IN THE COURT OF APPEAL

AT ELDORET

CORAM: ONYANGO OTIENO, KARANJA & KOOME, JJ.A.

CRIMINAL APPEAL NO.10 OF 2012

BETWEEN

DORCAS JEBET KETTER

JOSEPH BOIT.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Eldoret (Mohammed Ibrahim, J.)

dated 29th November, 2003

in

H.C.CR.C.NO.96 OF 2003)
****

JUDGMENT OF THE COURT

A full reading of the entire proceedings that has landed on our desk by way of this appeal demonstrates a sad and unfortunate aspect of the history of the entire case which bordered on what we may with restraint call injustice nearing torture to some of the original suspects and even to those who have landed before us, when one considers the time that was taken to finalize a case that was before the trial Court for the first time on 13th November, 2003 and ended on 29th November, 2011 – just over 8 years when the witnesses that testified for the prosecution were only eleven in number and none gave lengthy evidence. The result was that those who were acquitted at the end of it all – and they were two – only gained Pyrrhic victory as they were released after incarceration for just over eight (8) years and those now before us – the appellants – had to wait for all that time to know their fate. Looking at it all, the only reasons for that scenario were first that Judges were apparently sent on transfer without arrangements for them to complete their partly heard cases; that the law that existed then did not allow for the criminal trial in the High Court to be taken over and to continue where the original trial judge was for one reason or the other unavailable and lastly simple inability to deliver judgments on time.

Be that as it may, the appellant ***Dorcas Jebet Ketter*** (who was the second accused in the trial court), and ***Joseph Boit***, (first accused in the trial court), together with two others were in an information dated 9th February, 2004 arraigned in the High Court at Eldoret with the offence of ***Murder contrary to Section 203 as read with Section 204 of the Penal Code***.

The particulars of the offence were that

"On 30th day of September, 2003 at Kabore Sub-location, Lolminingai Location in Nandi North District of the Rift Valley Province jointly with others not before Court murdered HILLARY KIMISIK MALAKWEN."

On 13th November, 2003, they appeared before Gacheche, J. but plea was not taken till 12th July, 2004 when each of them denied the charge. Thereafter, after normal procedural adjournments, the hearing proceeded but after hearing eleven (11) prosecution witnesses with the aid of assessors and the prosecution closed its case, the matter was adjourned to 23rd October, 2006 to enable one of the defence counsel to address the Court under ***Section 306 of the Criminal Procedure Code***. That never happened as at one time the learned Judge was indisposed and at another time one of the learned counsel for the accused was also indisposed but on the main, because, during the intervening period, the learned Judge was transferred to Kisii and was unable to travel back to Eldoret to complete it whereas when it was taken to Kisii, counsel for 3rd and 4th accused, together with all accused persons and assessors did not appear. The matter was then marked to be heard de novo. Kaburu Bauni, J. took over the case. He empaneled the assessors and proceeded to hear the case. After hearing two witnesses, he dispensed with the services of the assessors and proceeded to hear the case. He also heard eleven (11) witnesses and the prosecution closed its case. In a ruling dated 7th March, 2008, he found all the accused had a case to answer and put each of them on their defence. He then adjourned the hearing to 28th April, 2004 for defence case. However, that was not to be. He passed on. The file thereafter was put before Ibrahim, J. All counsel asked the Court to proceed from where Kaburu Bauni, J. had stopped and the Court obliged and after complying with the Provisions of ***Section 201*** as read with ***Section 200 of the Criminal Procedure Code***, and also after complying with the Provisions of ***Section 306 of the Criminal Procedure Code***, each accused gave an unsworn statement on 30th March, 2009, and the hearing was adjourned to 16th August, 2009 but on that day the accused persons raised preliminary points, two of which were later withdrawn. The hearing of the preliminary objection in respect of the other two accused went on and ruling was delivered on 3rd August, 2009 when the preliminary objections were dismissed and the submissions in the main case proceeded. Judgment was to be delivered on 24th September, 2009 at 11.00 a.m. but that never materialized. The learned Judge was transferred to Mombasa Court before he could deliver the judgment. The record shows that he was transferred to Mombasa in August, 2009, and later was again transferred to Nairobi from Mombasa. The judgment was never delivered until over two years later on 29th March, 2011. This brief history we have set out above explains our comments at the onset of this judgment. However, this is now water under the bridge.

