REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, OUKO & KANTAI JJ.A)

CRIMINAL APPEAL NO. 44 OF 2013

BETWEEN

RAPHAEL ISOLO ECHAKARA.....1ST APPELLANT

HARRISON CHEGUGU ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisii (Sitati, J)

dated 4th October, 2012

in

H.C.CR.C. NO. 51 OF 2008)

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JUDGMENT OF THE COURT

This is an unfortunate and sad case. A young life was brutally taken away under circumstances that left no doubt that human hand or hands was or were involved. The police were apparently informed within few minutes after the murder, and started what they called investigations and almost immediately, such that one would have expected a water tight case had been made out upon which a conviction could be entered without any lingering reasonable doubt. However a careful perusal and analysis of what the prosecution availed before the trial court reveals so many loose ends that deserved consideration and which upon the same consideration would have made it difficult, if not impossible for a court of law seriously applying its mind to the facts of the case and to the law, to convict upon reliance on the same.

The two appellants were arraigned before the learned Judge of the High Court Musinga J. *(as he then was)* upon an Information dated 21st day of November, 2008, in which the court was informed by the Attorney General, then in charge of criminal prosecutions as well that they were charged with the offence of murder, the particulars of which were that:-

"On the night of 11th November, 2008 at Kanyoni Flats Nyanchwa Estate in Kisii District

within Nyanza Province, jointly murdered Irene Achieng Oluoch."

They pleaded not guilty but after what was deemed as a full hearing in which eighteen prosecution witnesses testified for the State, each appellant gave unsworn statement in his defence, one defence witness gave evidence for the first appellant and the written submissions made by the then defence counsel, the learned Judge Sitati J. who took over the hearing of the case after the prosecution had closed its case and the appellants put on defence by Musinga J. in a lengthy judgment dated and delivered on 8th March, 2012, found each appellant guilty as charged, convicted each appellant and after hearing mitigating aspects, sentenced each to death.

That is what has prompted this appeal based on eleven (11) grounds filed by the first appellant's firm of advocates M/S Onsongo and Company, and three grounds filed by the second appellant's firm of advocates M/S Onyango Jamsumbah & Company. The first appellant's grounds of appeal are in brief, that the evidence adduced by the prosecution on identification of the appellant did not meet the legal threshold required for a conviction; that the circumstantial evidence adduced against the appellant left many hypotheses to the extent that it did not point at the appellant alone to the exclusion of others as the perpetrator of the offence, as many other matters were not investigated and ventilated so as to remove those other hypotheses; that the learned Judge failed to allow the first appellant to cross-examine the second appellant, and further erred in failing to indicate that PW10 was cross-examined, and further in failing to note that evidence of PW8 was not reliable; that the learned Judge erred in relying on hearsay and other inadmissible evidence and failed to have several other people called as witnesses; that she failed to appreciate that the evidence on the blood grouping left a reasonable doubt in favour of the appellant and that the conviction went against weight of evidence on record. The second appellant preferred three grounds filed by his firm of advocates. These were that the conviction was in law not proper as the prosecutions' case was not proved beyond reasonable doubt as is required by law; that she erred in relying on the identification evidence which was not sufficient and proper for purposes of a conviction and that the learned Judge erred both in law and fact by failing to put weight to the testimony and/or evidence of the appellant.

The evidence that was before the court which was considered was composed of testimony of eighteen (18) prosecution witnesses and as we have stated the evidence of one witness called by the first appellant and unsworn statements of both appellants. In a summary this was as follows: ***Pauline Atieno Oluoch*** *(PW11)* ***(Pauline)*** was sister to the deceased ***Irene Achieng Oluoch.*** Pauline was a girlfriend of ***Raphael Isolo Echakara*** *(the first appellant)*. Pauline was at that time a student at Maseno University. They had been friends since 2005. Sometimes in the year 2008 their friendship broke up. This was however despite the first appellant's attempts to resume and continue their friendship. It would appear, the first appellant never forgave Pauline for Pauline said in evidence that the first appellant took back a mobile phone he had given to her as a present and sent her a text message to the effect that he would kill her even if it took ten (10) years to do so. Pauline forwarded this text message to the deceased who was apparently known to the first appellant and, to his brother and mother. Pauline said the deceased, on receipt of the text message told her she contacted first appellant's brother who referred her to first appellant's mother ***Consolata***. Pauline said the deceased told her not to worry about the threat as she had talked to appellant's mother. There were other assurances given to Pauline on the text message threats by other people but we think that as these were hearsay, we need not repeat them here save to say that Pauline felt thereafter that the threats had been taken care of and so no longer had any fears for her life.

