworn statement of defence explained her communication with Winnie, while her conduct of registering her phone in the name of her friend Micheline was explained through evidence regarding the loss of her passport, and therefore no evidence of any criminal intention on her part was established. In addition, the defence witnesses confirmed that there was no enmity between her and Winnie.

[29] Furthermore, in the appellant's view, the chain of circumstances relied upon by the prosecution was broken, as there were several unanswered questions that arose from the prosecution evidence. Such questions included how Winnie who was not booked in the Hotel was able to access Room No. 417 without being seen, and the mystery surrounding the identity of Jean Claude the man who hired room 417. The appellant faulted the learned Judge for failing to properly consider her defence. On sentence the appellant pleaded that the sentence of life imprisonment that was imposed upon her was extremely harsh. For these reasons the appellant urged the Court to allow the appeal.

[30] Mr. O'Mirera Senior Assistant Director of Public Prosecutions appeared for the State. He relied on written submissions that he had filed, and which he duly highlighted during the hearing of the appeal. Mr O'Mirera opposed the appeal against both conviction and sentence, arguing that the appellant's conviction was safe as there was overwhelming circumstantial evidence that linked the appellant with the death of the deceased. He maintained that the evidence of Simon formed a chain of circumstances that explained how Winnie disappeared, and that Simon's evidence that he talked to the appellant about Winnie's disappearance is not hearsay but direct evidence on the circumstances attending the deceased's death. Counsel argued that the evidence of Edmond and Wairagu squarely placed the appellant at the scene as the lady who accompanied a man on hiring Room 417 at Saharan Lodge; that the learned Judge found the evidence of the prosecution witnesses truthful and reliable, including the communication data evidence adduced by Inspector Bitole and Inspector Gichuki and that she properly concluded that the appellant was succinctly connected in the chain of circumstantial evidence. In counsel's view the evidence regarding how Winnie's body was recovered implicated the appellant as someone who had special knowledge about Winnie's disappearance. Counsel pointed out that there was critical communication between Winnie and the appellant as established through the digital evidence which was admissible under section 78A of the Evidence Act; that under section 111 of the Evidence Act, the burden shifted to the appellant as she was possessed of facts especially within her knowledge, and therefore her defence was properly rejected. Counsel concluded that motive was not an essential ingredient for the offence of murder.

[31] This being a first appeal we reiterate our duty as restated by this Court in **Mark Oiruri Mose vs Republic [2013] eKLR**;

**“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court, afresh analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that. The well-known case of **Okeno vs Republic (1972) EA 32** which sets out that principle has been referred to in several decisions of this Court and of the High Court.”**

[32] It is in this spirit that we have endeavored to revisit and capture the evidence that was adduced before the trial court. In reconsidering the evidence, we note that the appellant having been charged under Section 203 of the Penal Code, the prosecution had to prove the elements of the offence of murder beyond reasonable doubt in order to secure a conviction. Thus the prosecution had to prove that Winnie died and that her death arose through an act or omission of the appellant either directly or in concert with another person; and that the appellant had malice aforethought in committing the act or omission.

[33] The circumstances in which Winnie's body was recovered from Room 417 in Saharan Lodge leaves no doubt that her death was not accidental but the result of a deliberate act of strangulation. The main question before the trial court was basically who committed this act, and whether that person had malice aforethought to cause the death or injury of the deceased. It is not in dispute that there were no eye witnesses to the crime. The evidence against the appellant was therefore purely circumstantial.

[34] The trial Judge properly directed herself on the law by relying on appropriate authorities on circumstantial evidence. These included some of the authorities that have been cited in the submissions made before us, such as, **Rex vs Kipkering arap Koske & Anor** (supra); **Sawe vs Republic** (supra); and **Ernest Abanga alias Onyango vs Republic** (supra). In **Muchene v Republic [2002] 2 KLR 367**, this Court held that:

**“1. It is trite law that where a conviction is exclusively based on circumstantial evidence such conviction can only be properly upheld if the Court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant but also that there exist no co-existing circumstances which would weaken or destroy such inference.**

**2. It is settled law that the burden of proving facts which justify the drawing of such inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains as such.”**

[35] The principle in these decisions is that the circumstances upon which the guilt of an offender is to be inferred, must be each identified and firmly established, and the facts so established must form a complete and consistent chain pointing compellingly to the guilt of the offender, and there must be no weak link or loose ends that creates a doubt or points a finger at some other person.