The record before us shows that the appellants and the deceased were neighbours in their rural home at Kabore Village in Nandi District. ***Wilfrida Barabara Kosgei*** (PW2) lived about 300 metres from the home of the second appellant; ***Isaak Kipchoge Karonei*** (PW3) who was also from the same village or area with the appellants and was son of the deceased ***Hillary Kimusik Malakwen*** and ***Phyllis Jeruto*** (PW9) was deceased's daughter, while ***James Chepkwony*** (PW4), ***Hillary Sambu*** (PW5), ***Robert Kipkosgei Tabut*** (PW6) were all people from the same Kabore Village whereas ***Albert Kipkorir Saina*** (PW7) was the Assistant Chief of Kabore Sub-Location and ***Zipporah Jebiwot Malakwen*** (PW8) was the deceased's sister in law. In short, all the first nine witnesses were people from the same area and they knew each other, in our view, very well.

Celestine Malakwen (PW1) was the wife of the deceased. She was a teacher at Lutyet Primary School in Nandi North. On 30th September, 2003, at about 4.00 p.m. as she was going home from school, on reaching the gate to the second appellant's home, she saw ***Zipporah*** being beaten by a certain woman whose name she did not know. One of the daughters of the first appellant hit the ground with a panga and

another daughter called ***Emily*** approached ***Celestine*** with a stick and beat her with it. ***Celestine*** ran away as she was being chased and beaten by ***Emily*.** She ran to her home which was between 150 and 200 meters away from the second appellant's home. She found the deceased at home and explained to him what had happened. Later at about 6.00 p.m. the second appellant, and his two sons went to the home of ***Celestine*** and the deceased. They were with another person who was the co-accused of the appellants at the trial but who was acquitted after first trial. They pushed the door of the bedroom where the deceased was sleeping; pulled the deceased out and started to beat him. ***Celestine*** screamed but the second appellant told her they (second appellant and other invaders) knew what they were doing. They removed the deceased away from his home and went towards the house of the second appellant.

The first appellant who is second appellant's daughter together with two of her siblings namely ***Stella*** and ***Eunice*** joined the team led by the second appellant. They had sticks. When ***Celestine*** made an attempt to follow them they threatened her. At that time, the deceased had only underwear. ***James Chepkwony*** passed by and ***Celestine*** gave him trousers to take to the deceased. This is confirmed by ***James*** in his evidence to the Court. Thereafter ***Celestine*** continued to hear noises from the second appellant's home which noises continued up to 4.00 a.m. Next morning several people who went near second appellant's home told ***Celestine*** that they saw fire at the gate of the second appellant's home but she did not go there although the report was that it was as if a body was being burnt. In her evidence bones were collected by police from the burnt place. Later she learnt that second appellant had alleged that the deceased had bewitched his wife who was sick during that period. In her own explanation, this witness said that first appellant was at their gate when the deceased was being pulled by second appellant, his sons and others and that she saw her husband pulled up to the house of second appellant. **Wilfrida** ***Barabara Kosgey*** (Wilfrida) was a neighbour of the second appellant, their home being only 300 meters apart. She heard shouts from second appellant's home. This was at 8.00 p.m. She went there and the second appellant opened the door to his house for her. Once in the house, she saw somebody whose hands were tied to the rafters. Second appellant and his children were in the house. First appellant was also in this house. She recognized the person tied to the rafters as the deceased ***Hillary Malakwen*.** Second appellant told her that the deceased had bewitched his wife. After talking with second appellant for about fifteen (15) minutes, second appellant went out and returned with two glasses of water which he poured on to the hands and legs of the deceased. The deceased started screaming and the second appeallant went to her home. Next day she heard the deceased had been burnt. She went to the scene and observed that the fire was on the road near the home of the second appellant and it was a huge fire. She however did not see the appellants beating the deceased, but the deceased pleaded with her to plead with the second appellant for him.