Meanwhile, the deceased was at the relevant time a friend of ***Dr. Bernard Oduor Juma*** *(PW1)* ***(Bernard),*** who had met her in June, 2008. Bernard was a medical officer at Aga Khan Hospital, Kisii, and resided at Uhuru Complex, Kisii. The deceased was working at Kenya Commercial Bank, Kisii Branch and lived at Kanyoni flats, Nyanchwa Estate in Kisii Town. On 11th November, 2008, at about 3.00 pm the deceased went to Aga Khan Hospital for treatment. This was after she had contacted Bernard and so after running other errands, the deceased eventually went to Bernard's residence where they stayed till 8.30 pm and was dropped to her Kanyoni flats, Nyanchwa. Bernard dropped her there in his vehicle. One of her mobile phones remained at Bernard's house and she contacted Bernard to drop it for her at her work place the next morning. There is no evidence that she left her flat that night, neither is there any evidence that she had any visitors to her flat. ***Dennis Nyakeriga Nyandingusi*** *(PW2)* ***(Dennis)***, the

accountant at Nyanchwa Adventist college and living at Kanyoni flats, Nyanchwa and who knew the deceased as his neighbour staying in the first floor while he was on the second floor was in his house at about 8.00 pm. He was watching TV. He heard some people knocking the door to his flat. He peeped through the window and saw two people. He did not open the door. Those two people were adults and after complaining that Dennis was not opening the door, they left. At about 9.00 am Dennis heard a woman screaming from a flat below his flat. He did not know who was screaming. After five minutes, Dennis took his bright torch, put it on and went out of his flat to check what was happening. He saw other neighbours outside there and he heard there was someone hiding behind a car next to Kanyoni flats. On that man being interrogated, he identified himself to the satisfaction of people who were there including Dennis. Dennis said that man *"was wearing a jacket, but his hair was shaggy"* and he had a bottle of soda. The neighbours were satisfied as to his identity and they left him to go. None volunteered an information as to who had screamed. That man, later identified as the second appellant was left to go and not only so but a motorcyclist was asked to take him to town. After some five minutes, Dennis heard from an undisclosed person that Irene was dead. They went to the deceased's house, and found her dead in a pool of blood. It is not stated as who opened the door to the deceased's flat before neighbours went inside or whether it was found already opened or whether it was broken into. Further it is not stated as to who first discovered her dead. According to Dennis, there was a sickle near the bedroom door which had blood stains. Dennis said, at the juncture, the landlord whose name was not disclosed appeared in the deceased's flat and the same landlord called the police. Dennis identified the second appellant as the person he had seen on the material time. We are at pains to find out whether Dennis identified him as one of the two people who had knocked his door or whether he was identified as the person found under a vehicle. This however is cleared by Dennis in cross-examination when he said that he did not see the faces of the two people who were knocking. Thus according to Dennis, the second appellant was the person found under a vehicle. Dennis said the second appellant had no blood stains. Again in cross-examination, Dennis said he did not know whether the deceased's door was broken into and that the second appellant was not asked what he was doing where he was found.

Ibrahim Ogure Kebati *(PW3)* ***(Ibrahim),*** lives about 20 – 30 meters from Nyaboke flats where second appellant was found. He saw the person he identified as the second appellant, who had jeans trousers, a white T-shirt and a jacket. After he had interrogated the second appellant on his identity, he pleaded with the people to let the second appellant go and he asked a motorcyclist ***Geoffrey Momanyi Ochora*** *(PW5)* to carry the second appellant to the town. Thereafter, he heard screams from Kanyoni flats and he together with another got into a taxi to see if they could catch up with the motorcyclist carrying the second appellant, but though they met the motorcyclist, they could not trace the second appellant. ***Morris Babu*** *(PW4)* confirmed having also seen the second appellant only adding that the second appellant had a mark on his face, which mark, the court stated in a note, was very tiny and hardly visible.