[36] We have carefully considered the grounds of appeal, the rival submissions made before us, the evidence as gleaned from the record of appeal and judgment of the High Court. As it is clear that the appellant was convicted on the basis of circumstantial evidence, the issue that we must address is whether the prosecution proved the inculpatory facts upon which the appellant's guilt is anchored; whether the facts so established formed a complete chain that led irresistibly to the appellant as the person who caused the act or omission that resulted in the death of Winnie; whether there were any co-existing circumstances that could weaken the inference of guilt; and whether the appellant had malice aforethought in committing the act or omission.

[37] The learned Judge addressed the circumstantial evidence against the appellant as follows;

**“57. The issue is whether the circumstantial evidence against the 1st defendant is sufficient to sustain a conviction. The first test is whether the circumstances from which an inference of guilt is sought to be drawn, has been cogently and firmly established... I find it cogently and firmly established that the deceased and the 1st accused were friends and were in the same trade of prostitution. That is not contested. I find that it is established beyond any reasonable doubt that the two of them were in communication and that they were in the same location at 3 pm on the material day. The phone data is very clear on that.**

**58. The nexus required is one sought to be established by the prosecution that the 1st accused was one of the two who hired the room where the deceased's body was found dead. Proof of this point depends with the evidence of PW2 and 4. I have considered the fact that PW2 and 4 testified that the 1st accused in company of an unknown man booked a room at Saharan Lodge. Both witnesses described a tattoo the 1st accused had on her shoulder. PW4 identified her in a parade conducted 26 days after the incident. It was PW4 who hired out the room. PW2 saw those who hired it as he went to take back his position from PW4 after the room was rented.**

.....

**65. The other test is whether the circumstances the prosecution seeks to rely upon are a definite tendency unerringly pointing towards guilt of the accused; and whether 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 no one else.**

**66. The prosecution has shown that the 1st accused true names remain mysterious as she has used other persons identification documents to secure her cell phone lines (two in this case) and for securing services. The other point is that after this incident, the 1st accused crushed her cell phone sim card line which she had used to communicate with the deceased before her death. She said as much in her defence. She also gave away her handset, mobile phone, to her brother DW3, who confirmed it in court. I find this conduct of crushing her cellphone line and giving away her handset was a deliberate act to cover her tracks. All these factors, including that of identification unerringly and irresistibly point to 1st accused guilt.”**

[38] The learned Judge identified several inculpatory facts from which she drew the conclusion that the appellant was guilty of the murder of Winnie. First, is the issue of identification of the appellant as one of the two people who hired Room 417 at Saharan Lodge on 16th February 2013. Second, is the appellant's communication with the deceased on the 16th February, 2013 including a communication when the two were around the area of Saharan Lodge. Third, is the fact that the body of the deceased was discovered two days later in Room 417. Fourth, is the fact that the telephone lines which were used by the appellant to communicate with Winnie were not registered in the name of the appellant but in the name of someone else. Fifth, the appellant destroyed the sim card for the telephone line that she had been using to communicate with Winnie and gave the mobile phone she was using to her brother.

[39] It is necessary that we interrogate these facts to confirm whether the same were firmly established, and if so, whether they are incompatible with the innocence of the appellant, and whether they form a chain that irresistibly point to the appellant as the person who killed Winnie.

[40] Both Edmond and Wairagu identified the appellant as the one who was with the man who hired room 417 at Saharan Lodge. As regards the identification by Edmond, the learned Judge correctly found that his identification was not safe to rely on. This was because the appellant was exposed to Edmond before her identification, which made the purported identification by Edmond no more than dock identification. As was stated by this Court in **Ajode vs. Republic [2004] eKLR**:

**“It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade.”**

[41] As Edmond did not participate in any identification parade, his identification of the appellant had no probative value. This leaves the identification evidence of Wairagu as the sole evidence of identification that was relied upon. It is trite law that such evidence must be carefully considered and evaluated before it can be relied upon (see **Wamunga v Republic**, 1989 KLR 424).

[42] The learned Judge having considered the evidence of Wairagu, was satisfied that Wairagu had ample opportunity to see the two customers as he conversed with them about the room and took them to see the rooms. The learned Judge concluded the issue of identification as follows:

“61....PW4 described the man as stout and short with features of a wrestler. The lady was described as light skin with a tattoo on the shoulder. PW4 identified the 1st accused and described the tattoo to the police. PW2 gave similar description of the two he saw in the lodging and who were identified to him by PW4 as those who had hired room No. 417. I find that PW4 received very strong impression of the features of the 1st accused, which he described to the police before her arrest. Those features were tested positively during his testimony in court.

...

63. ...I find that considering the unique features of the 1st accused, 26 days were not such a long time. I find the fact PW4 took time with the 1st accused as she chose the room of her taste after walking up two floors with her and the fact that after that she remained at the stairs chatting away in a foreign language which seemed to fascinate PW4 as he noted it. I find all these factors gave PW4 an opportunity to see the 1st accused clearly and to leave a permanent impression in his mind of 1st accused identity. I find that the two made a lasting impression in his mind, something he could not easily forget.

64. Based on these findings of identification, I am satisfied that the 1st accused was properly identified by PW4 as the one who with another not before the court, booked the room and paid for it two days before the rotting body of the deceased was found in it.”

[43] The learned Judge appeared to have accepted Wairagu’s evidence in chief that he gave the description of the appellant and her companion to the police. However, the proceedings in the record of appeal reveal that under cross-examination, Wairagu admitted that his statement that was recorded by the police did not contain any description of the appellant, nor did it appear to contain that very crucial lead that the appellant had a tattoo on her arm. Moreover, Wairagu admitted that during the identification parade, it is only the appellant who had a tattoo on her arm. Obviously, this was a clear distinguishing feature. The appellant maintained that she was prejudiced in the identification parade because of the tattoo. Surprisingly, the parade officer, Chief IP Owino testified that he never saw any tattoo on the suspect.

[44] The force standing orders which are reproduced in the parade identification forms give clear instructions on how the parade is to be performed. We reproduce two crucial requirements stated in the form as (d) and (n):

**d. The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;**

.....

**(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified” (emphasis added)**

[45] It is evident that Chief IP Owino did not take into account the tattoo on the appellant’s arm. Even though it was not a disfigurement, it was a clear distinguishing mark which the parade officer ought to have ensured was concealed and not apparent during the identification parade. This Court in *Njihia vs Republic [1986] KLR 422 noted that: -*

**“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”**

[46] In *John Mwangi Kamau vs Republic [2014] eKLR* this Court appreciated that Identification parades are meant to test the correctness of a witness’s identification of a suspect, and noted that ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. However, following *Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008*, the Court held that the identification parade was not invalidated by the witnesses not having previously given a description of the suspect to the police, but that the relevant consideration would be the weight to put on the evidence regarding the identification parade in light of such omission.

[47] It is clear that the parade officer CIP Owino did not take precaution in ensuring that the tattoo on the appellant which was a clear distinguishing feature was not apparent during the parade such as to identify the appellant. This lessened the reliability of the identification parade as the possibility of Wairagu having identified the appellant simply because she had a tattoo cannot be ruled out.

[48] Notwithstanding our finding on identification, assuming for the sake of argument that the appellant was indeed identified as the woman who was with the man who hired the room, the question is, was this an inculpatory fact that was incompatible with the innocence of the appellant? The evidence revealed that the appellant was a commercial sex worker. Therefore, her being with a man hiring a room in a lodge is consistent with the nature of her trade, and does not necessarily implicate her with a body found in the room two days later. Both witnesses testified that the woman who was in the company of the man who hired the room was loud, as she kept on talking loudly on her phone. She therefore drew attention to herself and this was not consistent with someone who had an intention to commit a heinous crime in the room that was being hired.

[49] In addition, there is a gap in the evidence regarding the nexus between the appellant and Winnie. No one saw the two together in the hotel, nor is there evidence that their conversation on that day was different from what the appellant stated in her defence. There is also the missing link concerning the man who hired the room. The man identified himself as Jeane Claude. Both the appellant and her witness Innocent, claimed that they identified one Jeane Claude to the police who arrested him, but who later released him. Without this man having been charged the evidence against the appellant remained mere conjecture.