Isaac Kipchoge Karonei, son of the deceased was at home when second appellant, first appellant and others went to their home and said they wanted the deceased. They removed his father out of their house where he was sleeping, beat him up and took him to second appellant's house. Second appellant claimed the deceased had bewitched his wife. Isaac followed them but was chased away and returned home. Later he reported the incident to the Chief, who then contacted the police station and reported the matter. He returned home. Later in the night he saw fire from far and he was told his father had been burnt. That fire was from the home of the second appellant. He identified the first appellant as one of those who went to his father's house and forcefully removed the deceased.

James Chepkwony, who had gone to look for charcoal from a nearby village heard screams from the home of the deceased. On reaching near the source of that noise, he saw the deceased, the second appellant, and the deceased's hand was held by a son of the second appellant. Later one of the people said they wanted the deceased to go and take milk with second appellant's wife who was sick. At that time, the deceased had no clothes on. After leaving them, he met ***Celestine*** who gave him a trouser to take to the deceased. He rushed back to the people he had met with the deceased. He gave the deceased the trouser. Next day as he was in his shamba he heard people say that deceased had been burnt. He went and saw fire which was still smouldering near the road. That fire near the roadside near second appellant's home was also seen by ***Hillary Sambu*** who went there the next day having heard screams the previous evening within the same area. On the same 30th September, 2003 at around 4.00 p.m. Second appellant went to ***Robert Kipkosgei Tabut*** at his shop and borrowed a knife and a file.

Zipporah Jebiwot Malakwen was sister-in-law of the deceased. On the same 30th September, 2003, she

went to see second appellant's wife who was sick. While there, one of the daughters of second appellant started screaming and cutting ground with a panga. One woman hit ***Zipporah*** on the left cheek. Her in-law called ***Leah*** asked her to go home and she complied. Later she heard one ***Phyllis*** scream and saying ***Hillary*** had been killed. In cross-examination, she said ***Stella*** was the one with a panga and was the one cutting the ground. ***Phyllis*** was with deceased's daughter. All she said was that on 30th September, 2007, sons of second appellant went to her father's house and took him away and that was the last time she saw their father, the deceased. She was in the kitchen when this happened but after a while she ran away. The last of the witnesses from Kabore was ***Albert Kipkorir Saina,*** the Assistant Chief of the area – Kabore Sub-location in Nandi District. He was at his home asleep at about 9.00 p.m. On that particular day – i.e. 30th September, 2003 when one ***Maritim Samoei*** woke him up and told him that some people went to the home of the deceased and took him away over the allegations of witchcraft. He told ***Mr. Samoei*** to go to Lessos Police Station and report the incident. Next day he reported the matter to the police through mobile phone.

CIP David Ruto was the OCS Kapsabet Police Station at the relevant time. On 1st October, 2003, he received two telephone calls from the assistant chief and Eldoret Police Station. He proceeded to the scene where there was fire at the roadside next to the home of the second appellant. He went to the deceased's home where he found his wife and was told what happened the previous night the gist of which was that the son of the second appellant took the deceased to the house of the second appellant and when she tried to follow them she was chased away. That morning she found the deceased had been burnt. ***CIP David*** checked the fire and found ashes and small bones and a bad smell. The body had been burnt completely. He found second appellant at the scene and he (second appellant) took the police to his house. The second appellant maintained he had been bewitched by the deceased. He also showed this witness carcass of a dead cow which he claimed had also been bewitched by the deceased. The second appellant was told to report to the police station and he did so after two days. He was arrested and later the other suspects including the first appellant were also arrested. One of the suspects was arrested by ***PC Elisha Rop*** (PW10), but that aspect is no longer relevant as that suspect was acquitted after full trial. The appellants together with two others were thereafter charged.