Stella Morangi Momanyi *(PW6)* ***(Stella)***, was staying with her aunt at Nyanchwa, Kanyoni flats. At about 9.00 pm she was in the house when a person knocked at the door and when she put on light she saw a person she later identified as second appellant who talked to her through a glass door. The second appellant asked for Irene who was working at Kenya Commercial Bank. Stella directed him to the flat next door to her aunt's door. After 30 minutes of that encounter, she heard screams and when they opened the door there were many people and Irene was dead. On 17th November, 2008, she identified the second appellant. In cross-examination, she stated that there was a glass pane which was missing. She did not know where screams she heard were coming from.

On the same night of 11th November, 2008, ***Samson Ondimu Omenye*** *(PW7)*, a watchman at Park View Guest house near Hema hospital, Kisii opened the gate to a customer who went to the reception to enquire for a room. He was given the room by ***Vincent Mose*** *(PW8)* who was a cashier at the guest house, but as the guest whom he identified as the first appellant did not have his identity card, claiming he had lost his wallet, the receipt was retained.

It is not certain as to when the matter was reported to police station and as to which police officer received the first report. We say so because the record shows that when ***PC Benjamin Koome*** *(PW12)*, scenes of crime officer went to the scene on 11th November, 2008, at 10.27 pm he said he was in

company of ***Inspector Kamau*** while the only Inspector Kamau in the record as one of the witnesses said he received information about the incident at 11.30 pm and naturally reported to the scene after that time and then called Divisional Commander who responded with officers from the CID. In our minds, if matters were handled by the police procedurally, then we would have expected the scenes of crime to report to the scene in response to orders or requests from the investigating officer and thus PC Benjamin must have reached the scene after a police officer had received the report of the incident. Be that as it may, PC Koome said he took several photographs of the deceased in different positions and said that on the next day 12th November, 2008, at Hema mortuary, he took more photographs showing injuries to the head and throat. He also took the photograph of the main door to the house and general view of Kanyoni building. ***IP Wycliff Mwangi Kamau***, as we have stated, received murder report at about 11.30 pm and proceeded to the deceased's house. He found the deceased lying down with deep cuts on the wrist and on the neck. He called Divisional Commander who responded with other police officers while IP Kamau proceeded to where on information the second appellant was, having been arrested by members of the public at Bobaracho area after the appellant failed to meet bus fare and was removed from the bus to Nairobi. He rearrested the second appellant. In his testimony, the second appellant had a sweater which had blood stains. He took second appellant's trouser, shoes, T-shirt and sweater all of which he gave to ***Senior Sergent Benson Naibei*** *(PW17)* on 12th November, 2008. Senior Sergent Naibei visited the scene at Nyanchwa and took some soil sample outside the compound near the road. He then contacted Safaricom, Nairobi to assist them trace the first appellant. According to this witness, notwithstanding that he was not of the rank of an Inspector and notwithstanding the amendments to the Evidence Act, he got what we feel was a confession from the second appellant who was then in police custody to the effect that he *(the second appellant)* was with the first appellant at the time the offence was committed. As a result of what Safaricom told Senior Sergent Naibei, they went to Kisii bus stage where they arrested the first appellant. Second appellant was in police custody at the bus stage. Upon interrogation of the first appellant, the police took him to Park View Guest house and he allegedly showed the police the coat he was wearing at the time of crime which was in a stationary defective vehicle parked there. It had some blood stains. This witness did not take blood samples from the two appellants and from the deceased. He said a doctor at Kisii General hospital, whose name was not revealed took the blood samples. These blood samples together with clothes together with the knife recovered from the deceased's house were all taken to ***Albert Katauri Mwaniki*** *(PW15)* ***(Albert)*** a Government analyst who received them from ***PC Koome*** on 19th November, 2008, whereas on the same day, shoes together with soil samples were also received by ***William Kailu Munywoki*** *(PW10),* a Government analyst from PC Koome. Meanwhile, on 14th November, 2008, at 11.00 am ***Dr. Momanyi*** performed postmortem on the body of the deceased, which was identified to him by ***Fanuel Oluoch Gaya*** *(PW16)*. The postmortem report prepared by Dr. Momanyi was produced in court by ***Dr. Cheruiyot Kipngeny*** *(PW9)*. The cause of death was found to be cardiorespiratory arrest due to severe bleeding as a result of a cut wound by a sharp object. William Kailu Munywoki in his report, found that the two soil samples were related to soil on the white sports shoes removed from the second appellant. Albert's report was to the effect that the blood sample of the deceased was that of group B, whereas blood samples of first appellant and of the second appellant were of groups A and O respectively but that the knife was heavily stained with human blood of group B, coat of the first appellant was slightly stained with blood of group B, and stripped white and brown T-shirt of the second appellant had light human blood group B.

Dr. Asaria Onyango, a consultant Psychiatrist at Kisumu examined both appellants on 19th November, 2008, and found them fit to plead to the charge. C.I. Peter Mwangi conducted identification parade for the two appellants at which he stated both were identified – first by one ***Violet Kemunto Mogaka***, and the second appellant by Dennis, Ibrahim, Stella, Morris and one Dominic.

The above evidence formed the prosecutions case. On its consideration, the appellants were each put to his defence and as we have stated, each offered unsworn statement in defence and first appellant called one witness. The first appellant's defence, again briefly, was that he did not know anything about the death of the deceased nor did he know her in person. He cleared his attachment at Homa Bay District Hospital as he was then a 2nd year student at Kenyatta University pursuing a degree course in Nursing. He took a bus to Kisii where the bus stopped to pick up more passengers. He went out to buy snacks and credit. As he was still awaiting his turn at the shop, police officers arrested him and took him to police station where he was kept in custody for thirty five (35) days till 18th December, 2008, when he was

taken to court and was charged with murder. He denied knowing the second appellant and also denied sleeping at a guest house. He claimed that no blood samples were ever taken from him and no identification parade was conducted for him. Lastly he denied knowledge of Pauline and her allegations of threats against her. The second appellant was a continuing student at Kenyatta University pursuing Bachelor of Education specialising in Maths and Geography. He denied the charge. On the material day, he had been carrying out his research at Suneka and completed at 4.00 pm. He then boarded a vehicle to Nairobi reaching Kisii at 6.30 pm. Thereafter he went to bus the stage and booked Nyamira Express which was scheduled to leave Kisii at 9.00 pm. He went to a nearby restaurant to kill time and returned to the bus stage at 8.30 pm. The bus left on time but after covering about 5 kilometers, he had problems with the bus crew and he then alighted to wait for another bus. As he was still waiting a police vehicle arrived and he was arrested and taken to a police station. Despite his being beaten thoroughly, he refused to confess to the alleged offence. He remained in police custody till 18th December, 2008, when he was taken to court. He said he did not know the deceased and could not have murdered her as he had no motive for the same. He denied being at Nyanchwa Estate anytime that fateful evening. He denied the allegation that he was found hiding under a vehicle. He invited the court to observe his face and unlike the person the witness said had a scar, he did not have any scar on his face. He denied seeking from Stella where the deceased lived and denied knowledge of the clothes and shoes allegedly taken from him by police officers. He also stated that no blood samples were ever taken from him and he ended by saying that he was a victim of mistaken identity.

Linus Emojong Echakara *(DW3)* is the first appellant's father. He confirmed that the first appellant was a student at Kenyatta University pursuing a Bachelor of Science course. In November, the first appellant told him he was going for his practical attachments to Homa Bay. He sent him money for the same and so to him the first appellant was in Homa Bay at the relevant time. In cross-examination, he said he knew nothing about the case.

The learned Judge considered the entire evidence, a summary of which we have set out above and as we have stated, having done so, she found each appellant guilty as charged, convicted them and after considering mitigation and Probation officer's report she had sought and the States submissions on sentence, she sentenced each appellant to death. In finding each guilty, the learned Judge of the High Court had the following to say:

> ***"68. It is clear to this court that the 1st accused in participating in this crime was reacting to the fact that Pauline had jilted him and that the deceased had a part to play in it when Pauline refused to mend fences with him. That may have been so, but did the 1st accused have to descend so low? The 2nd accused was clearly heard asking for the deceased's house by Stella and he was seen going towards the house. Dennis had earlier on seen the two accused persons together as they knocked on his grills under bright security lights on the balcony. Did the 2nd accused have to be dragged into this whole bizarre incident? Both accused persons are very young people and the fact that the 1st accused had been jilted by Pauline was not necessarily the end of the world whose beautiful ones are yet to be born. This murder was, in my view most foul. The 1st accused's denial of both Pauline and the deceased cannot be true.***
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> 69. ***In the premises, I have come to the conclusion that based on the evidence on record, each of the accused is guilty as charged. I therefore convict each of them for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code."***

This is a first appeal and in law we are duty bound to revisit the evidence afresh, analyse it, evaluate it and reach our own conclusion provided that we are minded that the trial court had the advantage of seeing the demeanor of the witnesses and hearing them and thus give allowance for the same – see **Okeno vs Republic (1972) EA 32.**

In order to do justice to the entire case, we propose to consider the case that was advanced against each appellant separately. We have no doubt that the proof of their

guilt if at all was by circumstantial evidence as none saw any or both of them inflict injuries to the deceased.

In respect of the first appellant Raphael Isolo Echakara, the main points that resulted into his conviction as can be deciphered from the judgment of the learned Judge, were first that he was a jilted lover of Pauline who had promised revenge against Pauline even if it took after ten years and that he was the one who had sent message of condolences to Pauline long before Pauline knew of the deceased's death. The second point was that he was positively identified at an identification parade as the person who had hired a room at the guest house, thirdly that he led the police to where a jacket he had worn at the time of the incident was, which jacket had stains of blood which on examination by the Government analyst was found to be human blood of group B similar to the blood group of the deceased; fourthly that Dennis had earlier on seen the first appellant and the second appellant together as they knocked on his grill under bright security lights on the balcony of his flat and lastly that the second appellant told Senior Sergent Benson that he *(first appellant)* was with the second appellant when the offence was committed. We think that of these five points, the point we have set out here as the fourth point namely that Dennis had earlier on seen the two appellants as they knocked on his grill can be disposed of quickly for in our view, this was a misapprehension of facts by the learned Judge. What Dennis said in evidence in chief was as follows:-

> *"I heard some people knocking the grill to the main door of my flat. I peeped through the window. I saw 2 people but I did not open. The balcony is lit by a (sic) electric bulb. The 2 complained that I was not opening and they would therefore leave. The 2 people were adults. The two people left."*

In that evidence, Dennis did not say he identified the two people as the two appellants. Indeed he did not say that he could identify the two people who knocked at the grills of his main door. This becomes clear in his evidence in cross-examination where he said:

> *"I did not see the faces of the 2 people who were knocking."*

Indeed even when he later saw the second appellant who was found behind a car, he did not identify him as one of the two people who knocked at the grills of his main door. However, the learned Judge, in her judgment stated:

> ***"Dennis had earlier on seen the two accused persons together as they knocked on his grills under bright security lights on the balcony."***

This was as we have said a misapprehension of facts as Dennis never said the people who knocked at his grills were the appellants nor that the balcony lights were bright. All he said was that he saw two people whose faces he did not see and that he saw them with the aid of electric bulb in the balcony but not bright electric light. This aspect must have affected the learned Judge's mind on the identification of the appellants which is a matter of law.

The next issue is the evidence of Pauline. In our considered view, the evidence as to the past relationship between Pauline and the first appellant and on the text message was relevant for the establishment of a possible motive. Also the evidence of what the first appellant allegedly did or said soon after the death of the deceased would have been relevant for the same purpose, but only if the same evidence was properly admitted in law. However, that evidence was not in law admissible. Pauline said:

> *"On 12/11/2008 a friend of the first accused known as Silas, a student at Maseno, told me "Pauline Pole." I did not know why he told me that. I had not heard about Irene's death. While in class I was telephoned by Kisii Police station who told me that Irene had been murdered. I got curious as to why Silas knew about the death before me. I talked to Kennedy Olenyo, I asked him to talk to Silas and found (sic) out how he got to know about it. Kennedy talked to Silas. Silas said that he had received a text message from the 1st Accused on 11/11/2008 asking him to send his condolences to me."*

Neither Silas nor Kennedy Olenyo were called as witnesses and so whatever they said could not be tested by cross-examination and that is the main test of what is hearsay evidence. If Silas had been called and had said that the first appellant sent him a text message on that fateful night 11th November, 2008 that Irene was dead, then clearly the first appellant would have had to explain his source of the message if he was not involved – see ***Section 111*** of the Evidence Act for how he came by that information would have been in his own particular or special knowledge and the burden of proof would have shifted to him. But, Silas never gave evidence and that evidence of Pauline remained hearsay evidence which should not have been admitted in law and certainly could not be relied upon for a conviction.

The third point raised against the first appellant which led to his conviction was that he was identified positively at an identification parade as the person who booked a room at Park View guest house. The learned Judge stated as follows on that aspect in her analysis of evidence:-

> ***"The second parade was in respect of 1st Accused. He had no objection to having the identification parade conducted. He chose to stand between member numbers 5 and 6. 1st accused was identified by the only witness Violet Kemento Mogaka, by being touched on the right shoulder, (Violet was not called as a witness, but Vincent Kemunto Mogaka testified as PW9)."***

We have perused the record before us. First it is true that one Violet Kemunto Mogaka never featured as a witness and was never referred to by any other witness throughout the proceedings. One is not certain as to how it comes that she was an identifying witness as recorded in the parade forms. Secondly and more important, the record shows that PW8 was Vincent Mose and not Vincent Kemunto Mogaka. Indeed this confusion in the evidence as to who identified the first appellant at the identification parade was traced back to the evidence of Chief Inspector Peter Mwangi who stated that he invited Violet Kemunto Mogaka, the only witness and who positively identified the first appellant yet the same Violet Kemunto Mogaka whoever she was, was never a witness in the entire case. We do not understand on what basis that identification parade form was produced and admitted in court as Violet who was supposed to give evidence on it so as to have it marked for identification and thus pave way for IP Mwangi to produce it was not a witness. In our view the evidence of identification of the first appellant which was to be confirmed by the results of the identification parade could not be relied upon for conviction.

On the allegation that the first appellant led the Senior Sergent Benson to the recovery of a jacket which was tainted with human blood, the law is now well settled that as ***Section 31*** of the Evidence Act chapter 80 Laws of Kenya was repealed, the court can no longer act on the evidence related to items recovered as a result of a confession extracted from an accused person. In this case Senior Sergent Benson could not take an inquiry statement or even charge and caution statement from the first appellant because he was below the rank allowed to do so even before the entire repeal of these provisions. Court could not in law act on the evidence obtained as related to what was recovered through such evidence. What happened here was not in law proper. The evidence leading to the recovery of the alleged jacket was not admissible in law and evidence obtained through such a confession was not admissible. Further it was alleged that it had slight blood stains of a human being. That blood was compared to blood samples allegedly obtained from the first appellant. First appellant denied having given his blood to anybody or that anybody took his blood. The prosecution said through Senior Sergent Benson that:

> *" I did not take blood sample from the accused. A doctor at Kisii General Hospital did so."*

That unnamed Doctor who allegedly took blood sample from both appellants was never called as a witness to connect the appellants to the alleged blood samples in the face of the first appellant's denial of having given blood sample and with the failure to avail the alleged Doctor who took the blood samples which was sent to Government analyst and which was compared to the human blood stains in the coat allegedly recovered from an open vehicle to which the first appellant allegedly led Senior Sergent Benson, the evidence as regards the blood stains on the alleged coat could not be relied on to sustain a conviction. In any event, as the evidence of Albert that the test as regards the blood stains was not conclusive and was only about 66.6% accurate such evidence could not have proved the case beyond

reasonable doubt as required by law as 33.4% margin in such cases render reasonable doubt.

The last point that was relied upon to connect the first appellant to the crime was that the second appellant allegedly told Senior Sergent Benson that he was with the first appellant. In our view, this is a non-starter with respect. First the recorded evidence on that aspect is as follows:

> *"At the time of the incident there were reports that he was with the second accused. The second accused told me so."*

This was not a clear information and the way it was related clearly showed it was an afterthought. One would have expected senior Sergent Benson to say in court that the second accused told him that he was with first accused. He first started by stating that there were reports that he was with second accused. Then apparently on being asked who gave him these reports, he changed and settled on the second appellant as the one who had told him so. Further, this was, if he got it from the second appellant, a confession by a co-accused which in law is evidence of the weakest kind and needed other evidence to support it before it could be relied on for a conviction – see the case of **Anyangu & Others vs Republic, (1968) EA 239.**

Thus in the end each of the pillars upon which the conviction of first appellant were hanging cannot stand. We will later discuss the effect of this when considering the law as regards circumstantial evidence.

We now turn to consider the case of the second appellant ***Harrison Chegugu***. We have discussed pieces of evidence that were common between the two appellants such as whether Dennis identified them as the two people who knocked on the grill and the issue of proof through the blood samples allegedly found in some of the clothes claimed to have been worn by each of them at the material time at the scene. We need to add to that evidence of clothes worn by the second appellant that it appears from the record that either the second appellant worn a coat when he was found behind a car and later he wore a sweater at the time Senior Sergent Benson arrested him or there was contradiction as to which clothes he wore at the time he was found behind the car which, from the record, was the nearest he was seen to the scene of the incident. Dennis saw that person immediately he was caught from behind a car and said that he was wearing a jacket and his hair was shaggy. He went on and said:

> *"The second accused had no blood stains."*

Ibrahim who resided near Nyaboke flats and who also responded to the commotion from Nyaboke flats saw people surrounding a person he later identified as the second appellant. This is his description of that person:

> *"He was a short man, had a jeans and a white T-shirt and a jacket."*

He said the second appellant was outside Nyaboke flats where vehicles are parked. The deceased died at Kenyoni flats which was clearly near Nyaboke flats. Ibrahim stated further that at the time he saw him, the second appellant was muddy. Against the above evidence which was firm that when the second appellant was found behind a car near Nyaboke flats he had a jacket, I.P. Kamau, on rearresting the second appellant from the members of the community policing none of whom was called as witness, said the second appellant had a sweater which had blood stains, and it was that soiled blue and white sweater which was taken for examination. We find it difficult to appreciate the circumstances that could have led to a jacket being referred to as a sweater. In our view, if the second appellant was found behind the car at Nyaboke flats that fateful night wearing a jacket and was given a lift to the town by Geoffrey then even if he had changed his clothes, the jacket would have been the cloth he was wearing at the time of the incident for that was the cloth he was found wearing and immediately thereafter the death of the deceased was discovered. But as we have stated that jacket had no stains. This raises doubts as to the origin of the sweater that was taken for examination and the learned judge could not have been right in relying on that clothe as coat for record shows what was examined was sweater.

Other than the above, the other issues raised against the second appellant were that Stella saw him and talked to him and directed him to the deceased's flats as he had asked for the same. This was indeed strong evidence against him, if the Stella's identity of the second appellant was within the standards required in law. The person she identified as second appellant knocked that door at 9.00 pm and she said in her evidence in chief that she talked to that person *"through the glass door,"* later in her cross-examination she said *"there was a glass pane that was missing."* She did not say whether she talked to the man through that gap left by the missing pane. Further, though she said her aunty told her to put on the light, it was not stated where that light was, whether inside the house or security light and how bright or strong that light was. If the light was security light outside the door then it would have been easy to identify the person but if the light was inside the house and there was glass between the two then it might have presented some difficulties identifying a stranger. In any case, the learned Judge in her judgment on this point referred to this evidence and stated in her judgment:

> ***"She said there was bright light from the electric security light which enabled her to clearly see the 2nd accused who had shaggy hair."***

What Stella said which we have analysed above was that her aunt told her to put on the light to see who it was and towards the end of his examination in chief she said:

> *"There was electric light."*

She did not describe the light as bright and further Stella said the person's hair was curly and did not say the person had shaggy hair. Again Stella did not describe the electric light as *"electric security light."* As if that is not enough the learned judge could not have been right in stating that Stella said she looked at that man intentionally for about 5 minutes before he went towards the deceaseds' flat. All Stella said was that she directed the person to where Irene's flat was, but did not say she saw that person going towards Irene's flat. It was also not correct to say as the learned judge stated, that *"A little while after the 2nd accused had gone towards the deceased's flat there were screams and the deceased was dead."* Stella said it was 30 minutes later that she heard screams. In our view these various misapprehensions of Stella's evidence probably led the learned Judge to conclude that Stella's evidence left no doubt whatsoever that the second appellant must have been one of the murderers. The second appellant might have been a murderer, but on the evidence of Stella, thirty minutes after discussion with a stranger seen through either a glass window by use of electric light of which strength was unknown and position unknown cannot conclusively point a finger at such a person as the murderer and non other.

The other evidence was clear, that Dennis, Ibrahim and Morris saw the appellant near Nyaboke flats. He had a bottle of soda, and gave satisfactory identity of himself to the extent that Ibrahim was satisfied that he had done nothing and they arranged for his exit from that place. Although the second appellant denies that evidence, we are satisfied in our minds that he was the person seen behind a car at Nyaboke flats. We will later discuss whether that alone could lead to his conviction. The other point raised by the prosecution against him was that his shoes had soil that resembled the soil sample found near the scene of the incident. In our view, that would have provided the nexus between the second appellant and the deceased's house or the scene of the incident and that is the link it was meant to supply. Indeed William found that the soil from the rubber shoes apparently worn by the second appellant on the material day was similar to the two soils from different locations. However, the soil sample was not taken from the deceased's house. Senior Sergent Benson said in cross-examination:

> *"I took the soil sample outside the compound near the road. The second accused was arrested by members of the public along the road. He was standing somewhere."*

If the examination was meant to demonstrate that the second appellant was at the deceased's flat and thus was the murderer, then it failed miserably as all it showed was that second appellant walked along the road just like many others did. One wonders, after Stella's evidence that it was the second appellant who sought Irene's house that night and was directed there, why then the prosecution did not find it proper and highly relevant to take dust from the deceased's house or even to dust it for finger prints. If that had yielded positive results then that would have proved a water tight case against the second appellant. That

was not done and all we are left with is no more than guesswork which in law however strong cannot be relied on for a conviction in a criminal case.

The last matter that was raised against the second appellant is that he confessed to the offence in that he told Senior Sergent Benson that he was with first appellant when they committed the offence and that he assisted the police to trace the first appellant. We have dealt with this aspect when we considered matters raised against the first appellant. Briefly that evidence, if it even was there, should not have been admitted in law as the Senior Sergent had no capacity to receive it and in any case there was no caution administered before such statement was volunteered. We need not say any more on that.

As we have stated hereinabove, no one witnessed this bizarre murder of an innocent young life. The evidence advanced by the prosecution was all circumstantial. That being the case, the prosecution was duty bound to build a water tight case against each appellant based on unbroken and tight chain of evidence before a court of law could convict on it. In our view, though much was canvassed as to whether each appellant was positively identified at various places such as Park View guest house in the case of the first appellant and outside Nyaboke flats in the case of second appellant, after those identifications if done to the satisfaction of the Court, one thing still remained and that is whether the person found outside Nyaboke flats and the person who slept at Park View guest house were the people who committed the offence. That is where the issue of circumstantial evidence comes in, because even with the proof of those aspects, there is still the question of whether these pieces of evidence or in respect of each appellant whether that evidence leads one to an inevitable conclusion that it was either or both appellants who committed the offence and none other. In the case of **Republic vs. Kipkering Arap Koske and another (1949) 16 EACA 135** the predecessor to this Court held:

> **"In order to justify 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."**

This holding in law was amplified and explained by another decision of the predecessor to this Court in its decision in the case of **Simoni Musoke vs R (1958) EA 715** where it was also held that circumstantial evidence can be a basis of a conviction only if there is no other co-existing circumstances weakening the chain of circumstances relied on.

All the above are clearly spelt out in the case of **Sawe vs. R (2003) KLR 364.**

Applying these legal principles, we are of the considered view that with all the loose ends we have set out that exist in this case; with all the non apprehension of facts by the learned Judge as we have indicated above, and with the scenario whereby all that was proved against each appellant was that they were in Kisii on the relevant date and that the second appellant was a few metres away from the deceased's house and with the prosecution's failure to call important witnesses such as the Doctor who took blood, the person who first discovered the body of the deceased and Silas who gave certain serious information to Pauline, we are far from being persuaded that the case before the trial court was proved beyond reasonable doubt. Indeed many lingering doubts remained unresolved. We have seen remarks on the record by the learned Judge made in the course of sentencing the appellants which are to the effect that the first appellant was recorded by the Probation officers as having committed the offence out of anger because he was jilted by Pauline, and that the second appellant may have done so because he was alcoholic and could have been influenced by alcohol and drug. That Probation report is not in the record before us and in any event even if it were before us, it could not in any way be admitted for purposes of deciding on the guilt of the appellants on this appeal as the circumstances under which such a report could have been obtained would not allow them to be admitted into the record. We therefore attach no importance to these comments of the learned Judge in passing the sentence upon the appellants.

This appeal is allowed. The conviction in respect of each appellant is quashed and the sentence in respect of each appellant is set aside. Each appellant is set at liberty unless otherwise lawfully held.

Dated and delivered at Kisumu this 14th day of March, 2014.

J.W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

W. OUKO

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR