IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE , KIAGE & MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 509 OF 2010

BETWEEN

MABEL KAVATI……1ST APPELLANT

FELIX SAVANYI KWESHA ALIAS MICHAEL.....……..……2ND APPELLANT

AND

REPUBLIC.....……..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi Lesiit, J) dated 22nd October , 2010

in

H.C.CR. C NO. 6 of 2009)

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JUDGMENT OF THE COURT

The appellants herein ***Mabel Kavati*** and ***Felix Savayi Kwesha Alias Michael*** and ***another*** were jointly arraigned before the High Court at Nairobi vide Criminal Case No. 6 of 2009 with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on the 16th January, 2009 the appellants jointly with another murdered Father ***Giuseppe Bertaina.***

The appellants pleaded not guilty to the charge and were tried. The prosecution called a total of 17 witnesses. The first appellant ***Mabel Kavati*** elected to give an unsworn statement and called no witness. The second appellant ***Felix Savayi Kwesha Alias Michael*** herein gave sworn evidence and called one witness, ***Dr. Kamau***.

The Prosecution's evidence briefly is that the offence occurred at the Consolata Institute of Philosophy, which is located in Karen area, Nairobi. As described in the testimony of ***Father Marandu (PW1),*** the Institute comprises four big buildings comprising a library, a meeting hall, 2 classes, offices and a language center which was then under construction. To access the Institute, one had to pass through either of two gates, one on Lang'ata road and another on Magadi road. All these gates were at the material time manned by security guards.

On this fateful day, the Institute only had a handful of staff on site, namely PW1 ***Father Hipoloti Marandu*** the rector, PW2 ***Martin Ndegwa Kiragoa*** the librarian, the ***deceased*** who was manning the finance office as the bursar, PW6 ***Joseph Kiratu, Gitau the Registrar*** and the clerk ***Fredrick Oguro.*** The office of the deceased was located at the far end of the building, separated by two (2) classes from the office of the Rector PW1.

The Institute's staff relived their last moments and or actions with the deceased on the fateful day as follows. PW1 ***Father Hipoloti Marandu*** reported on duty as usual and then left to give a lecture at Tangaza college in the neighbourhood of the Institute. Upon his return, he passed through the office of the deceased, to inquire from the deceased for any messages or phone calls made to PW1 in his absence. When the deceased informed him that there had been none, PW1 left for his office where he remained until PW3 ***Macharius Zephania Onchomba*** came to ask for his academic transcript and PW1 referred him PW3 ***Macharius Zephania Onchomba*** to the deceased's' office to pay for the same before it could be issued to him.

PW2 ***Martin Ndegwa Kiragoa*** reported on duty and continued with his duties until 11.00 a.m. when PW3 drew his attention to the deceased's death. PW2 ***Martin Ndegwa Kiragoa*** accompanied PW3 ***Macharius Zephania Onchomba*** to the deceaseds' office and upon confirming what had happened he alerted PW1 about it.

PW7 Aaron Gacengeci a computer technician at the Institute saw the deceased at 11.00 a.m., when the deceased handed him kshs.7,000.00 to go and buy a UPS. On his way out, PW7 ***Aaron Gecengeci*** met a former student whom he had known by facial appearance, identified as the second appellant **.** PW7 was descending the stairs while the former student was ascending the stars. There was no heavy human traffic up and down the stairs. PW7 greeted him and he uttered something PW7 could not recall.

PW10 Michael Njuraita Mwangi on the other hand, met with the deceased at 10.30 am when the deceased gave him a note and certain books and directed him to return them to the Nairobi University book store as wrong books and exchange them with the correct books. PW10 left for the library to inform the librarian, PW2 of his mission. As he entered the library, he saw a woman and 2 men walking in a single file leaving ***Magadi*** road and walking towards the Institute's administration block. They were 10 meters away from him.

The chain of events leading to the discovery of the deceased's body in his office starts with the testimony of PW3. On the 15th day of January, 2009 ***PW3, Macharius (Macarios) Zaphania Onchomba*** a past student of Consolata Institute of Philosophy, set off from his home area in Kisii, to come and collect his academic transcript from the said institute. PW3 arrived in Nairobi in the evening and spent the night at St. Camillus Seminary on Bogani Road Nairobi. Come 16th January, 2009, he left for Consolata Institute of Philosophy, arriving there at around 10.40 a.m. He made his way to the secretary's office and made inquiries about his academic transcript. The secretary referred him to the Dean's (PW1) office. He headed there, but did not find the Dean. He came out of PW1's office and stood outside. He was then confronted by the presence of 3 people including, a woman. He identified one of the two men as the second appellant a former student of the same Institute. The second appellant addressed PW3 thus:-

"***Father Bertania anawesa kuwa na mtu kwa ofisi yake?"*** (Is ***Father Bertania*** with anyone in his office?) PW3 responded that he did not know. The second Appellant then went and peeped into the deceaseds' office through the door which was open. He then came and stood a few meters away from PW3. Since PW3 had no suspicion of any mischief that the second Appellant may have been upto, he left for the canteen to buy airtime. Not finding any, he left for the library where he purchased some airtime. He got into a conversation with the librarian which lasted fifteen(15) minutes, at the end of which he headed back to the Deans' office. On the way to the Dean's office as he went upstairs he met with the same woman and now one man coming down the stairs. The man told PW3 "***kwaheri mzee (***bye mzee***")*** and the woman remarked "***habari"*** (How are you?")