[50] Mr O'Mirera applying the last seen alive theory argued that under section 111 of the Evidence Act, the burden of explaining the presence of Winnie's body in Room No 417 rested on the appellant as it was a matter that was especially within her knowledge. In our view Section 111 that shifts the burden onto an accused person was not applicable. This is because there was no evidence adduced by the prosecution that proved that Winnie was last seen alive with the appellant. That fact cannot be deduced from the fact that the appellant communicated with Winnie on telephone. We reject this submission and find that the burden remained upon the prosecution to prove how Winnie's body ended up at Saharan Lodge in room No 417.

[51] The appellant did not deny knowing Winnie or communicating with Winnie on phone on 16th February, 2013 when Winnie was last seen alive. In addition, the appellant admitted that she went to buy lunch from a Congolese restaurant in River Road near the bus coach, which was around the same area where Winnie was dropped by the taxi driver. The appellant maintained that apart from communicating with Winnie on the phone, she never physically met with Winnie on the fateful day.

[52] The records from Safaricom confirm what the appellant admitted that she spoke several times with Winnie on the material day. There is evidence that at around 21.45 hours on that day, the appellant's phone and Winnie's phone were both located around Ngara area. In so far as the communication was concerned, this piece of evidence regarding the appellant's phone and Winnie's phone, both being around Ngara area raises a suspicion that either the appellant may have been with Winnie in Ngara or the appellant may have been in possession of Winnie's phone. The appellant has admitted that she was staying in Ngara area at the material time but she denies having been with Winnie at that time or having Winnie's phone in her possession. In the absence of any other evidence, the question as to where exactly in Ngara Winnie's phone was, and whether the appellant had anything to do with it remains unanswered. Therefore, the evidence regarding the presence of Winnie's phone in Ngara is not evidence that can be said to be incompatible with the appellant's innocence nor does it lead to any inference of guilt on the part of the appellant. In addition, the phone was traced in Kayole and found in possession of one of the appellant's co accused. As rightly observed by the trial Judge there was no nexus between the appellant and her co-accused as there was no evidence adduced that provided any link between the appellant and her co-accused.

[53] It is clear from the following extract of the judgment that the learned Judge drew an adverse inference from the following circumstances:

**“66. The prosecution has shown that the 1st accused true names remain mysterious as she has used other persons identification documents to secure her cell phone lines (two in this case) and for securing services. The other point is that after this incident, the 1st accused crushed her cell phone sim card line which she had used to communicate with the deceased before her death. She said as much in her defence. She also gave away her handset, mobile phone, to her brother DW3, who confirmed it in court. I find this conduct of crushing her cellphone line and giving away her handset was a deliberate act to cover her tracks....”**

[54] The appellant gave her name as Antoinette Uwineza and produced a copy of her passport explaining that her original passport got lost. It was not established that Antoinette Uwineza was not her real name. Further, the appellant explained the circumstances in which she had her telephone line No. 0725 435 796 registered under the name of her friend Micheline Uwababyei. Micheline who testified as defence witness confirmed the appellant's evidence. No evidence was adduced by the prosecution to controvert the appellant's explanation. There was evidence that the appellant also used another line No. 0721 757484, but no evidence was produced to show that this line was not registered in her name. It is therefore not correct that the appellant's name remained mysterious or that apart from this single instance, she used other persons' identification documents to secure services. Passport No. 156421 which was used to hire room No 417 at Saharan Lodge and which was found to be a forged passport was produced by the man who identified himself as Jean Claude. There is no evidence that the appellant used that passport as her passport.

[55] The appellant's conduct regarding the destruction of her sim card for Cellphone Line No. 0725 435796 raised suspicion particularly as she attempted to lie that the phone and sim card was stolen. It is noteworthy however, that following the disappearance and discovery of the body of Winnie, the appellant continued to use the same line for a while and Simon was even able to communicate with her after he found the number amongst Winnie's items. The appellant explained to IP Gichuki that she destroyed the sim card because she was avoiding a white man from whom she had stolen. In court, the appellant admitted having destroyed the sim card but did not give the reason. She also explained that she gave her brother the phone because she had been gifted another phone by a Chinese man.

[56] It cannot be said that the explanation given by the appellant to IP Gichuki was totally unbelievable or not feasible. The fact that she gave the handset to her brother does not support the conclusion by the learned Judge that she was covering her tracks. Clearly there was suspicion arising from the appellant's connection with Winnie, and the fact that the appellant talked with Winnie on the fateful day, and that the appellant later destroyed her sim card. However, these facts are not sufficient to lead to an irresistible conclusion that the appellant was involved in the death of Winnie. Nor are they incapable of other explanation that is consistent with the appellant's innocence.

