REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 113 OF 2008

BETWEEN

AGNES TERESIA JAMES AMATI

SAMUEL MBUGUA RUGURU.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Ombija, J) dated 6th August, 2008

in

H.C.CR. C NO. 210 of 2003)

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JUDGMENT OF THE COURT

The appellants herein ***Agnes Teresia James Amati*** (the first appellant) and ***Samuel Mbugua Ruguru*** (the second appellant***)*** were jointly charged in the High Court of Kenya at Nairobi in Criminal Case No.210 of 2003 with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya. The particulars of the offence were that on the 29th day of August, 2003 at Majengo "A" Estate in Kajiado District within the Rift Valley Province murdered ***Mary Bogoma Amati.*** They denied the charge.

The prosecution tendered evidence from nine witnesses. The appellants were the sole witnesses for their defence. The first appellant gave sworn evidence, while the second appellant gave unsworn evidence.

The prosecution evidence in a summary is as follows. The deceased ***Mary Bogoma Amati*** was daughter to (***PW3), James Katima Amati,***and a deceased wife who died in the year 1997, leaving PW3 a widower with five (5) children among them the deceased, and ***(PW4) Charles Njogu Katima***. It was PW3's testimony that soon after the death of the he deceased's mother, the five orphaned children were entrusted unto the care, control and custody of their paternal grand mother (***Mother of PW3).*** They stayed in Kisii

for some time before being rerouted back to Kajiado to live with their father (PW3) and his then second wife, the first appellant.

As at the time of the incident subject of this appeal, PW3 and the first appellant had lived together for a long time. PW3 had constructed a house for her. The housing unit comprised a shop at the front and three living rooms at the rear with each room being served by a separate door. Other facilities on site were a kitchen, a bathroom and a chicken house.

Events leading to the death of the deceased started on or about 23rd day of August, 2003. On this day, the first appellant asked her house help ***Fatuma Wanjiku Murage (PW2)*** to come and spend the night in the compound with the deceased to enable the first appellant to attend to church activities. PW2 obliged to this request. It was however PW2's evidence that both she and the deceased doubted the first appellant's genuineness on the request to attend to church activities. They suspected that she was going on a frolic of her own. This displeased the deceased and after discussion with PW2, both resolved to let (PW3) know of it. They did pass on this information to PW3 who ultimately thereafter raised the issue with the first appellant. The first appellant responded that she had all along been attending a church function. PW3 left the matter to rest at that.

On 27th August, 2003 the first appellant sent PW2 to call the second appellant. PW2 obliged. On arrival at the second appellant's home, she missed him, his wife. She left a message with the 2nd appellants wife that he should see the first appellant. PW2 recalled seeing the 2nd appellant come to see the first appellant that same afternoon as had been required of him.

On 29th August, 2003, PW2 reported to work at the first appellant's premises as usual. She worked from 9.00 a.m. to 12.00 noon. She was given an off not to come back after lunch. She left for the mosque and then to their house. She was later joined at 2.00 p.m. at their house by the deceased. They had lunch together, spent time chatting and then PW2 escorted the deceased back to her home. They walked slowly charting their way to the first appellants' premises, arriving there at 4.00pm. As PW2 parted with the deceased, she met the second appellant entering the first appellants' shop. PW2 exchanged greetings with the 2nd appellant and then left.

At about 10.00 pm of the same date, PW2 was summoned to the first appellant's shop. Upon arrival at the scene, she was confronted with a blue t- shirt, a cap and one left rubber shoe black and white in colour. PW2 recognized these to be the items she had seen the second appellant wearing that afternoon when she met him entering the first appellants' shop as she was leaving the compound after parting with the deceased. To PW2, the deceased was in good health when they parted and had no complaints. She then saw the body of the deceased lying in a pool of blood in the room used by the deceased, one of the three rooms behind the shop operated by the first appellant.

PW3s' testimony is that on this material day, he had supper in his 3rd wife's house. He retired to bed at about 8.00 pm in the same 3rd wife's house but he was restless and decided to leave for the first appellants' house. On arrival, he rang the first appellant's mobile phone. She responded. He asked her to open the gate for him but she did not. After 15 minutes, PW3 flashed the first appellant's mobile phone again but she did not respond. PW3 then called one ***Ndisia*** an in-law to the first appellant. ***Ndisia*** came to where PW3 was at the gate to the premises. ***Ndisia*** also flashed the first appellant phone but she did not respond.