It is not clear as to whether PW3 responded to the two or not. But he proceeded on to PW1's office and upon arrival, found (***PW1)*** present. Upon explaining to PW1 the purpose of his visit, PW1 referred him to

the deceased who was the Institute's bursar to pay for the academic transcript. PW3 accordingly headed for the deceaseds' office to make payment. PW3 ***Macharius Zephania Onchomba*** knocked at the door several times but there was no response from inside. He became impatient and pushed the door open. PW3 ***Macharius Zephania Onchomba*** says he was in shock to see the deceased lying on the floor of his office, with polythene papers stuffed in his mouth, a tape across his nose and head, and hands and feet tied tightly with ropes. PW3 noticed no movement or evidence of signs of any breathing meaning the deceased was already dead.

PW3 took courage and headed to the library and told PW2 ***Martin Ndegwa Kiragu*** of what he had just seen in the deceaseds' office. PW2 went and peeped into the deceaseds' office, confirmed what he had been told by PW3, to be true (PW2) then went and alerted PW1 ***Father Hipoloti Marandu*** of what he had seen in the deceased's office. PW1 ***Father Hipoloti Marandu*** quickly left for the deceaseds' office. PW3 ***Macharius Zephania Onchomba*** mentioned seeing three people hovering in the corridor where the deceased's office was located. One had been a former student he had met in the first year in the year 2005, who also used to play football with PW3 though for opposing teams. PW3's team was called Cammillians, while that of the 2nd appellant was called De paul (Vincentians). PW3s was sure the appellants were among the three people he saw at the Institute on that day. He had ample time to recognize the 2nd appellant and register the appearance of the 1st appellant as she was the only female that he saw at the Institute on that date

Meanwhile ***PW8 Christopher Kiama Mwangi*** employed at the Institute to do maintenance work, reported to work at 8.00 a.m. and went about his work until 11.00a.m, when he and his colleagues saw fire at Brook House School direction just in the neighbourhood of the Institute. They went to check what it was and on the way, they met three people: a woman carrying a bag, a man wearing a blue shirt and black trouser carrying a brief case and another wearing a black suit. They were coming from the direction of the Institutes' administration block. PW8 challenged the trio to stop, demanding to know how they had gained access into the compound. The trio defied PW8 and took off. PW8 started chasing them while raising an alarm.

PW5, Michael Njeru Njai a watchman at the Institute had reported on duty at the Institute as usual. He performed his duties normally until his attention was drawn to the alarm which had been raised by PW8. On turning to the direction of the alarm, he noticed the presence of three people, a woman, and 2 men. The trio were approaching the gate that PW5, was manning. The trio had not accessed the Institute through the gate he had been manning. PW5 did not know at what time the three had accessed the Institute. When the trio defied the challenge to stop and ran out of the Institute, PW8 and 5 kept chase. The woman ran in a different direction. PW5 kept chase, caught up with her, subdued her and then returned her to the Institute and detained her in the sentry box at the gate that he was manning. There she remained until she was handed over to the police. PW8 and a few colleagues chased the men, who stopped as if to take out weapons. PW8 and his colleagues feared for their lives and suspecting that the weapons could be dangerous, gave up the chase and retreated to the Institute.

The second appellant was arrested on the 24th January, 2009 by PW15 following information from one brother, ***Wekesa.*** He was thereafter handed to PW14 ***Joseph Karanja*** a magistrate then based at Makadara law Courts, who took a charge and cautionary statement from him. It was objected to by the 2nd appellant, but was subsequently admitted in evidence after a trial within a trial.

(PW 11) No.62018 CPL Machline Mwakale, PW12 No.76877 P.C. Peter Omolo Owino, (PW15) No.38774 CPL Patrick Mwanga and (PW17) SGT Joshua Mworia all attached to Hardy Langata Police Stations and CID offices responded to the telephone call from PW1 and visited the scene. They found the deceaseds' body lying on the floor with polythene papers stuffed in the mouth, hands and feet tied. The office drawers were open and papers in them scattered.

The body of the deceased was thereafter removed to Lee Funeral Home mortuary for post mortem, carried out on the 17th day of January, 2009 by PW13 ***Dr. Francis Maina Ndiangui,*** after it had been identified by Padre ***Dietrich Penza Wazina.*** PW13 made the following observations on the body:-

"The body had the hands tied in front of his body with a new sisal rope measuring 10ft. There was a similar rope which was availed to me by the investigating officer which he informed me had been used to tie his legs. There was a two inch white cream cello tape which went round the neck five times. There was a white spongy black nylon paper stashed in the mouth. There was a white blue checked handkerchief stashed into the mouth at the pharynx, means it was deep into the throat. There was multiple bruises on the neck and face some of which were lineer and consistent with scratch marks.

On the basis of the above findings, the Doctor formed the opinion that the death was due to asphyxia due to both ligature strangulation and gagging.