[57] It is unfortunate that despite Simon's gallant efforts to trace the killers of Winnie, the police did not live up to their motto of “utumishi kwa wote” as Simon did not receive much help from them. For instance, although the body of Winnie was taken to City mortuary by the police, Simon only managed to trace and identify the body of Winnie about 10 days later through the help of a private investigator. Simon was the one who traced John the taxi driver and gave the police the information. Simon was the one who traced the number of Antoinette and spoke to her before handing over the number to the police.

[58] The police appeared to have done little to trace Winnie or her killers. In fact, the police hampered the investigations by committing several blunders that negatively impacted the prosecution case. These included the appellant being exposed to Edmond a crucial identifying witness, which compromised the evidence of Edmond on identification of the appellant, leaving only the evidence of identification by

Wairagu.

[59] Secondly the evidence from Safaricom which was crucial evidence intended to link the appellant with Winnie was treated in a lackluster manner. The witness IP Bitole was clear that he was required to produce the call data information of the phone used by the appellant between 16th January 2013 and 4th March 2013. The witness explained the connection between the two phones for only two days 16th and 17th February 2013. No evidence was given about communication with other numbers including the number of Simon and yet Simon testified that he spoke to the appellant several times on the same line i.e. 0725435796, and even suspected that it was the appellant who sent him a message from Winnie’s phone saying that she had gone to Nakuru. Therefore, no connection was made between the number alleged to have been used by the appellant and the calls that Simon received on that fateful day and night. Moreover, the data for the rest of the period was not explained or connected to the matters in issue.

[60] Simon believed that the appellant is the one who called him posing as Juliet, however, he only spoke to Juliet for a short time and by that time he had not spoken with the appellant. The data for the number that Juliet used was also not traced. There is therefore doubt as to whether Simon could have made a voice impression which was fool proof regarding the similarity in the voices. Moreover, Simon claimed to have met the appellant only once before in a club. He could not identify the appellant but could recall that she had long hair and a tattoo on her upper arm though he could not recall which side. The meeting took place at a night club where it was fairly dark with disco lights on and the lighting was poor. Under cross-examination Simon conceded that he had not mentioned the tattoo in his statement. It is evident that apart from the telephone conversation that Simon had with the appellant, he did not really know the appellant and neither his description of the appellant nor the voice recognition can be safely relied upon.

[61] The evidence regarding Collins whom Simon mentioned extensively, remained hanging as the police officers did not mention him. Nor did the police adduce any evidence regarding Jean Claude who was said to have been arrested and then released. These were pertinent gaps that weakened the inference of guilt against the appellant

[62] There was no clear evidence that was adduced regarding malice aforethought on the part of the appellant. The learned Judge inferred malice in accordance with section 206 of the Penal Code that states as follows:

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**

- a. 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;**
- b. 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, although such knowledge is accompanied by indifference whether death or grievous bodily harm is cause or not, or by a wish that it may not be caused;**
- c. An intent to commit a felony;**
- d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

[63] From the nature of the injuries that were on Winnie’s body when it was discovered in Room 417 we do not doubt that whoever inflicted the injuries and strangled Winnie had the intention of causing her death or serious injuries, such that malice aforethought can be inferred against that person under section 206(a) of the Penal Code. However, the person who inflicted the injuries must be established through evidence that meets the required standard. It is only then that the intention to cause death or injury can be inferred from the proved act. We find that the evidence adduced against the appellant fell short of proving that she inflicted injuries on Winnie either on her own or in concert with others. No inference of malice aforethought could therefore be attributed to the appellant from Winnie’s injuries.

[64] The upshot of the above is that the circumstantial evidence relied upon to convict the appellant fell short of the threshold required, as it neither led irresistibly to the appellant’s guilt nor was it incompatible with the appellant’s innocence. The circumstances may have raised suspicion but as this Court stated in **Sawe versus Republic [2003] KLR 354:-**

**The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.**

Consequently, we allow this appeal, quash the appellant’s conviction and set aside the sentence of life imprisonment. The appellant shall be set free unless otherwise lawfully held. It is so ordered.

**Dated and Delivered at Nairobi this 25<sup>th</sup> day of September, 2020.**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**