After about 25-30 minutes while still outside the gate, PW3 heard movement over the chicken house next to the wall, then on top of a neighbours toilet. Out of curiosity PW3 jumped over the wall into the compound but could not access the rear living rooms because the access to them was locked from the inside.

PW3 then called out the first appellant to open for him. She replied that she did not have the keys. She mentioned going to ask the deceased who had the keys to open for him. After a short while PW3 threw his set of keys to the first appellant and requested her to open for him. She did open for him. Upon

entering the compound, he looked around. He found nothing out of the ordinary in the rooms occupied by the 1st appellant but in the living room used by the deceased, he found the deceaseds' body lying sprawled on the floor in a pool of blood. When asked why the deceased had been murdered, the first appellant kept quiet. PW3 then called neighbours and PW2. The security lights in the compound were off. PW3 noticed blood stains on the clothes that the first appellant was wearing. The white and black rubber shoe also had blood stains on it. There was also a lesso in the deceased's room used as a duster. It was wet and appeared to have been used for wiping something. The floor of the room where the deceaseds' body was lying was also blood stained.

PW4 ***Charles Njogu Katima*** a son to PW3, and brother to the deceased and ***PW5 Abdala Mwangi*** a neighbour, were among those who responded to the distress call. They both confirmed seeing the cap, t-shirt and one left foot rubber shoe at the scene. PW2 who had also arrived at the scene identified these to have been worn by the second appellant that afternoon. PW4, PW5 and other members of the public left in search of the second appellant. Upon arrival at the 2nd appellant's homestead, they carried out a search but missed him. They however recovered near the chicken house a jeans trouser, a jeans jacket, and a right foot black and white shoe similar to the left foot shoe recovered at the scene of the murder. They took these items to the scene and later handed them to the police..

Then PW5 in the company of other members of the public left for ***Jimmys*** house where the second appellant was suspected to be hiding. Upon arrival, they searched the compound and the house. They found the second appellant hiding behind a carton. He was arrested and taken to the scene.

The evidence from the police officers is that, it was at around 11.30 PM when ***PW1, NO. 61055 Erustus Njonjo*** was instructed by the duty officer to proceed to a scene of murder following a report to the police station shortly before. PW1 proceeded to the scene of the murder in the company of ***PW8 No. 218954 CIP John Murema, P.C.M Mbole, P.C. Mwai and P.C. driver Maithya.*** The scene was Keumbu stores. Upon arrival, the police recovered a cap, a left foot rubber shoe whitish in colour and a T. shirt.

PW1 also recovered a lesso and a handkerchief which were blood stained. He noticed items scattered in the deceaseds' room which to him was evidence of a scuffle. There were blood stains on the floor which someone appeared to have been cleaning. PW1 recovered a blood stained knife from the deceased's room. PW2, 3 and 4 identified the knife as the one used by the first appellant to cut soap in her shop, but it had no specific mark. It looked like any other knife. PW1 recovered from the first appellant a blood stained skirt and blouse; already stated from PW4, 5 and other members of the public a right foot white and black rubber shoe; a jeans trouser and jeans jacket. Both rubber shoes had blood stains on them. PW2 confirmed to the police that the T-Shirt, Cape and both rubber shoes were those she saw the second appellant wearing that afternoon. PW5 on the other hand identified the jeans trouser and jeans jacket as those he saw the 2nd appellant whom he knew very well wearing that same day of 29th. Both appellants were arrested and taken to the police station.

The body of the deceased was removed from the scene to the mortuary. It was later identified by PW3 and PW4 to ***PW6 Dr. Stephen Gathogo*** for postmortem, examination on the 30th day of August,2003 at 1.00 p.m. PW6 observed only one injury on the right side of the neck. It was a clean stab wound about 2 cm x2 cm. Both the right carodit and the posterior part of the trachea had been severed. There were bruises over the right shoulder. In the Doctor's opinion, the cause of death was massive haemorrhage secondary to a stab wound.