The sum total of the prosecution's case that was before the court was in brief that on 30th September, 2003 in the later afternoon, as the deceased was in his house sleeping, his house was invaded by the second appellant together with his sons and the first appellant was also there. They took him to their house where he was tortured and eventually burnt whether alive or after he had died is not certain. This is the evidence of ***Celestine*** who had witnessed some commotion at the second appellant's house just as she approached their home and thereafter she witnessed her husband being taken away to second appellant's house which house was nearby. She tried to follow the appellants and others but was threatened with physical assault upon her and she went back to their house. ***Isaac*** also witnessed the invasion and their taking away of his father, the deceased. ***Phyllis Jeruto*** also witnessed her father being taken away by the second appellant and his sons. ***James Chepkwony*** saw the deceased with second appellant and others on the way to second appellant's home. He saw him as they were on the way and he saw him a second time when ***Celestine*** gave him trousers to take to the deceased. And ***Wiflrida*** saw the deceased inside the house of the second appellant. Not only that but at that time she saw deceased in the house of the second appellant, his hands were tied to rafters and when water was poured on his hands and legs, he screamed. Thus the deceased was traced in the company of the second appellant and first appellant from the deceased's home; on the road to the second appellant's home up to inside the second appellant's house. He was also witnessed undergoing torture inside the second appellant's house and thereafter no one saw him alive and instead fire was seen on the road near the second appellant's home. The body of the deceased was never seen again; no postmortem report was produced. There was no medical evidence on the cause of death, if he died.

In their defences given vide unsworn statements, the first appellant ***Dorcas Jebet Ketter*** said on that day 30th September, 2003, she was at home nursing her mother who was sick. At about 6.30 p.m. She heard noise and people were shouting the name of ***Hillary*** but she did not know what it was all about. Next morning at about 11.00 a.m. Police officers from Kapsabet went to the scene. She went to the scene but stood at their gate. Police went up to their home and saw her mother. She went away. On 2nd November,

2003, police returned and arrested her, took her to Kapsabet Police Station and she was charged with the offence. She denied Killing the deceased. Second appellant also denied killing the deceased. He also gave unsworn statement. On 30th September, 2003, he went to Moiben to buy herbal/traditional medicine. He did not find the medicine-man. He was told he had gone to Ziwa. He followed him there and got medicine. He slept that night at Cheptiret and the next day returned home. When he reached home, he saw many people near the road and police officers also came there. He joined the crowd. The Chief and OCS called him and he led them to his house where they saw his sick wife. When they asked him about the incident, he denied any knowledge of it. He showed the Chief and OCS a dead cow which was in the store. The OCS then asked him to report to the Police Station the next day, but he went on 4th October, and he was arrested. Thereafter, other people including the first appellant were also arrested. They were later charged as stated above.

The above were the facts that were before the trial court which the learned judge considered and led to the conviction of both appellants. The learned judge found the evidence of ***Celestine*** consistent and credible and found that her evidence was sufficiently corroborated by the evidence of ***Isaac***, and the evidence of ***James*** as well as that of ***Wilfrida*** who saw the deceased being tortured. The learned Judge felt that notwithstanding the absence of medical evidence as to the cause of death of the deceased as no postmortem report was availed and no medical evidence was led to establish whether the deceased actually died and the cause of his death, nonetheless, the evidence that was before him, in law established beyond doubt that the deceased died from acts of the appellants. He then felt safe convicting them and although there were no mitigating facts before him, he sentenced them to death.

The appellants felt dissatisfied with the conviction and sentence and hence this appeal premised on two memoranda of appeal both filed in person by the appellants in which the grounds raised are in essence identical. ***Mr. Barasa***, the learned counsel for both appellants argued grounds 1, 3, 4 and 5 together. These grounds are as we have stated identical with minor differences in wording and in numbering and they are: -

"1**.** ***That the learned trial judge failed in law by convicting and sentencing me without mitigation matters as it is part of the judgment and without observing that no judgment can be pronounced without receiving the mitigation circumstances and as such my rights were prejudiced.***

2. **….....**

3. ***That the learned judge erred in law by convicting me on circumstantial evidence which are not watertight as the alleged remains of the deceased were not taken for forensic examination and that no doctor testified.***

4. ***That the learned judge erred in law by convicting me to suffer death without observing that there was no differences or grudge or bad blood between the two families.***

5. ***That the learned trial judge erred in law by convicting and sentencing me on prosecution case without observing that this case was partly heard by the assessors who did not give their verdict."***

Mr. Barasa the learned counsel representing both appellants in his submissions stated that the entire case that was before the trial court was based on circumstantial evidence on the main as no single witness saw the appellants or either of them killing the deceased. In his view, the evidence nonetheless, did not meet the standards required before an accused person can be convicted on circumstantial evidence. This was mainly because there was no medical evidence of the cause of death and no effort was made to adduce forensic medical evidence to show that the deceased died and not only that but that he died as a result of the injuries inflicted on him by the appellants either jointly with others or on their own. This was mainly because the body of the deceased was not recovered, and so was not examined as required by law. He referred us to several decisions of various courts on this issue. He urged us to allow the appeal.