The first appellant gave unsworn evidence. In brief, the first appellant recalled waking up early that fateful day of 16th January, 2009. She prepared herself and left to look for a job. She had no particular destination. She just started walking aimlessly along Karen road when she encountered two men running in the opposite direction. She ignored them as she had nothing to do with them. Shortly thereafter she came across another man who appeared to be chasing the two. He inquired from her if she had seen the two men. She answered in the affirmative. He asked the direction they had taken and she showed him. Instead of going after the two men in the direction she had pointed out, he grabbed her alleging she had been with the two men who had run away. He started pulling her, causing her shoes to come off her feet. The man dragged her into the Institute and detained and locked her up in the sentry box. She remained detained whether police picked her up.

From the Institute, she was taken to ***Hardy Police Station*** where a thorough search was conducted on her body but nothing was recovered from her in connection with the offence. At 7.30pmis when she was informed that two cheque books belonging to the Institute and believed to have been stolen from the deceaseds' office had been recovered from the sentry box where she had been detained. She denied any knowledge of the two cheque books. She argued, if they had been in her possession, PW5 who apprehended her would have recovered them from her bag and handed them over to the police at the time she too was handed over to police.

The second appellant gave sworn evidence denying any involvement in the commission of the offence. He learned of the deceaseds' death on 17th January, 2009 through the newspaper. It took him by surprise. He conceded that he knew the deceased as he had been a student at the Institute between 2004-2006. He confirmed having been arrested on the 24th January, 2009 at Kawangware at 5.00pm. He was then taken to Hardy Police Station where he was interrogated, threatened, and intimidated in connection with the incident. He was then given a piece of paper containing pre-prepared contents and told to memorize them. Thereafter, he was taken before a stranger before whom he was threatened and told to reproduce what he had memorized from the content of the pre-prepared piece of paper which he did, but later recanted the said contents.

Regarding the testimony of PW3, the second appellant contended that PW3 ***Macharius Zephania Onchomba*** told lies when he claimed that he had seen him at the Institute on the date of the murder; that he last saw the deceased in 2006, when he left the Institute and he had never been back there ever since; that at the time when the murder of the deceased allegedly occurred, he was at his place of work; that the witnesses who had been to the office of the deceased shortly before the deceased was found murdered never saw him in the deceaseds' office; that the watchmen manning the gates to the Institute also never saw him entering or leaving the compound of the Institute.

At the close of the entire case, the learned trial Judge (***Lesiit J)*** in a Judgment delivered on the 22nd day of October, 2010 arrived at the conclusion that the Prosecution had discharged its burden of proving the commission of the offence against the first and second appellants. On that account, she found the two Appellants guilty of the offence as charged and sentenced them to death.

The appellants were aggrieved by that decision and filed their respective appeals firstly vide home made grounds of appeal which were subsequently replaced by a supplementary memorandum of appeal filed by ***Mr. Nyachoti*** their learned counsel, on the 12th day of June, 2013. Eight (8) grounds of Appeal are raised

namely:-

1. ***That the learned trial Judge erred in law and fact in failing to hold that suspicion against the Appellant however strong and compelling was not sufficient to condemn the Appellants and thereby convicted them of the offence of murder.***

2. ***That the learned trial Judge erred in failing to rule that the prosecution did not prove beyond reasonable doubt that the appellants either killed or took part with others in the killing of the deceased.***

3. ***That the learned trial Judge of the High Court erred in law and fact by relying on the confession of the second appellant without seeking corroboration and therefore reached a wrong decision.***

4. ***That the learned trial Judge erred in law and fact in advancing theories and speculations to fill the glaring loopholes in the prosecutions' case to justify conviction of the Appellants on patently in sufficient evidence.***

5. ***That the conviction of the Appellants was based on presumption and circumstantial evidence not sufficient to justify any or any reasonable inference of guilt on the part of the appellants.***

6. ***That contrary to section 169(1) of the Criminal Procedure Code (Cap 75) the Judgment of the Superior Court did not contain the point or points for determination on the basis of which the learned trial Judge dismissed the appellant's defences and convicted them of murder.***

7. ***That the learned trial Judge ignored serious irregularities in the investigation and prosecution of the murder case thereby violating the Appellants right to fair trial under Section 77 of the Constitution.***

8. ***That the learned trial Judge erred and misdirected herself in law by relying on fabricated contradiction and speculative case of the prosecution to convict the appellants.***

Mr. Nyachoti, learned counsel for the appellants, urged us to allow both appeals. The grounds in support are that the circumstantial evidence relied upon by the learned trial Judge to convict the appellants was weak as it does not sufficiently link the appellants to the commission of the offence; that in terms of the decision in the case of ***Kinuthia versus Republic [2003]KLR 55,*** the testimonies of PW3 and PW5 should have been treated with caution as they were treated as suspects in the murder of the deceased, and locked up with the appellants, which action should have created an impression in the mind of the learned trial Judge that PW3 and PW5 were not straight forward witnesses as the police action had raised suspicion about their trustworthiness and were therefore persons of doubtful integrity. ***Mr. Nyachoti*** went on to argue that in the circumstances, the testimonies of PW3 and PW5 should have been deemed unreliable and unsafe to be acted upon to found a conviction.

Regarding the cheques allegedly stolen from the deceaseds' office, it was ***Mr. Nyachoti's*** argument that these were found in the sentry box where PW5 worked and where he had detained the first appellant long after both the 1st appellant and PW5 had been taken to the police station by the police. It was ***Mr. Nyachoti's*** further argument that had the 1st appellant had possession of these cheques, then definitely PW5 and the police would have seen them and handed them over to police when the fist appellant was handed over to the police.

Regarding the 2nd appellant's retracted confession, ***Mr. Nyachoti***, citing the decision in the case of ***M'Inanga versus Republic [1985] KLR 294,*** argued that this statement should not have been relied upon by the learned trial Judge in the absence of corroboration.

By reliance on the case of ***Wibiro versus Republic [1960] EA184, Mr. Nyachoti*** reiterated that the appellants appeal has merit; that there was no evidence before the learned trial Judge which placed the

appellants at the scene of the murder, or proved opportunity for the appellants to access the deceased's' office and commit the murder. He argued that the absence of an acceptable defence should not have been treated as a factor strengthening the prosecutions' case and that the learned trial Judge should not also have resorted to her own theories to fill up the gaps in the prosecution's case.

Mr. Monda for the State on the other hand urged us to dismiss both appeals on the grounds that the circumstantial evidence relied upon by the learned trial Judge to convict the appellants was watertight; that the first and second appellants were both identified at the institute on the date the deceased was found murdered; that the identification of the second appellant was one of recognition; that the appellants' alibis were displaced by the evidence of identification and recognition; that there is demonstration that appellants knew who they were targeting, evidenced by the fact that they waited for an opportunity to enter the deceaseds' office and commit the murder borne out by the fact that the appellants did not enter any other office.

The conduct of the Appellants negatives their innocence, argued ***Mr. Monda.*** To learned counsel, this was evidenced by the fact that the appellants sneaked into the institute secretly and upon their presence being detected and challenged to stop by PW5, PW8 and their colleagues, the appellants defied the challenge, took off and became violent. He argued that the learned trial Judge rightly termed allegations of PW3 framing up the second appellant as an afterthought; that malice aforethought was demonstrated to exist, evidenced by the manner in which the deceased was murdered; that the evidence placed the appellants at the scene of the murder; that the appellants had an opportunity to commit the murder and that the offence was proved beyond reasonable doubt and the appellants were properly convicted of that offence.

In reply to ***Mr. Monda's*** submissions, ***Mr. Nyachoti*** still maintained that the evidence adduced did not point irresistably to the guilt of the appellants; that opportunity to commit the alleged murder of the deceased was open to other persons accessing the Institute; that the mere fact of entry of the appellants to the institute did not in itself mean that the purpose of their entry thereon was for purposes of the commission of the murder as it was nothing but mere trespass. Although they concede that the 1st appellant was pursued and arrested just outside the institute, their argument is that her visit to the Institute if any was innocent and not for purposes of the Commission of the alleged offence. Further that appellants were not required to prove their innocence.

This being a first appeal, it is our duty and the appellant is entitled to expect from us a fresh, thorough and exhaustive assessment, appraisal and analysis of all the evidence that was before the trial Court so as to reach our own independent conclusion on the guilt or otherwise of the appellants. See Rule 29(1) (a) of the Court of Appeal Rules which donates to us power to re- appraise the evidence and to draw our own inferences of fact.

The principles upon which we exercise this jurisdiction have been repeated time and again by this Court in numerous decisions by its precedessor, the Court of Appeal for Eastern Africa and itself. We only need to sample a few to drive the point home. In ***Okeno versus Republic [1972] EA.32*** the predecessor of this Court, had the following observation to make:-

"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 versus Republic [1957] EA36) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (Shantilal M. Ruwala versus Republic [1957] EA 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 finding 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 had the advantage of hearing and seeing the witnesses."

See also ***Peters versus Sunday Post [1958]EA424*** wherein it was held, inter alia, that:-

"***Whilst an appellate Court had jurisdiction to review the evidence to determine whether the conclusion of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion; or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate Court will not hesitate to so decide."***

This thread of reasoning has not only been carried on, but reiterated by this Court. See the case of ***Muthoka and another versus Republic [2008] KLR 297*** wherein it was held, inter alia that- "***It was the duty of a first appellate Court to analyze the evidence and come to its own independent conclusion bearing in mind that it did not see or hear the witnesses and making allowance for that.***

The complaints raised by the appellants in the supplementary grounds of appeal can be clustered as follows;

1. Whether the judgment of the High Court complied with the prerequisites of Section 169(1) of Criminal Procedure Code (Cap 75) Laws of Kenya.
2. Whether the learned trial judge of the High Court erroneously misapprehended the weight to be attached to circumstantial evidence before acting on it to found a conviction against the appellants.
3. Whether the learned trial judge of the High Court erroneously relied on the retracted statement of the second appellant as a basis for founding a conviction against the said 2nd appellant in the absence of corroboration.
4. Whether the appellants were denied a fair hearing in the circumstances of this case.
5. Whether the learned trial judge used weekness in the appellants defences to strengthen the Prosecutions case?. And lastly
6. Whether the learned trial Judge used her own theories to fill up any gaps in the prosecution's case.

Section 169(1) (2) of the Criminal Procedure Code Cap 75 Laws of Kenya allegedly breached by the learned trial judges judgment provides:-

"***Every such Judgment shall except as otherwise expressly provided by this code, be written by or under the discretion of the presiding officer of the Court in the language of the Court, and shall contain the point or points for determination, the decision thereon and the reason for the decision and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it.***

(2) In the case of a conviction, the Judgment shall specify the offence of which and the Section of the Penal Code or other law under which, the accused person is convicted, and punishment to which he is sentenced.

The Judgment sought to be impugned is before us. We have gone over it on our own and considered it in the light of the prerequisites. First we find that the evidence tendered by both the prosecution and the defence was set out in great detail. Second, the learned trial Judge did not only bear in mind the applicable principles of both law and case law to the facts before her, but also went ahead and applied them to the facts of the case and drew conclusions on the case. Third, though issues for determination were not set out in a numerical order, nonetheless these were raised from the facts before the Judge, the principles of law applicable to them were identified and applied to those facts and then conclusions drawn. Examples of these were as follows. The time that death occurred was critical and on the basis of the evidence of PW1, 2, 3 and 10, the judge concluded that the time of death was slightly after 11.00 a.m. Identification of perpetrators was a material issue and on the basis of the overwhelming evidence before her, the appellants had been placed at the scene of the murder. Malice aforethought had been established based on the manner the death was caused. On identification parades, the learned judge concluded that it was not necessary to hold any for the second appellant as PW3 and PW8s' evidence of recognition was sufficient to place him at the scene of the murder. The evidence of PW5 who chased and caught the 1st appellant was reliable as the chase was in broad day light, it started in the compound of the Institute, PW5 never lost sight of her and had no reason to tell lies about her. This evidence placed the 1st appellant at the scene of the murder; her conduct of running away when challenged to stop is evidence of guilty conduct. The prosecution's evidence rested mainly on circumstantial evidence and before it could

be relied upon to found a conviction the inculpatory facts must point irresistably to the guilt of the accused person and in the circumstances of this case such evidence was before her. Lastly, common intention had been established as per the principles in the case of ***Njoroge versus Republic [1983] KLR 197, and Rex versus Tabule Yenka and S/o Kirya [1943] 10 EACA.***

From the above analysis we have no doubt that the learned trial Judge meticulously complied with the prerequisites as regards the drafting of judgments specified in Section 169(1) (2) of the Criminal Procedure Code. We therefore dismiss this argument.

Regarding circumstantial evidence, we are guided by the decision in the case of **Paul *versus the Republic [1980] KLR 100,*** wherein it was held inter alia that

*"**Where the prosecution relies upon circumstantial evidence to establish the guilt of the accused, the inculpatory facts must be incompatible with the accuseds innocence and incapable of explaination upon any other hypothesis other than his guilt"***

In ***Kariuki Karanja versus Republic (1986) KLR 190*** it was held inter alia that:-

"In order for circumstantial evidence to sustain a conviction it must point irresistibly to the accused and in order to justify the inference of the guilt on such evidence the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving the facts justifying the drawing of that inference is on the prosecution.

See also the case of ***Sawe versus Republic [2003] KLR 354*** wherein the following principles were set out:-

1. ***In order to justify conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.***
2. ***Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.***
3. ***The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.***
4. **…**
5. **…**
6. **…**
7. ***Suspicion however strong cannot provide the basis of inferring guilt which must be proved beyond reasonable doubt.***

From the record, the learned trial Judge made observation on the facts before her and then drew conclusions that the time of death was a little after 11.00am; that on the basis of the evidence before her of PW7 ***Aaron Gacengeci,*** PW2 ***Martin Ndegwa and*** PW3 ***Macharius Zephania Onchomba;*** there were indeed three visitors on the floor of the building where the office of the deceased was located; that the mission of the three was unknown; that the three did not enter any other office in the entire Institute; that PW7 ***Aaron Gacengeci and PW3 Macharious Zephania Onchomba*** recognized the second appellant as a former student of the Institute; that ***Njuraita's*** attention had been drawn to the presence of a woman among the three because women were rare visitors at the Institute; that the woman seen amongst the three visitors was identified by ***Njuraita*** to be the first appellant.

Turning to the defence evidence on identification generally, the learned trial Judge made findings that there was no doubt that the trio seen on that corridor that morning had the opportunity to commit the offence; that she believed the evidence of ***Macharius Zephania Onchomba and Aaron Gacengechi*** that the trio had waited around the corridor purposely for an opportunity to enter the office of the deceased and commit the murder which they did.

With regard to the first appellant's defence in particular, the learned Judge concluded that there was overwhelming evidence, that the first appellant was seen at the Institute as she walked, rather ran, out of the gate; that although the evidence of identification of the 1st appellant by PW3 ***Macharius Zephania Onchomba*** and PW10 ***Michael Njuraita Mwangi*** is evidence of dock identification, which in law is worthless and weak, none-the-less there was sufficient circumstantial evidence to connect her to the murder of the deceased as an accomplice as she was seen crossing the road outside the Institute in the company of the 2nd appellant and another man and came into the Institute and stood ten (10) meters away from PW10; cheques which had been stolen from the office where the deceased had been murdered were found in the sentry box where the first appellant had been detained. The evidence pointed irresistibly to the first appellant as one of those who had been to the office of the deceased that morning where the cheques had been prior to the incident. ***PW5 Michael Njeru Njai*** challenged the first appellant and his cohorts to stop to find out what they had come to do in the Institute but instead of stopping, the first appellant and her accomplices took off. She was pursued and when him caught up with her she threatened him saying that she was HIV positive and threatened to bite him so as to infect him also. To the learned judge, this was evidence of guilty conduct or guilty mind because if the first appellant had nothing to fear, she could not have threatened PW5 ***Michael Njeru Njai***. The said threats were the last attempts to escape from the scene due to what she had done.

With regard to the second appellant's defence, the learned trial judge dismissed his allegation of ***PW3 Macharius Zephania Onchomba*** having fabricated him because of an alleged enmity which had arisen between them because of football games in which they were playing for different teams. There was no substance in that assertion, more so when it was never put to PW3 in cross-examination and it was therefore an after thought. The presence of the second appellant on the floor where the deceaseds' office was housed was corroborated by **PW7** ***Aaron Gacengechi*** who knew the second appellant before; ***Macharius Zephania Onchomba*** did not mention the name of the 2nd appellant in vain as he had mentioned to PW 2, ***Martin Ndegwa Kiragua*** earlier on that he had seen the 2nd appellant and two others on that corridor that same morning.

We have on our own considered the above conclusions reached by the learned trial Judge as against the rival arguments presented to us and the totality of the evidence on record. There is no dispute that the deceased reported on duty on the fateful day as usual and settled down in his office and was seen in the greater part of that morning going about his daily routine duties in his office. The deceased's office was at the far end of a building sparsely occupied by lean staff of the Institute, with very little human traffic in its corridor. It is apparent that there was no student population around at the material time. The little human traffic that there was on this fateful date comprised staff who were going about their daily routines in their respective offices and had no business hanging out around the corridors. The four who came out to the mentioned corridor did so while enroute either to the deceaseds' office or some other office. PW3, PW8, PW10 paid attention to the accused trio and registered their appearances because they included a woman alleged to be a rarity at the Institute.

There is evidence that the Institute could be accessed through two gates both of which were manned by security guards but none as to whether the nature of the fencing of the compound was such that would not allow free ingress and egress of the Institute through any other avenue by any intruder. This not withstanding, we have no doubt and are in agreement with the learned trial Judge that the witnesses who testified that they noticed the presence of three visitors to the Institute's compound on this fateful day did not lie. This is borne out by the fact that indeed three persons who were not part of the staff or the Construction team that was going about its work on the compound were seen and when challenged to stop, they took off and had to be chased. Two disappeared but one who is the first appellant was caught and detained in the compound a fact she conceded in her evidence, save that she says she was innocently mistaken, grabbed from outside the compound of the Institute then dragged into the compound and detained in the sentry box before being handed to the police.

The evidence tendered also clearly demonstrates that the perpetrators of the murder committed their heinous act during the day. There is no allegation of any hooded faces seen in the corridor. One of the three, the second appellant was not a new face at the Institute as he had been a past student. The second appellant admitted having been a past student of the Institute both in his extra judicial statement and

evidence in Court.

The three had not camouflaged or concealed their appearances in any way. The witnesses saw them in broad day light. There was no commotion around. The three took their time and made their presence appear as normal as possible so as not to attract suspicion. The witnesses who said they saw them were not under any apprehension of danger to their persons. There was therefore room for registration of the trio's appearance by way of recognition of a familiar face of the 2nd appellant and identification of a new face of the first appellant. The allegation of fabrication of the accusation on account of an alleged past grudge between PW3 and 2nd appellant was rightly discounted by the trial Judge. Likewise the allegation by the first appellant that she was arrested on a public road and then dragged into the compound of the Institute was also rightly disregarded. There was no reason for her to be picked upon by PW5. We agree that the 1st appellant's chase started within the Institute compound and spilled out but not far from the Institute where she was caught and returned to the compound and locked up in the Sentry box.

The issue of the cheques recovered in the sentry box where the first appellant had been detained also featured prominently as linking the first appellant to the scene of the murder, as these cheques were part of the items used by the deceased in normal routine in the discharge of his duties. It is on record that the office where the deceased had been murdered had been ran-sacked and that accounts for the finding of the cheques in the sentry box. The only reasonable explanation that can be given for the movement of the cheques from the deceaseds' office is that the person who moved them there had a hand in the deceaseds' murder.

It is on record that the first appellant had a hand bag when she was caught by PW5, a fact she admitted herself. She was detained in the sentry box with the hand bag. It is not alleged that PW5 searched that bag. The first appellant was not locked in the sentry box with a guard watching over her all the time till she was handed over to police. The possibility of the cheques being removed from the bag and placed somewhere in the sentry box is not remote and cannot be ruled out considering that it must dawned on the 1st appellant that she was being detained on suspicion of having a hand in the deceased's death.

The sentry box was PW5's usual work station. It is appreciated that PW5 was also held as a suspect, but we find that he was rightly not prosecuted as no witness traced PW5 movements to either the deceaseds' office or the floor where the deceaseds' office was located. PW5 first came into the picture in connection with the deceased's death when he challenged the trio to stop and explain how they had gained entry into the Institute and say where they were coming from. There is nothing to suggest that PW5 was a suspect and had a reason to frame and or plant cheques on the first appellant.

Even if the evidence of the cheques is discounted as a contributing factor to the incriminating circumstantial evidence against the first appellant; the other evidence analysed above sufficiently connects her to the scene of the murder.

As for the second appellant, we are satisfied that the evidence of recognition sufficiently placed him at the scene of the murder. The 2nd appellant made a confessionary statement which he later on re-tracted in the course of the trial necessitating the holding of a trial within a trial by the Court, before it was admitted in evidence. We agree with ***Mr. Nyachoti's*** submission and reliance on this Court's decision in the case of ***M'Inanga versus Republic [1985], KLR 294*** that once the second appellant retracted his confessionary statement, that statement became one of the weakest and worthless pieces of evidence which the trial Court could not rely on to support the 2nd appellant's conviction in the absence of corroborative evidence.

The learned trial Judge made the following observations on the said statement:

"The second accused made a statement which he retracted. That statement was P. Exh.15. I have considered the contents of the statement and find that it gave details of how the 2nd accused, in the company of one man and one woman went to the office of the deceased and held him to facilitate a robbery.

In the statement the second accused stated that the three of them had no intention of cause the deceased on injury or death and that they only turned violent when he refused to assist them and ordered them to leave the room.

The question is whether the prosecution proved common purpose. Even if the 2nd accused and his cohorts had intention only to rob the deceased, but in the process of executing their plan the deceased died, the offence committed is murder. So long as the persons charged are proved to have been present, it matters not who among them did the act resulting in death.

…

Having considered the statement of second accused, I find that it was consistent with the evidence of the prosecution adduced against him in all material particulars. It was consistent. In terms of the number of persons involved in the murder and in the manner it was executed"

We agree that the observations made by the learned trial Judge above represent the correct position as borne out by the evidence on the record. Our reasons for saying so are as follows. Allegations of the trio's entry into the Institute unnoticed has been proved by the testimony of the security guards PW5, PW8 manning both entrances to the Institute who testified that the trio did not access the Institute through the gates manned by them. The number of assailants was confirmed by the evidence of PW3 and PW10 who saw the trio standing 10 meters away from him and when descending the stairs leading from the corridor where the deceaseds' office was located. That the deceased resisted the robbery is borne out by the fact that the deceaseds' body was found bound, hand and feet and a handkerchief as well as polythene papers stashed into his throat, may be to silence him to avoid attraction. After accomplishing the mission they stealthily walked away and nobody ever heard any commotion from the deceased's office. PW5 ***Michael Njeru Njai*** and PW8 ***Christopher Kiama Mwangi*** chased the trio and managed only to arrest the first appellant and the two men escaped. In the result, we agree and confirm the learned trial Judge's finding that there was sufficient corroboration for the retracted statement and it could safely be relied upon to found a conviction not only of the 2nd appellant, the maker but also the first appellant, his accomplice.

On common intention, Section 21 of the Penal Code Cap 63 Laws of Kenya provides:-

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence"

In ***Rex versus Mikaeri Kyeyune and 4 others 8.E.CA 84*** the Court of Appeal for Eastern Africa made the following observation.

"Any person identified as having taken part in the beating must be regarded as linked by a common intention"

In ***Rex versus Tabula Yenka S/o Kirya and 3 others [1943] 10EACA 51***, the same Court held, inter alia, and we agree;

"To constitute a common intention to prosecute an unlawful purpose … it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault."

See also the case of ***Njoroge versus Republic [1983] KLR 197*** wherein there was observation that:-

"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endevours to effect the

common assault of the assembly.

…

Their common intention may be inferred from their presence, their actions and the omission of either of them to dissociate himself from the assault"

On this, the learned trial Judge made the following observation:-

"Even if the 2nd accused and his cohorts had intention only to rob the deceased, but in the process of executing their plan the deceased died, the offence committed is murder. So long as the persons charged are proved to have been present. It matters not who among them did the act resulting in death"

We find the above observation correct. This is borne out by the fact that the perpetrators were three, who sneaked into the Institute stealthily. They hovered on the corridor where the deceaseds' office was located waiting for an opportunity to enter. They only entered the deceaseds' office at the Institute meaning that, that was their only destination at that Institute. They robbed and killed in the process. They walked out together and when challenged to stop they took off together and only one, the first appellant was caught. Their conduct, as observed by the learned trial Judge, demonstrates a clear existence of a common intention.

On lack of a fair hearing, Section 77(1) of the repealed Constitution provided:-

"If a person is charged with a Criminal offence, then unless the charge is withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law"

The elements of what does or does not constitute a fair hearing are set out in subsection 2 of that Section. These are, presumption of innocence, the right to be informed of the charges as soon as possible in a language an accused understands; to be given adequate time and facilities for the preparation of his defence; right to defend himself or by an advocate; to be afforded facilities to cross-examine in person or by his legal representative the witnesses called by the prosecution, and also to be assisted to call evidence in his defence; to be present throughout the trial unless if he consents otherwise or conducts himself in such a manner so as to render the continuance of the proceedings in his presence impracticable and the Court has ordered him to be removed and the trial to proceed in his absence.

A survey of the record before us reveals that the offence was committed on 16th January, 2009 the same day that the first appellant was arrested. The second appellant was arrested on 24th January, 2009. On 30th January, 2009, both were assigned defending counsel. Plea was taken on the 3rd day of February, 2009 and although the language in which the charge was read to the appellants is not indicated, there is no complaint raised about that. As such the requirement was complied with. Witnesses were called and duly cross-examined fully. The appellants were given a chance to tender their own testimonies either sworn or unsworn. The 1st appellant chose to give an unsworn statement and called no witnesses while the second appellant gave sworn evidence and called one witness. They were allowed to make submissions both at the close of the prosecutions' case and at the conclusion of the whole trial. From the above analysis we are satisfied that the trial of the appellants was free, fair and just.

As regards the assertion that the learned trial Judge exploited the weaknesses in the appellants' defences and used them to boost the prosecution case, we find that the learned trial Judge noted that the 1st appellant had been spotted within the Institute's compound as she ran out. She and her companions had been seen walking within the compound only ten (10) meters from ***Njuraita*** PW3 saw her as they by passed each other on the corridor leading from where the deceaseds' office was located and lastly that her conduct of defying the challenge of PW5 to stop is evidence of guilty conduct. As for the 2nd appellant, that though he denied the commission of the offence, the evidence of recognition by PW3 ***Macharius***

Zephania Onchomba and PW10 ***Michael Juraita Mwangi*** coupled with the content of his corroborated, retracted confessionary statement placed him at the scene of the murder.

PW3 and PW5 were material witnesses for the prosecution. It is undisputed that they were at some point arrested and locked up with the appellants on suspicion of involvement in the murder of the deceased. We are in agreement with the submission of ***Mr. Nyachoti*** on the general proposition that a witness who creates an impression on the mind of the Court that he is not straight forward, raises suspicion about his integrity and trust-worthiness should be treated as an unreliable witness and his/her evidence should not be acted upon (see ***Kinuthia versus Republic*** [2003] KLR 55).

The learned trial Judge after assessing the evidence of these witnesses (PW3 and PW5) concluded that it was without blemish and could be relied upon. We have no quarrel with that observation and we confirm it. The account of PW3 on the movement of the trio was supported by the testimony of PW7 ***Aaron Gacengeci and PW10 Michael Njuraita Mwangi***. While that of PW5 regarding the presence of the appellants at the Institute that fateful morning was supported by the testimony of the 1st appellant herself that she was arrested just outside the Institute and then returned back to the Institute. The statement of the second appellant confirms presence and involvement of both appellants in the commission of the offence. Though retracted it was fully corroborated. We are satisfied that when this evidence is considered in the light of the totality of the evidence on the record, it leaves no doubt about its truthfulness. There was nothing suspicious about this evidence. The learned trial Judge ably balanced the defence case as against the prosecution's case and rightly found the defence case ousted. Nowhere in the record does the learned Judge use the appellants' defences to boost the Prosecution's case. We dismiss this complaint.

As to whether the learned trial Judge employed her own theories to fill up alleged gaps in the prosecution case, the business of the learned trial Judge was to determine whether the offence of murder as laid out had been proved as against the appellants or not and accordingly convict or set them free. Whether a hominicide amounts to the offence of murder in law depends solely on proof of facts establishing the existence of malice afore-thought. Its elements are clearly set out in Section 206 of the Penal Code and crystallized by case law. A perusal of the record reveals that the learned trial Judge was alive to this requirement. She took note of the elements of malice afore thought as set out in Section 206 of the Penal Code namely that malice afore thought is deemed to be established in instances where 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; where 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 caused or not, or by a wish that it may not be caused; an intention to commit a felony and lastly an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed an act related to a felony.

The learned trial Judge made the following observation:-

*"**The evidence of the prosecution was that the deceased had polythene paper bags stuffed into his throat and secured with masking tape. The Doctors evidence was that the deceased had died of asphyxia due to the stuffing by the polythene and due also to mammal strangulation.***

"It is quite clear that the person or persons who did that to him had formed an intention to cause the deceased grievous harm or death. They had formed the necessary mens rea to cause either death or grievous harm to the deceased.

…

"The prosecution has proved Section 206(b) and (c) of the Penal Code. I find that the second accused together with the 1st accused caused the death of the deceased in the cause of executing the felony of robbery. They were properly charged with this offence."

We have no quarrel with that observation as there is no evidence disclosing that appellants went to the

Institute for any innocent purpose. We agree with the learned trial Judge that the fact that the office where the deceased worked had been ransacked was sufficient proof that one of the intruders missions was to commit a robbery which they did.

The tying up of the hands and feet of the deceased was to immobilize the deceased. The stuffing of the handkerchief and polythene down the deceaseds' throat and masking these with a masking tape may have been for purposes of silencing the deceased from screaming to attract help. Forcing handkerchief down the deceased's throat, followed up by polythene paper held in place by a masking tape is in itself conduct of a person who did not only intent to stop the screaming but also the breathing. The perpetrators either intended just to achieve the stopping of both the screaming and the breathing or just did not care what the consequences of their action would be. Such conduct and/or attitude forms part of the elements of malice afore-thought outlined above. And since death did occur, the facts disclose the offence of murder. We therefore find no fault with the final conclusion of the learned trial Judge that the appellants were properly charged with the offence of murder and that the evidence tendered when considered in totality had proved that the appellants participated in the commission of that offence. These are not theories made up by the learned trial Judge, but clear statements of application of well established principles of both law and case law to undisputed facts before the Judge. She was perfectly right in arriving at the conclusion that the facts disclosed the offence charged which had been proved beyond reasonable doubt.

In the result we find no merit in this appeal. We accordingly dismiss it in its entirely.

Dated and Delivered at Nairobi this 31st day of January, 2014.

R.N.NAMBUYE

……...……..

JUDGE OF APPEAL

P.O. KIAGE

…….……...……

JUDGE OF APPEAL

J. MOHAMMED

……..……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

D/O