PW7 Stephen Matinol Joel Wairu, on 12th day of September, 2003, received from numbers 62613 ***P.C. Dan Mburu and No.61813 P.C. George Murea,*** a kitchen knife, a grey pair of long trousers, a short sleeved T. Shirt, a black jacket, a pair of black rubber shoes, and a cap all belonging to the second appellant; a grey short sleeved blouse, a white black light green blouse both of the first appellant, a purple light green towel, a black red lesso, a red white handkerchief and a knife all recovered at the scene. Also taken to him were blood samples of the deceased and both appellants. PW7 carried out the forensic analysis and made findings that the blood samples of the two suspects were both of blood group ***"O".*** While that of the deceased was of blood group "***B".*** The T. shirt, cap, blouse and shirt had no blood

stains. The knife, towel and lesso were heavily stained with human blood group ***"B"*** belonging to the deceased. The trouser, pair of shoes, blouse and jacket were slightly stained with human blood, group ***"B"***

In her own testimony, the first appellant recalled her phone ringing on the 29th day of August, 2003. On picking it, she realized it was her husband PW3' who was ringing. PW3 asked her why she had not responded promptly. She replied that she had not heard her phone ring as she had been in the bathroom.

PW3 asked her to open for him, which she did. PW3 came to the house, sat down for a while and then asked for the deceased. The first appellant referred him to the deceased's room. PW3 left for the deceaseds room and shortly thereafter came back running and informed her that the deceased was dead. She left for the deceased's room and on arrival, was surprised to find the deceased lying down already dead. She started crying and had a black out. When she came to, she saw two (2) men in her house who introduced themselves as policemen. They took her to the police station where she was detained for two (2) months and later taken to Court on 29th day of October, 2003 and charged with the offence of murder of the deceased which she had no knowledge of.

The first appellant disowned exhibits alleged to have been recovered from her body namely a skirt, blouse, sweater and lesso as well as the knife. She had no idea whose items they were. She added that the deceased's room could not be accessed from her house and that the security lights were faulty; that the deceased's room had no security lights; she denied PW3s' allegation that he saw her pulling the body of the deceased.

When cross-examined, she admitted that, PW3 came to her house that evening twice; she had a good relationship with her husband PW3; that the 2nd appellant had been a mason for PW3 and she had known him for five years. She denied seeing the 2nd appellant's shoe in her compound. She saw the shoes in court.

The first appellant confirmed that PW2 was her maid; she was on duty on the 29th day of August, 2003 and left duty at 5.00pm; that she had been in the building with the deceased on the night of the incident. She denied seeing any blood stains on the deceased; denied ever bringing men to the premises or having a grudge with the deceased; denied that she and the 2nd appellant were lovers and or that they had cut the deceaseds' throat.

According to the second appellant, all he recalls of the fateful day is that, he went about his daily chores; he was paid for work done; he bought some necessities and went home. He had supper and then left for a friend's house to spend the night there as there was no room in his house because their maid had brought in her sister. He slept. At 10.30 p.m he heard noise outside the friend's house. The door was opened. People came in, shone torches on him and said ***"he is this one***". He was grabbed, beaten and taken to the home of PW3. He was by then bleeding. He was taken to the police station and questioned about the murder of the deceased. He denied any knowledge of the murder of the deceased. He admits he used to work for PW3. There was no bad blood, between them. He denied having any other relationship with PW3's family. He denied ownership of the shoes, trouser, shirt, jacket and cap recovered in connection with the murder of the deceased.

All the three assessors who had participated in the trial returned opinions of guilty against both appellants.

In a judgment delivered on the 6th day of August, 2008 ***N.R.O. Ombija* J** found the appellants guilty of the offence charged and sentenced both to death. The learned trial Judge after assessing, analyzing and evaluating the evidence tendered before him made the following observation on that evidence.

"Against that backdrop of evidence, it is my judgment that Agnes (A1) and Mbugua (A2) were lovers. This relationship did not go down well with the deceased who reported the matter to Amati (PW3). In the course of time, there developed a hate relationship between the two accused and the deceased. The second accused was one of the lovers of Agnes (A1). Agnes enlisted the services of Mbugua (A2). On

the night of 29th August, 2003 the two love birds murdered the deceased at Keumbu Stores. Fortunately Amati (PW3) had a premonition. He went to the shop-cum house of both the deceased and Agnes (A1) in time to see Agnes dragging the body of the deceased` the verandah. By stroke of luck Mbugua (A2) was also arrested the same night. Certain items bearing the blood stains of the deceased produced in evidence were identified with Mbugua (A2). The government chemist confirmed that the blood stains found on the exhibits identified with Agnes (A1) and Mbugua (A2) matched that of the deceased. The knife –murder weapon – was also confirmed as having been stained with blood group which matched that of the deceased. Against that backdrop of evidence the defence of Agnes (A1) and Mbugua (A2) is unbelievable. The same has no ring of truth. I reject the same. I believe the evidence of the prosecution witnesses.

Accordingly I find as a fact and law that both the accused with malice aforethought murdered the deceased on the night of 29th August, 2003. I convict both accused of the offence of murder. I sentence both of them to suffer death as provided by the law"

The appellants were dissatisfied with that decision and they have appealed to this Court firstly in home made grounds of Appeal filed on 3rd August, 2008 for the first appellant and on the 5th August 2008 for the second appellant**.** Those of the first appellant were supplemented by supplementary grounds of appeal filed by learned counsel on her behalf dated and filed on 19th July, 2010 namely:-

1. ***That the trial Judge erred in law and fact by basing a conviction on unreliable and discredited evidence that was incapable of sustaining a conviction on a charge of murder.***
2. ***The Judge erred in law and fact by failing to warn himself or the assessors on the danger of convicting the Appellant on circumstantial evidence.***
3. ***The Judge erred in law and fact by failing to warn himself or the assessors of the non-co-existence of other evidence, in consistent with the inference of the appellants guilt.***

Out of the six grounds of appeal fronted by the 2nd appellant, ***Mr. Oyalo*** his learned counsel elected to confine his arguments to grounds 1 and 2 of the said memorandum of appeal, namely ***:***

1. ***That the trial Judge erred in both law? while convicting me without considering my constitutional rights were violated in light of my being long-incarcerated in police custody over 14 days which contravened Section 72(3) (b) of the Constitution of Kenya.***
2. ***That the trial Judge erred in law while convicting me further on, charges that weren't proved as to how I was parcel (sic) to them when P.W.1's evidence is put into consideration which didn't meet the circumstances of Section 77(2) of the Constitution of Kenya."***

In his oral submissions, learned counsel ***Mr. R.S. Kisaka*** for the first appellant urged us to allow the appeal. Reasons being that the evidence of PW3 raises doubt as no explanation was given by him for his failure to intervene if indeed he saw the first appellant pulling the body of the deceased instead of going to call neighbours; that no explanation was given as to why the prosecution failed to call a material witness namely one ***Peter Ndisia;*** that there was nothing to link the 1st appellant to the clothes found in the bathroom; and as such, the 1st appellants' denial that she had no knowledge of those clothes should have been accepted.

Mr. Kisaka argued further that the evidence of PW2 should be treated with suspicion as, she had been employed by the first appellant for only eight (8) months. She also had a reason to tell lies about the first appellant as she had been sacked from her employment. The prosecution failed to prove malice aforethought as there was nothing to link the appellant to the murder of the deceased whom she had raised from a tender age and with whom she had no differences. That the first appellant's assertions that she failed to open the gate when PW3 demanded of her because she was in the bathroom, should be believed; that the unidentified person PW3 heard jump over the fence when he called out to the 1st appellant to open the gate for him (PW3) is the person who murdered the deceased and that person is not the 1st appellant. Lastly that, there is no evidence to point irresistibly to the first appellant as the person who caused the death of the deceased; that nothing turns on the knife allegedly taken as the murder weapon,

which the first appellant denied any knowledge of. Also nothing turns on the alleged love affairs between the 1st and second appellants as the same was not proved beyond reasonable doubt by the prosecution.

Mr. Oyalo, learned counsel for the 2nd appellant also urged us to allow the 2nd appellant's appeal for the reasons that, the 2nd appellant's constitutional rights were infringed as he was detained for two months before he was taken to court, in contravention of Section 72(3) (b) of the repealed Constitution and on this account alone ***Mr. Oyalo*** asks for an acquittal. He further contends that the 2nd appellant was not given a fair hearing as the court irregularly took into consideration an improperly extracted confession, and relied upon and taken into consideration by the learned trial Judge. For this reason, he submitted, the 2nd appellant's conviction is not proper and should be overturned.

In response ***Mr. Kioko Kamula*** for the State urged us to dismiss both appeals because there was sufficient evidence to link both appellants to the murder of the deceased. **First** a shoe found at the scene of the murder and identified by PW2 to have belonged to the 2nd appellant and which PW2 had seen the second appellant wearing on the afternoon of the date of the murder of the deceased matched one recovered in the home of the 2nd appellant; that both appellants had clothes identified to belong to them which had blood stains which matched the blood group of the deceased; that the knife which had been in use in the shop operated by the first appellant was sufficiently identified to have been the murder weapon.

Counsel continued to argue that the first appellant was seen by PW3 pulling an object towards the room of the deceased and that object was the deceased's' body. PW2's evidence on the motive of the killing that both appellants were lovers and that the deceased was opposed to that love affair was believable and was rightly accepted by the trial court. PW2 had worked for the first appellant for some time and was therefore in a position to have an accurate knowledge of what she was talking about.

Mr. Kioko also added that if indeed the 2nd appellant's constitutional rights had been infringed, then the appropriate remedy for this infringement should be an award of damages and not an acquittal; that there should be no reprieve for a party who has been indolent and sat on his rights considering that the issue of constitutional infringement was being raised belatedly; that the complaint should have been raised at the earliest opportunity in the trial court to allow the police an opportunity to give an explanation to the trial court for the delay if any in bringing the second appellant to court and should therefore be ignored.

Lastly he argued that although the State concedes that there appears to have been a misdirection regarding an alleged confession allegedly made by the 2nd appellant to certain persons upon his arrest, during the learned trial Judges' summing up of the evidence to the assessors, nonetheless that misdirection did not count towards the final finding by the trial Court of the 2nd appellant's guilt of the charge he faced as the evidence adduced by the prosecution demonstrated existence of malice aforethought.

This being a first appeal, it is our primary 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 arrive at our own independent conclusion on the guilt or otherwise of the appellants.

In ***Mrs. C.Figgies versus Rex [1940] 19KLR 32*** while quoting with approval the decision in the case of ***Coghlan versus Cumberland [1898] 1CH.704*** the Court of Appeal for Eastern Africa went on to observe inter alia thus:-

> ***"….the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must reconsider the material before the Judge with such other material as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from over-ruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens much turns on the relative credibility of witnesses who have been examined and cross—examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of a witness from written depositions and when the question arises which witness is to be believed***

rather than another, and that question turns on the manner and demeanor of a witness the Court of Appeal always is and must be guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances quite apart from manner and demeanor which may show that a statement is credible or not, and these circumstances may warrant the Court in differing from the Judge even on a question of fact turning on the credibility of witnesses whom , the Court has not seen"

The first appellant's complaints on appeal to this Court are basically three namely, that the learned trial Judge fell into an error when he based her conviction on unreliable and discredited evidence incapable of sustaining a conviction for the offence of murder; that the learned trial Judge failed to warn himself and the assessors on the dangers of convicting the appellant on the strength of circumstantial evidence and lastly that, the learned trial Judge failed to warn himself and the assessors of the non-coexistence of other evidence with the inference of her guilt.

The second appellant complaint's are basically two namely alleged violation of his constitutional rights under Section 72 (3) of the repealed constitution; and ***secondly*** that the evidence relied upon by the prosecution to found a conviction against him fell short of the standard required to be met by the provision of Section 77(2) of the repealed constitution.

Section 72 (3) of the repealed Constitution makes provision that a person who is arrested or detained for the purposes of bringing him before a court of law in execution of the order of a court or upon reasonable suspicion of his having committed or being about to commit a criminal offence and who is not released is required to be brought before court within 24 hours of such arrest or detention. When the offence is one punishable by death then such a person should be brought to Court within fourteen (14) days. Section 77 (2) of the repealed Constitution on the other hand dealt with minimum guarantees of protection of the rights of persons arrested and or detained under Section 72(3).

It is undisputed that appellants were arrested on the night of 29th day of August, 2003, the night of the murder. The information on the basis of which they were arraigned in Court was dated 17th day of October, 2003. Court proceedings opened on 29th day of October, 2003 in the absence of the appellants. The appellants appeared in Court for the first time on the 27th day of November, 2003, two days short of three months from the date of arrest, which period was definitely outside the 24 hours and fourteen days guaranteed by the repealed Constitution.

Directions were given for separate counsel to be assigned to each appellant. Plea was taken on 15th day of December, 2003, by which time both appellants were represented. The appellants appeared in Court on several occasions for mention after their respective pleas had been taken. The trial commenced almost two years later on the 6th day of June, 2005. Throughout that period, upto the end of the trial on 12th day of January, 2007 and then up to the delivery of the Judgment on 6th August, 2008 there is no time the second appellant raised complaint about infringement of Section 72(3) and Section 77 (2) of the repealed Constitution for his detriment.

It is now trite as submitted by learned counsel for the State that it is prudent to raise such complaints at the earliest opportunity in order to give the State an opportunity to offer an explanation as to the delay and in the process give the trial Court an opportunity to determine whether such non compliance, if any, vitiates the trial or not and to give reasons. The role of an appellate court demands simply to determine whether the trial Court exercised its discretion judicially or not in allowing the trial to proceed. The foregoing being the position, reiterate what has been stated many times before that the appellants recourse is in damages and not an acquittal.

The entire evidence tendered on the record demonstrates that there was no eye witness to the murder of the deceased. The evidence appraised, evaluated, assessed, and analysed by the learned trial Judge and which we are required to re-assess, re-evaluate, and re-analyze is in the nature of circumstantial evidence. The parameters of the applicability of this principle in criminal jurisprudence have now been crystallized by numerous cases.

In ***Paul versus the Republic [1980] KLR 100*** it was held inter alia that:

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

While in **Kariuki Karanja versus Republic [1986] KLR 190**, the Court added 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 guilt on such evidence, 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. The burden of proving the facts justifying the drawing that inference is on the prosecution."

See also the case of ***Sawe versus Republic [2003] KLR 364.***

It is undisputed that the deceased lived in the same compound as the first appellant. They slept in separate rooms. There were allegations of infidelity on the part of the 1st appellant which displeased the deceased. The deceased passed on that information to her father PW3. PW3 raised that issue with the first appellant. The first appellant denied the allegations. Although the learned trial Judge made a finding that this created hatred between the two and could account for a possible motive for the murder, particular acts demonstrating existence of hatred are not borne out by the evidence. This therefore remains a matter of suspicion. It is now trite that suspicion however strong does not amount to proof of guilt. (See the case of ***Sawe Versus Republic (Supra***) One thing which is clear is that the deceased was in good health on the day she was murdered. She spent the greater part of that day with PW2. She then returned to the premises at around 4.00 pm in the company of PW2. This account of events by PW2 was not controverted. We therefore make a finding that the deceased was in good health just before she was found murdered.

For unknown reasons, the first appellant inquired from PW3 if he would be going to her place that night of 29th August, 2003. PW3 replied in the negative, but then changed his mind later. The compound forming the scene of the murder is secured by a stone wall with only one entrance secured by a lockable gate locked and opened from inside. This is borne out by the evidence of PW3 that when he came to the premises, and sought entry from the first appellant and she failed to open quickly for him, and although he had his own set of keys on him he could not open from the outside. When the first appellant told PW3 that she did not have keys with her as they alleged to be with the deceased, PW3 had to throw his set of keys inside. The first appellant used these to open the gate from inside for PW3. This is a clear demonstration that no intruder could have gained entry into the compound without either jumping over the wall into the compound or gaining entry through the gate opened from the inside.

Apart from the evidence of PW3 that when he called out the first appellant to open the gate for him at around 8.30-9.00 pm he heard something jump over the chicken house onto a neighbours toilet and ran away, there is no other evidence of any intruder having gained entry into the compound either by jumping over the wall or otherwise. PW3 admitted in evidence that he did not know what jumped over the chicken house but now we are sure that it was a human being because one shoe of a human being was recovered from the roof of the chicken house.

The evidence also demonstrates that there were security lights but none appears to have been switched on. It is not clear whether this was deliberate or not. This notwithstanding, PW3 peeped through the gate and saw the first appellant dragging something towards the room of the deceased. He could not identify what it was then, but when he got in and saw the body of the deceased lying in her room, he concluded that the first appellant had been pulling the body of the deceased towards her room. Police also noted a trail evidence of blood stains from the verandah to the deceased's room.

When PW3 eventually gained entry into the compound, and confirmed the death of the deceased, it is only the first appellant who was on the site. It is on record that the first appellant did not complain of any intrusion into the compound by any undesirables notwithstanding that she had no obligation to say

anything.

Upon discovery of the deceaseds' body, police were called to the scene. They arrived shortly thereafter. Among these, were PW1. PW1 was firm that he noticed things scattered in the deceased's room, evidence of a struggle having taken place there. There is no evidence from any witness alleging to have heard of any scream or commotion at the scene not even the first appellant who was found on the premises. The floor of the room where the deceaseds' body was found was wet. It appeared as if somebody had attempted either to wash or wipe away the deceaseds' blood. There was a bathroom in the compound. It is the first appellant's own testimony that she did not hear PW3 calling her to open the gate for him because she was in the bathroom. This is the same bathroom where wet blood stained items were found. There is no evidence on record demonstrating that the said bathroom was shared by strangers or neighbours. There is also no demonstration that the deceased may have had use of that bathroom, got murdered in the bathroom and then her body removed to her room as there was no trail of blood from the bathroom leading to the room where the deceaseds' body was found. There was a wet lesso and towel in this bathroom. These had blood stains of the blood group of the deceased.

Only one shoe was found on top of the chicken house in the compound. A trip to the 2nd appellant's home by PW4 and PW5 yielded the second matching shoe and a jacket. The shoes were identified by PW2 to have belonged to the second appellant. In fact he was wearing them on the afternoon of 29th August, 2003. PW4 knew the home of the 2nd appellant and he was not controverted on this assertion. It was not controverted that both PW4 and the second appellant were local residents and the possibility of each knowing where the other lived could not be ruled out. The second appellant himself confirmed in his testimony that he was well known to PW3's family for the previous five years. PW, a local resident, also knew the second appellant's home very well. PW5 alleged to have seen the second appellant wearing the jacket found in the chicken house in the second appellant's homestead that same day.

As for the evidence on the forensic analysis report, it is evident that the items found in the bathroom where 1st appellant alleged to have been taking a bath were found to be stained with human blood group of the deceased. These were disowned by the first appellant. A skirt and a blouse was however removed from the body of the first appellant. PW1 stated that he noticed blood stains on them; that is why he requested the first appellant to remove them and hand them to him for forensic analysis. Although the first appellant disowned them, there is no evidence that any stranger forced them on her body. PW1 a police officer who had just responded to the murder report and who apparently did not know the first appellant before had no reason to fabricate evidence against her. PW3 confirmed PW1's evidence that the first appellant had blood stained clothes and that it is he PW3, who alerted police about them before police requested her to remove and hand them to police.

The shoes and the jacket identified to be belonging to the second appellant had blood stains of the deceaseds' blood group. Although the second appellant also disowned them, We find nothing in the testimony PW2, PW4 and PW5 who linked them to the second appellant to suggest that these witnesses were telling lies, or that the evidence had just been planted on to the second appellant. The witnesses were believed by the learned trial Judge and we have no reason to doubt that belief.

Particulars of alleged unreliable and discredited evidence allegedly taken into consideration in error by the learned trial Judge in support of the 1st appellant's conviction have not been pointed out to us. The only evidence which could come near that assertion may be the evidence of an alleged love affair between the appellants. This may provide a motive for the murder. The law is that motive is not a mandatory ingredient for the establishment of an offence of murder. A key ingredient of the offence of murder is "***malice a forethought***". Elements of malice aforethought are clearly set out in Section 206 of the Penal Code. It provides inter alia:- ***"…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 the 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 a companied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(c) An intent to commit a felony.

d. ***….”***

A perusal of the learned trial Judge's judgment reveals that although this provision was not explicitly set out and interrogated by the learned trial Judge as well as its attendant case law, nonetheless, we find that the learned trial Judge was alive to this requirement and applied the elements of malice aforethought to the facts before him before arriving at the conclusion that the appellants were guilty of the offence as charged.

The concluding observation of the learned trial Judge have already been set out above. We have no quarrel with that finding. To us, any person who uses a knife to cut the throat of another person to the extent of severing the trachea and the carodit surely intends to cause the death of that person. This is what happened to the deceased. Since death did occur, we have no doubt that the facts disclose the offence of murder.

As for reliance on circumstantial evidence, we agree the entire prosecution case rests on circumstantial evidence. We however find that there was no requirement for the learned trial Judge to warn himself and the assessors before acting on such evidence. The only prerequisite that the learned trial Judge was expected to observe was to ensure that the inculpatory facts are incompatible with the appellants' innocence and incapable of explanation on any other hypothesis other than their guilt there were no co-existing factors that would weaken or destroy the inference of the appellants guilt as per ***Musoke versus Republic.***

Herein, the inculpatory facts against the first appellant are as follows. The deceased was alive at 4.00pm, on the same day when she was murdered. The deceased parted with PW2 in the very compound which formed the scene of the murder at 4.00pm. There was no evidence that the deceased was murdered elsewhere and then her body returned and stealthily placed in her room. PW1, one of the police officers who visited the scene in response to the report of murder, found items in the deceased's' room scattered which was evidence that indeed there had been a struggle in the said room. PW3 when he peeped through the opening in the gate, saw some person he assumed to be the first appellant pulling an object towards the room of the deceased. Although the first appellant denied to have been the person pulling that object, there is no evidence that any other person or intruder was in the premises at that particular moment. By that time the sound of a person jumping over the chickens' house on to the neighbour's toilet had already occurred earlier.

PW1 also observed evidence of an object having been pulled from the outside to the deceaseds' room. There were blood stains on the ground. This confirms as true what PW3 observed that indeed an object was pulled from the outside towards the deceased's room. That object turned out to be the deceased's body.

The gate was securely locked. The first appellant who was found in the compound alone complained of no intrusion by strangers. No screams were heard from the deceased which the first appellant could not have heard. A wet lesso and clothes were found in the very bathroom where the first appellant was allegedly taking a bath, when PW3 rang her mobile phone demanding of her to open the gate for him, of which she declined to do feigning absence of keys and which she reluctantly opened when PW3 threw his set of keys to her. These wet clothes had blood stains of the deceased's blood group, which means that they had come into contact with the deceased's blood upon her throat being slit. In the absence of evidence of intrusion by a stranger, the only reasonable conclusion to be drawn from the surrounding circumstances is that the first appellant was privy to all that was going on in the compound. Clothes recovered from the first appellants body had come into contact with the deceaseds' blood. This could only have occurred at the time the deceaseds' throat was slit leading to the spilling of her blood on to the first

appellant's clothes.

As for the second appellant, the inculpatory facts are that, it is undisputed and as confirmed by his own testimony, he does not live on the compound of the scene of the murder. His clothes were found in this compound. One shoe which was blood stained with the blood group of the deceased was found on top of the chicken house in this compound, while its matching partner was found in the 2nd appellant's compound by PW5 and PW5. PW2 also identified to have seen the pair of shoes on the appellants feet when she exchanged greetings with the second appellant as she left the first appellants compound, while the second appellant was entering the same compound on the same date of the murder. No grudge or ill will has been shown to have existed between 2nd appellant and the witnesses who linked those items to him. The second appellant's denial of ownership of these items therefore stands ousted.

All the above inculpatory facts provide a sufficient link of the appellants to the commission of the offence charged.

The exculpatory facts put forth by the appellants were simply a denial of any knowledge of the causation of the death of the deceased and denial of items recovered from the first appellant's body and compound as belonging to them. We find the evidence of identification of these items in connection with their ownership by the appellants sound, reliable and beyond any reproach.

As for alleged reliance by the learned trial Judge on the alleged disjointed and discredited pieces of evidence, we find none to have been disclosed. The chain of events analysed above, culminating in the evidence of the forensic analyst all not only place the appellants at the scene of the murder, but sufficiently link them to the death of the deceased and ousts their exculpatory assertions. The surrounding evidence is incapable of explanation on any other hypothesis other than the appellants' guilt.

In the circumstances, we find the finding of the appellants guilt and conviction was based on sound evidence. We find no merit in these appeals. We accordingly dismiss them in their entirety.

Dated and delivered at Nairobi this 7th day of February, 2014

R.N. NAMBUYE

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JUDGE OF APPELA

W. OUKO

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

D/O