Mr. Chirchir, the learned senior principal state counsel, on the other hand urged us to dismiss the appeal contending that the decision was based on safe, cogent and sound grounds of law. Admitting that there

was no medical evidence adduced to show the cause of death, he contended that this was because, the body was not recovered and no bones were recovered for purposes of forensic tests to establish the cause of death. Nonetheless, the deceased was murdered as the trial court was convinced that he was indeed murdered. In this scenario, ***Mr. Chirchir*** maintained, circumstantial evidence left the court convinced that he was indeed murdered, was all that was required and that was, according to him adduced through the evidence of ***Celestine***, ***Wilfrida***, and ***Isaac***, which evidence established that the deceased was taken to second appellant's house and later was not seen alive again. He further submitted that the provisions of ***Section 111 of the Evidence Act, Chapter 80 Laws of Kenya,*** were applicable in this case and as the appellants were the last people seen with the deceased before his disappearance, they had to explain what happened to him. He urged us to dismiss the appeal.

In our view, the facts of the case which we have set out and summarized above clearly establish that the deceased was removed from his house by the second appellant, his sons and other people. The first appellant, daughter of the second appellant was in that group. This was in the later afternoon of 30th September, 2003. ***Celestine*** the wife of the deceased together with their son ***Isaac*** saw it all; ***James*** saw them on the way and ***Wilfrida*** saw the deceased in the second appellant's house. These are all people from one area and they know each other very well. In the course of their evidence, they mentioned the names of the appellants without any hesitation. The event happened in broad daylight well before 6.30 p.m. and therefore visibility was not a problem at all. All these lead us, like the trial court into one conclusion that the first appellant's evidence that she merely heard people shouting the name of ***Hillary*** as she was in her mother's house nursing her mother but never participated in the removal of the deceased from his house to her father's house and killing him cannot be true. Equally, the second appellant's version that at the fateful day he was at Ziwa far away from home cannot be true. It is, in our view, a poor attempt to plead alibi. It is ousted by clear evidence of the prosecution witnesses all of who knew the the appellants very well as close neighbours and saw them remove the deceased up to the second appellant's house. We too accept and we have no option but to accept, that the appellants were the last people seen with the deceased and thereafter deceased was never seen alive again.

The main issue in this appeal and which was rightly taken up by ***Mr. Barasa*** is whether in the circumstances of this case where no postmortem was carried out and no medical evidence was led to demonstrate the cause of death of the deceased, the Court erred in convicting the appellants.

It is not in dispute that no one saw the appellants kill the deceased. The nearest to this was the evidence of ***Wilfrida*** who saw the deceased when his hands were tied to the rafters in the house of the second appellant when she found first appellant, and second appellant in that house. What she witnessed was in our view torture of the deceased by the appellants and others but not killing of the deceased. Thus, the deceased died at the hands of the appellants could only be arrived at through consideration of the circumstances surrounding the entire incident. That is what in law is termed circumstantial evidence. We have no doubt in our minds as indicated above that the appellants took the deceased from his house to the second appellant's house, whether it is because they suspected the deceased bewitched second appellant's wife or not the deceased was removed from his house and taken away from his home to the second appellant's house by force and certainly without his consent. This is confirmed by the fact that was not disputed and corroborated by ***James*** that he was in his underwear when he was taken away and ***Celestine*** had to give ***James*** his trouser to take to him as he was already at the house of the second appellant. Further evidence confirming force being used upon the deceased is that, when ***Celestine*** attempted to follow the appellants and others who had removed him, obviously to know more of what was going on, she was threatened with physical injuries in case she insisted on doing that. These pieces of evidence, plus the main evidence of ***Wilfrida*** that she saw the deceased tied to the rafters in the second appellant's house at about 8.00 p.m. by use of hurricane lamp in their houses clearly indicated that the deceased had been in the hands and control of the appellants and others for sometime from around 4.00 p.m. to 8.00 p.m. and beyond, all this time being tortured. When the second appellant poured water on deceased's legs and hands, deceased screamed meaning he was suffering pain. This was as a result of torture. The deceased even told her to plead with second appellant on his behalf. In that house, the deceased was in the hands of the appellants and others from the time he was taken from his house and thereafter. ***Celestine*** said the deceased did not go back to their home. They waited for him but in vain but they continued hearing noises from second appellant's home which continued up to 4.00 a.m. Next

morning the deceased was nowhere but near the second appellant's house there was a big fire. So the deceased who was in the house of the second appellant throughout the evening of 30th September, 2003, and the night of 30th September/1st October, 2003 was no longer seen alive again and his body was also not seen. Instead a big fire was seen not far from the home of the second appellant. In our view, the circumstances of this case we have set out above irresistibly lead to only one answer and that is that they are the people who are responsible for the death of the deceased. In the case of ***Kipkering Arap Koske vs. Republic (1949) 16 EACA, 135*** The predecessor to this Court stated that in order for a court to convict an accused person based solely on circumstantial evidence;

(a) The inculpatory facts must be incompatible with the innocence of the accused,

(b) The facts must be capable of no other conclusion or explanation except the guilt of the accused.

These principles were modified by the decision of another predecessor to this Court sitting in Kampala in the case of ***Simon Musoke v. R (1958) EA 915*** particularly at page 719 when it stated:

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

This is an added principle which courts ensure they consider before convicting an accused person purely on circumstantial evidence.

In our minds the facts of the case point to none other than the two appellants either alone or jointly with others as the people responsible for the death of the deceased.

In any event, under the provisions of ***Section 111 of the Evidence Act*** (supra), they had to explain what happened to the deceased who was last seen with them and in their custody and who was being tortured by them from later afternoon of 30th September, 2003 to early morning of 1st October, 2003. That section provides as follows: -

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."

Thus as the deceased was removed from his house and home by the two appellants among others and taken to the second appellant's house where ***Wilfrida*** saw him being tortured as the first appellant was also present and thereafter he was never seen again, the burden of showing what happened to him was on the appellants which burden is only confined to some explanation not amounting to proof beyond reasonable doubt. This was not availed and hence on these circumstances, they and their colleagues were responsible for the death of the deceased.

This brings us to the most crucial part of this entire appeal and that is what we raised earlier in this judgment, namely whether the appellants, in the absence of medical evidence showing the cause of the death of the deceased could still be convicted of the offence as charged. This is the most agonizing part of this case. We have anxiously considered it. The deceased was taken away by the appellants on 30th September, 2003. By 9th February, 2004 when information was availed to court over four months later he had not been seen anywhere alive. Early on 1st October, 2003, few hours after his having been taken away and after ***Wilfrida*** had seen his hands tied to rafters in second appellant's house and he had pleaded to her to intercede on his behalf and four hours after the noise from second appellant's ceased, a huge fire was seen near second appellant's house and tales went round that the deceased was burnt. If burnt, the Court was not told whether he was burnt alive or burnt after being killed. What was apparently not disputed during the trial is that the deceased died. What was placed to us from the circumstantial evidence narrated above is that he died, whether before or after being set on fire, he died in the hands of the

appellants. No medical evidence was adduced on the cause of death. This is regrettable particularly as the deceased died long after proof of such issues, through D.N.A had evolved.

Celestine said police found the remains of her husband's body but she also said the police found bones only. She was not at the fire place as she did not accompany police to that scene. ***IP David*** who went to where the fire was, said in his evidence in chief that he checked the fire and the ashes. There were some bones and bad smell but the body had been burnt completely. In cross-examination by the learned counsel for the appellant's co-accused, he said that he arrived at the fire place at about 1.00 p.m., found some ashes and he saw some bones but could not tell from which part of the body and he did not collect them. He changed that evidence and said they were ashes and there was no particular bone and ended up saying there were no bones. This was shoddy investigation, as he also said they collected some ashes but even these were not sent for any examination and were not produced as exhibit in the case. In short although the deceased died, there was no medical evidence of the cause of death and no attempt to establish it.

In the case of ***Ndungu v. Republic (1985) KLR 487***, this court discussed the principle that in some cases death can be established without medical evidence and also discussed other cases such as the Tanzania case of ***R v. Cheya (1973) EA 500*** and after considering them at length stated as follows: -

"Of course, there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of the death would be so obvious that the absence of a postmortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the cause of the death in the circumstances relied on by the prosecution."

That was in respect of cases where the body is available but because of the nature of injury the cause of death cannot be determined even after postmortem. It is however important that even in such cases the court recognized the principle that there are cases where death can be established without medical evidence. In this case, the body itself was not recovered so that it would have been futile for a medical expert to even be called upon to give evidence on body he never saw; a body that never reached his clinic or mortuary for examination all because it was not there. In our view, in such cases once the evidence, circumstantial or otherwise leaves no doubt in the mind of the court that death did occur but the body was disposed of in one way or the other probably to destroy evidence and defeat justice, a court of law, properly directing its mind to the law and seeking to do justice cannot abdicate its duty to ensure justice.

To do so would send the wrong message to the criminals that so long as they get rid of the body, the court would be emasculated and would do nothing in the pretence that no medical evidence was availed establishing the cause of death. We think, every case must be decided on its own merit but where evidence is overwhelming that the deceased has died at the hands of a suspect, then even in the absence of a postmortem report, the court can still convict. We are certain such cases are very few and far between. This is not to absolve the investigation machineries from their work. In ***Article 768 of Section 9 of Halisbury's Laws of England (3rd Edition)*** dealing with Criminal Law and Procedure, it is stated:

"Where no body or part of a body has been found which is proved to be that of the person alleged to have been killed, the accused person should not be convicted either of murder or manslaughter, unless there is evidence either of the killing or of the death of the person alleged to have been killed."

Lastly, the New Zealand Court of Appeal decision in ***Republic vs Harry (1952) NZLR 11 (3rd Digest Supp)*** is clearly on that point. In that case Oliver J. said: -

"At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body or any trace of the body has been found and that the accused has made no confession of any participation in the crime before he can be convicted. The fact of death should be proved by such circumstances as renders the commission of the crime morally certain and leave no ground for reasonable doubt; the circumstantial evidence should be so cogent and compelling to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."

We agree. In this case the facts we have repeatedly cited herein above leave us in no doubt that Hillary died and that he died at the hands of the appellants. That his body was not recovered was more likely because of activities of the appellants who in one way or the other disposed of it.

The sum total of it all is that we find no reason to interfere with the decision of the trial court. It is based on sound evidence and on sound legal principles. It will stand.

Before we proceed to dismiss the appeal as we are bound to do, we observe that the learned trial Judge sentenced the appellant without first seeking mitigating circumstances as is required in criminal cases. He gave reasons for doing so. This point has been taken up in the grounds of appeal and we think rightly too. Whereas we agree that the nature of this particular case and the cruelty that was meted out to the deceased left no alternative to the court but to sentence each of the appellants to death, we are of the view that the learned trial Judge in contending that appellants were not prejudiced in their being sentenced to death because the offence they committed and the merciless manner in which they did it left the court with no alternative but to sentence them to death, misdirected himself on the issue of sentencing. The opportunity that is required to be given to an accused person to address the court in mitigation is not only to enable the court consider an appropriate sentence in the circumstances of the case but also to have that mitigation on record in case of any further appeal where the accused's conviction might be set aside and substituted by a conviction for a lesser offence, for example of manslaughter instead of murder. In such a case, it becomes easier for the appellate court to decide on the sentence if mitigating facts are on the record. Mitigation is also necessary in cases for example where Clemency Committee is considering a convict's case.. We state that under no circumstances should a court dispense with mitigation for whatever reason.

Having said the above, we nonetheless are of the convinced view that lack of mitigating circumstances in this case does not go to the merits of the appeal as it does not affect in any way the substance of the case that was before the trial court and as we have stated above the torture that was meted out to the deceased before being killed left no other room for a lesser sentence.

We think we have said enough. These appeals lack merit. They are dismissed.

Dated and delivered at Eldoret this 30th day of January, 2013.

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

W. KARANJA
.....
JUDGE OF APPEAL

M. K. KOOME
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR