IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 264 of 2007

FRANCISCA NGINA KAGIRI ……. APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(Appeal from the proceedings and judgment of the High Court of Kenya at Nyeri (Okwengu, J) dated 28th September,2007

in

H.C.CR.C.NO. 4 OF 2005)

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JUDGMENT OF THE COURT

The appellant ***FRANCISCA NGINA KAGIRI*** appeals to this Court against her conviction by the superior court ***(Okwengu, J)*** for the offence of murder contrary to section 203 as read with section 204 of the penal code. It had been alleged in an information filed by the Attorney General that on the night of 8th and 9th July, 2004 at Ha-ndege village within Nyandarua District of the Central Province she murdered ***ELVIS NJOGU NGIBUINI.*** Upon her conviction on 28th September, 2007 by the superior court (Okwengu, J), she was sentenced to suffer death as by law provided.

As this is a first appeal, we are duty bound to reconsider the evidence on record, evaluate it and draw our own conclusions. Those guidelines have been repeated time and again by this court and I need only to refer to ***OKENO v R [1972] EA 32*** where the predecessor of this court said:-

"**An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination** *(Pandya v R., [1957] EA 336)* **and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (***Shantilal M. Ruwala v R***., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see** *Peter v Sunday Post, [1958] E.A. 424."*

It is also an established principle of law that a court of appeal will not normally interfere with a finding of fact by the trial court, whether in a civil or criminal case, unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles

in reaching the findings he did – see ***CHEMAGONG v REPUBLIC [1984] KLR. 611.***

On 9th October, 2004, the body of ***ELVIS NJOGU NGIBUINI*** ("deceased") was found inside a septic tank in the compound of the appellant's home in Ha-ndege village where the appellant and the deceased co-habited as husband and wife. The body of the deceased was discovered in a decomposed state, associated with water and wetness. It was covered in a shirt, a trouser and a pair of socks. The body had fractures on the hand, 4th and 6th ribs with collection of blood on the same side. On the left, the 7th and 8th ribs were fractured at the back. There was also a fracture of the chick bone on the left side. Although the brain was extensively decomposed and there was evidence of haematoma (i.e. prior bleeding over the brain) a post mortem conducted by the chief pathologist ***DR MOSES NJUE GACHOKI (PW15)*** confirmed that the cause of death was head and chest injuries due to a blunt force.

The state of the compound where the body of the deceased was recovered was described by the scenes of crime officer ***PETER MWANIKI (PW 2). PW2*** was shown two septic tanks at the scene and the body of the deceased was inside one of them. Within the compound was a house built of brick with an iron sheet roof and wire fence with cypress trees. There was only one gate which was locked.

The prosecution called a total of 15 witnesses who testified for the prosecution. Briefly the evidence was as follows:-

The deceased and the appellant had been co-habiting together as husband and wife for a period of over twenty years. At the material time the two had set up a home on the outskirts of Nyahururu town where they had built a farm house. As at July, 2004 the two had employed two farm workers namely ***BERNARD MWITI GIKUNGA (PW7)*** and one named only as ***MUGAMBI***. The appellant also operated a transport and motor vehicle sales business in Nairobi. At the material time the relationship between the deceased and the appellant was strained as a result of an alleged extra marital affair which resulted in a love triangle between the deceased and one ***MONICAH WANJIRU MACHARIA (PW9)***. In-fact the couple was not sharing the same matrimonial bedroom and each slept in different rooms. The appellant had even asked several people to talk to the deceased and warn him about continuing with the extra marital affair. These people included the deceased's father ***EVANSON JOSHUA NGIBUINI (PW5)***, the deceased's cousin ***JOSHUA MATHENGE KARIUKI (PW6)*** and the deceased's friend ***CHARLES KIMARU MICHENI (PW8).***

The deceased and ***MONICA WANJIRU MACHARIA* (*PW9)*** had an affair for about a year, during which period, the deceased set up a clothes business for her. ***PW9*** was formerly working as a bar maid. From the evidence on record the clothes were being supplied by the deceased's brother, ***ISAIAH NGARI NGIBUINI (PW11)***. In June 2004, the deceased had alerted ***PW9*** that the appellant was trailing him as a result of the love affair. The deceased was depressed and even threatened to commit suicide.

On 8th July, 2004 ***PW9*** met the deceased at Kanjo's hotel in Nyahururu town between 11.00 a.m. and 1.00 p.m. The two later parted agreeing to meet the next day on 9th July, 2004. On the same day (on 8th July, 2004) at around 5.00 p.m., the deceased and one of his farmhands named Mugambi left his home and walked to a nearby shopping center and came back. Later the appellant arrived home in her personal vehicle thereafter and then left after a short while. The deceased, ***Mugambi*** and ***MWITI* (*PW7)*** had supper at 9.00 p.m. by which time the appellant had not returned. The deceased went to bed after 9.00 p.m. At 11.00 p.m., ***PW11*** called the deceased on his mobile phone and the deceased informed ***PW11*** that he was already at his home resting. The deceased went missing thereafter and his decomposing body was accidentally found on 5th October, 2004 in a septic tank at his home nearly three months after his disappearance.

On the morning of 9th July, 2004 ***PW7*** woke and found ***Mugambi*** being given instructions by the appellant. ***Mugambi*** and the appellant then left in the appellant's pick-up to deliver milk. ***PW7*** did not see the deceased that morning.

After the appellant and ***Mugambi*** came back from delivering milk, the appellant and her two workers

went to collect Napier grass from the farm of ***MICHAEL WACHIRA GAKURU (PW10)***. The appellant requested ***PW10*** for his mobile phone to call the deceased but the phone went unanswered.

Later on, on the same day 9th of July, 2004 the appellant and her two workers disagreed and the workers decided to quite employment. The two workers boarded a matatu to travel to Nyeri but ***Mugambi*** realized he had forgotten his identification card. The two went to the home of one ***KUNG'U*** at Subuku where they spent the night. The next day on 10th July, 2004 ***Mugambi*** went back to the appellant's home and collected his identification card. Thereafter ***PW7*** parted with ***Mugambi*** at Ndaragua and ***Mugambi*** proceeded to Embu.

Meanwhile, the deceased's girlfriend ***PW9*** and his brother, Isaiah ***PW11*** tried to call the deceased but the deceased phone went unanswered.

On the 12th July, 2004 the appellant called ***PW11*** and informed him that the deceased had gone missing on the 8th July, 2004. The appellant informed ***PW11*** that she had information that the deceased had taken a loan of Kshs 25,000 and was in town with ***PW9*** his girlfriend. The appellant also telephoned the deceased sister ***PERPETUA GATHIGIA NGIBUINI (PW1)*** and gave her the same information.

The next morning on 13th July, 2004 ***PW1*** reported the deceased was missing to Buruburu police station. ***PW1*** was by then staying in Nairobi. ***PW1*** was referred by the Buruburu police to Nyahururu police station.

On 14th July, 2004 ***PW1*** went to Nyahururu, traced ***PW9*** and both went to Nyahururu police station where they reported the matter to the deputy ***DCIO***. The two were referred to Oljororok police station. At the same time, the deputy ***DCIO*** sent two Officers ***PC NDORIA GATHECHA, (PW12)*** and ***PC MOSES KIMATHI (PW13)*** to the deceased's home to confirm the information. The two officers found the appellant and one named as ***BEN*** the 2nd accused, and the appellant confirmed the deceased had gone missing since 8th July, 2004. The appellant showed the two officers the deceased's mobile phone, and a wallet containing his driving license and other documents. The two officers took the appellant and the said ***BEN*** to the police station and the two recorded their statements and were released to go home and come back the same day.

On 18th July, 2004 ***PC NDORIA (PW12)*** and ***PC KIMATHI (PW13)*** visited the appellant's home and conducted a search in the whole compound but did not find any clue as to the whereabouts of the deceased. On 31st July, 2004 the two officers again went back to the home of the deceased and searched the compound in the company of other police officers. They thoroughly searched the compound including digging a cowshed, checking the septic tanks and emptying two wells. They did not however, find any clue as to the whereabouts of the deceased.

On 2nd September, 2004 ***SAMUEL IRUNGU NDERITU (PW3)*** was employed by the appellant as a farm hand. On 24th September, 2004 ***JOSEPH GATHITU KURIA (PW4)*** was also employed by the appellant. During the month of October, 2004 ***PW3*** and ***PW4*** were therefore both working as farmhands at the home of the appellant.

On 5th October, 2004 ***PW4,*** while chasing ducks and working within the compound of the appellant's home, accidentally stepped on a manhole cover of a septic tank and it tilted. At the time, the appellant was away in Nairobi. As ***PW4*** was trying to return the cover, he saw a piece of cloth inside the manhole and he looked inside and noted that there was a body inside the septic tank.

When ***PW3*** came back ***PW4*** showed him what was inside the septic tank and both decided to wait for the appellant to inform her of what they had seen.

The appellant returned on 6th October, 2004. The following day ***PW3*** informed the appellant what they had seen in the septic tank. The appellant instructed ***PW3*** and ***PW4*** to close the septic tank and warned

them not to reveal what they had seen. Both ***PW3*** and ***PW4*** claim that the appellant offered Kshs 100,000 in return for their silence.

On 9th October, 2004 ***PW3*** sneaked to Nyahururu police station and reported the incident to the ***DCIO DAVID KIMANZI NZUKI (PW14)***.

PW14 accompanied by ***PW12***, ***PW13*** and other police officers went into the home of the appellant. The manhole cover was opened and the body of the deceased was retrieved and taken to Nyahururu District Hospital mortuary from where it was transferred to the City Mortuary in Nairobi. One ***Mr Maina,*** a forensic expert, took items like hair, teeth etc from the septic tank for purposes of forensic examination. Unfortunately ***Mr Maina*** died before giving evidence in court. There was therefore no evidence on the findings of the forensic expert.

On 24th November, 2004 a post mortem was carried out by ***DR MOSES NJUE GACHOKI (PW15)*** on the body of the deceased.

In her defence the appellant gave sworn evidence and called no witnesses. The appellant explained that she did not participate in the killing of the deceased. The appellant told the court that on the night of 8th and 9th July, 2004 she was at her home with the deceased but the two slept in different bedrooms. The appellant explained to the court that since the year 2000 they had been using separate bedrooms because the deceased used to bring his girlfriend to the house. It was therefore not unusual that on this night that she slept in separate bedroom from that of the deceased.

On the morning of 9th July, 2004 the appellant woke up and while she was going out she noticed that there was a key on the outer side of the door. She inquired why the key was there and she learnt from ***Mugambi*** that it was the deceased who had left the key there as he was in a hurry after being called by his "wife" in town.

By 10th July, 2004 the deceased was still missing and the appellant called the deceased's sister ***PW1*** and brother, ***PW11*** informing them that she had not seen the deceased since 8th July, 2004. The appellant also went to the office of ***DCIO Nyahururu*** and reported the matter. She produced a letter given to her by the ***DCIO Nyahururu*** addressed "To Whom It May Concern" regarding her husband's disappearance.

The appellant reported the matter to the local chief of Gatimu location, advertisements were made in the daily nation, home news and BBC radio for any information regarding the deceased. The appellant also went to various police stations, mortuaries and hospitals looking for the deceased.

The appellant has denied any hand in the disappearance and subsequent murder of the deceased.

On being properly directed on the facts and the law, the assessors returned a unanimous opinion that the appellant was guilty as charged. They believed that there was cogent circumstantial evidence to sustain a conviction. The superior court accepted the opinion and was in no doubt that the prosecution had proved its case on the totality of the evidence on record. The judge delivered herself in the following manner:

"**I find that the truth of the matter is that the deceased was somehow lured out of his house where upon he was assaulted and his body thrown into the septic tank. I accept the explanation that there was a heap of firewood initially covering the manhole cover on that side of the septic tank and that is why this particular manhole had not been searched earlier. The question is, did the accused person participate in this assault either alone or jointly with others? The conduct of the accused person was not consistent with innocence. First, the accused failed to report the disappearance of the deceased to the police and only did so after** *PW1* **reported. Secondly, accused appeared to be having an overly familiar relationship with** *Ben***, during the time when she ought to have been concerned with her husband's disappearance. But the most damning evidence implicating the accused came from** *PW3* **and** *PW4* **i.e. the fact that accused was allegedly shown the body of the deceased after** *PW4* **accidentally chanced (sic) open it, but the accused did not take any action nor**

did she alert the police of the presence of the body …. Now the question is why would the accused person have failed to alert the police of the presence of the body in the septic tank within her home knowing full well that there was a possibility that the body could be that of her husband who was still missing? The only explanation is that the accused person was party to the death and therefore did not want to reveal the presence of the body to the police….. I find that the acrimonious relationship between the accused and the deceased provided a motive for the murder. I am satisfied that the accused and other unknown persons lured the deceased out of his house with the common intention of killing the deceased, and that the deceased met his death as a result of the assault perpetrated upon him pursuant to this common intention. Accordingly, I concur with the unanimous opinion of the assessors. I do find the accused person guilty of the offence of murder. I convict her of this offence under section 322(2) of the Criminal Procedure Code".

Aggrieved by those findings, the appellant came before this court and filed a memorandum of appeal putting forward the following grounds:-

1. The learned judge erred in law in failing to determine conclusively from the evidence available whether the body removed from the septic tank within the home of the appellant was that of the deceased given the conflicting evidence of *Dr Maina* **who died before adducing material evidence. A miscarriage of justice and prejudice were caused to the appellant.**

2. The learned trial judge erred in law in convicting the appellant on insufficient evidence thus arriving at a wrong decision. Prejudice was occasioned to the appellant.

3. The trial judge misdirected herself by believing that there was a pile of firewood which was not even mentioned by *PW3* and *PW4* **on the septic tank where the body was ultimately found when there was evidence that thorough earlier searches were made threat including stirring of manholes, draining of two boreholes and digging up of the cowshed. A miscarriage of justice was occasioned to the appellant.**

4. The learned trial judge failed to analyse and/or consider that the two farm hands *Mugambi* **and** *Mwiti* **left the homestead at the same time the deceased is said to have disappeared hence suspicion on their part taking into account they were also living in the same compound. A miscarriage of justice was occasioned to the appellant.**

5. The learned trial judge erred in law by failing to appreciate that *PW3* **and** *PW4* **did not take the first opportunity to report of their finding to anyone else or to the appellant when she came home from Nairobi that evening or the next morning. A miscarriage of justice was occasioned to the appellant**

6. The learned trial judge misdirected herself when she doubted the evidence of *PW3* **and** *PW4* **about the appellant's offer of Kshs 100,000 to buy the assailants yet she went ahead to accept that they reported to her of their finding who attempted to hash up the matter. A miscarriage of justice was occasioned.**

7. The learned trial judge misdirected herself by importing acrimonious relationship between the appellant and the deceased as the motive of the appellant killing the deceased hence holding that malice aforethought was established. A miscarriage of justice was occasioned to the appellant."

It was submitted by learned counsel for the appellant, Mr Njuguna Kimani that the evidence adduced does not irresistibly point to the guilt of the appellant. He relied on the following pieces of evidence for that submission:

(i) There was no direct evidence on who killed the deceased. In other words there was no eye witness to the commission of the offence.

(ii) There are doubts on whether the body which was removed from the septic tank was that of the

deceased because by the time ***PERPETUA GITHIGIA NGIBUINI (PW1)*** the sister of the deceased and ***EVANS WANG'OMBE*** the deceased's brother, identified the body on 24th November, 2004 the body had decomposed to an extent that facial recognition was not possible. To illustrate this point, counsel referred to the evidence of ***PW1*** stating:

"**The body is not identifiable as that of my brother.**"

MOSES KIMATHI (PW3) also testified as follows:-

"**On 9th November, 2004 the body of the deceased was decomposed. The other items recovered from the septic tank were taken by** *DR MAINA* **the forensic expert. Unfortunately he died and the items were misplaced.**"

While ***PW13 testified:-***

"***It is the sister of the deceased*** *Gathigia* ***and brother*** *Evans Wango'mbe* ***who identified the body of the deceased to the doctor. They were able to identify him through the dental formula, the nails and the feet. There was no forensic evidence to confirm the identity as part of the skin like on the face was missing but the legs had the skin intact. I can see from exhibit 1 photo No.16 that the face is not recognizable. They could identify him through his dental formula. It is true that the body had decomposed beyond recognition.***"

Dr Moses Njue (PW15) testified that there was extensive decomposition of the body although it was intact and not dismembered.

(iii) There is evidence from the appellant that one of the farm hands a ***Mr Mugambi*** disappeared on 9th July raising the question whether it was a mere coincidence that ***Mugambi*** left employment the same time the deceased disappeared.

(iv) It was not only the appellant who had access to the keys. The farmhands had keys for the small door and both the deceased and the appellant had keys to the main gate and therefore it is not only the appellant who had exclusive opportunity to commit the offence.

(v) The appellant testified that she had tried to reach the deceased on phone after his disappearance without success, informed the deceased's sister and brother, ***PW1*** *and* ***PW11*** *of the deceased's disappearance; visited several hospitals and mortuaries looking for the deceased; and had also advertised his disappearance with the radio stations including the BBC.*

(vi) There were doubts concerning the date of disappearance because one was reported having seen the accused on 9th July, 2004. The appellant, for example, testified:-

"*I told* ***Perpetua (PW1)*** *that I had not seen* ***Njogu*** *since 9th*",

While ***Joshua Mathenge Kariuki PW6*** said**:-**

"***I can see that I recorded in my statement that I saw*** *Njogu* ***on the 9th of July 2004 between 10.00 and 12.00 noon***."

We have considered the submissions of counsel on the issue of identity of the body found in the septic tank and we have no doubts that the body was that of the deceased.

The appellant herself under cross-examination, made that confirmation, thus:

"***I found*** *Njogu* ***dressed in a long trouser a shirt and a sweater. The clothes were among these (sic) produced before this court.***"

David Kimanzi Nzuki (PW14) *the DCIO for Nyandarua in his testimony said:-*

"***We went to the septic tank together with the 1st accused (the appellant).*** *Kimathi* ***opened the manhole and inside we could see a red white stripped shirt. It was this one (MFI 12 id). I immediately asked the 1st accused (now appellant) is this not*** *Ngibuini* ***and immediately she put her hands at the back of her head and answered that he was the one."***

He further added:

"***The scene was photographed and the body removed from the septic tank. There was a relative of the deceased called*** *Mathenge* ***who immediately identified him" …….***

"***It is the cover which was blocked with a heap of firewood from which we later found the body. When the body was removed the deceased was wearing his trouser (Ex 3) and this pair of socks Ex 4. The items were removed from the body at Nyahururu District hospital."***

The farmhand ***Joseph Gathitu Kuria (PW4)*** stated:-

"***We saw what was inside and she told us that it was her husband who had gone missing."***

PW1 the sister of the deceased testified that she was able to identify the body from his clothings which she knew. She described the deceased's clothing as follows:-

"***a trouser with a black belt and a shirt. The trouser was dirty. It was light brownish but dirty. The shirt was a checked (sic) with maroon and white."***

Finally on this point ***Monica Wanjiru Macharia (PW9)*** the girlfriend of the deceased was able to identify the deceased's clothing, in these words:-

"***I was familiar with the clothing of the deceased. I knew he had three pairs of shoes. I can identify this shirt (****MFI I* ***identified) as belonging to the deceased. I can also identify this trouser (****MF I2****) and this pair of shocks (****MFI I3****) as belonging to the deceased."***

That ground of appeal fails.

On the issue whether the appellant is a victim of suspicion or not the evidence which emerges from the record is set out herein below:

Mr Bernard Mwiti Gikunga, a farmhand who was one of two farmhands working in the deceased's farm testified as follows:-

"***We had supper then we all went to bed i.e.*** *Njogu****,*** *Mugambi* ***and myself. We went to bed at 9.00 p.m. We did not hear*** *Ngina* ***coming back*** *Ngina* ***had he (sic) keys to the gate.*** *Mugambi* ***and*** *Njogu* ***also had another set of keys." ……***

"***At around 8.00 a.m.*** *Mugambi* ***and I accompanied Mama in the pickup to go and cut grass. We came back at 1.00 p.m. We offloaded the grass and then asked for permission to go and cook but she said we could go and fetch water but I told her I could not go to fetch water when I was hungry. She told me the home was hers and she asked me to leave her home. I went and took my things. I asked her for my money but she said she did not owe me any money and that I am the one who owed her 200/. I therefore left and went to wait for a matatu. When I got into the vehicle I saw*** *Mugambi* ***who told me that he was also not interested in the job. We went with the matatu up to Nyeri."***

Concerning the farmhands relationship with the deceased the same witness stated as follows:-

"***During the time I worked for*** *Njogu* ***they were not having a good relationship with*** *Fransisca.* ***They***

were always quarrelling and accusing each other of having extra marital affairs. Most of the time *Njogu* ***would come to the house hiding so that*** *Ngina* ***does not see her. Our relationship with*** *Njogu* ***was cordial but when*** *Ngina* ***came there were (sic) problems."***

Under cross-examination ***PW4*** testified as under:-

"***I had a more cordial relationship with*** *Njogu* ***than*** *Ngina.* *Njogu* ***used to buy us beers."***

On the issue of access to the deceased's home the appellant testified as follows:

"***The gate had two locks, one for opening, the small gate for any people to enter and the other for opening the two main gates for vehicles to enter. The workers had keys to the small gate. The bigger gates were used to lock with a chain and a key and both my husband and I used to stay with a key to that gate."***

In the statement to the police Joshua ***Mathenge Kariuki (PW6)*** had stated that he had seen the deceased driving on 9th July 2004 at around 11.00 a.m.

However, upon cross examination he clarified the position as under:-

"***I can see that I recorded in my statement that I saw*** *Njogu* ***on the 9th July 2004 between 10.00 and 12.00 noon. The date was not 9th but 7th July 2004 I did try to correct the date but I was told it could not be corrected."***

On the cause of death, ***Moses Njue Gachoki*** testified that the deceased had fractures on 3rd, 4th and 6th ribs with collection of blood on the same side. On the left the 7th and 8th ribs were fractured at the back. He further said that there was evidence of a haematoma (i.e. prior bleeding over the brain) and as a result, he had formed the opinion that the cause of death was head and chest injuries due to a blunt force.

All in all, our analysis and evaluation of the evidence as set out above shows, the existence of circumstantial evidence irresistibly pointing to the appellant's guilt.

First on the issue of the identity of the body recovered the witnesses who testified as above namely, ***Gathigia (PW1), Mathenge PW6, Monica Wanjiru Macharia (PW9)*** were able to identify the clothing the deceased was wearing when he disappeared. And as quoted above the appellant herself did identify the deceased in her discussion with ***PW1*** to whom the appellant gave a description of the clothing the deceased was wearing the day he disappeared. Again when the septic tank was opened the appellant was present and she immediately confirmed that the recovered body was that of the deceased.

Secondly, it was clear from the evidence as recorded above that all the named witnesses were substantially accurate and consistent in describing the clothing and linking it as belonging to the deceased. We find a pattern of consistency in the description of the clothing the deceased was wearing. It is a common and unbroken thread in the evidence of the said witnesses. The superior court had no difficulty in believing the witnesses and this court after its own analysis and evaluation, shares the same view of the evidence, identifying the deceased.

In our view, although the evidence of the forensic expert ***Dr Maina*** could have shed more light on the issue of identification, had he not passed on before giving evidence, we find that the evidence of identification of the body as that of the deceased was sufficient and irrefutable.

Although the learned counsel for the appellant has argued that the body had decomposed extensively, the above witnesses were all able to identify the body by linking it to the deceased's clothing. The appellant was herself of the firm view that the body recovered from the septic tank at her house was that of her husband. We therefore do accept that the body recovered from the septic tank in the appellant's home was that of the deceased. We have been unable to entertain any reasonable doubts in the face of the

evidence as recorded.

As to the cause of death, the evidence of ***Moses Njue Gachoki*** a forensic expert was not challenged. The cause of death was head and chest injuries due to a blunt force.

As to the appellant's linkage to the murder, her own conduct both before and after the death of the deceased points to an elaborate plan on her part to cover up her involvement in the death. For example, immediately after the deceased disappearance, she did phone close relatives and friends of the deceased asking them to call the deceased on his cell phone yet the deceased's vital documents and items such as his ID, ATM card and the cell phone were traced to the deceased's bedroom where the appellant had access. The items were on a stool. Before the appellant had confirmed the disappearance, it is reasonable to infer that she had inspected the deceased bedroom where his cell phone was. At the same time she did not report the disappearance to the police until the deceased's sister ***PW1*** had done so. She had also complained to the father of the deceased, his brother and one friend about his conduct just a day before his disappearance. She had complained that the deceased's relationship with ***PW9*** was a matter of great concern to her. She had through friends and relatives of the deceased sounded a warning to the deceased. There is evidence of her involvement with accused 2, ***Ben,*** in what constituted a love affair.

To crown it all, the superior court did believe the evidence of the farmhands ***Mr Nderitu (PW3)*** and ***Mr Kuria (PW4)***.

The learned Judge ***(Okwengu, J)*** said:-

"***But the most damning evidence implicating the accused came from*** *PW3* ***and*** *PW4* ***i.e. the fact that accused was allegedly shown the body of the deceased after*** *PW4* ***accidentally chanced (sic) open it, but the accused did not take any action nor did she alert the police of the presence of the body. … "I believe and accept*** *PW3* ***and*** *PW4's* ***evidence that they did report the matter to the accused who attempted to hash (sic) up the matter and did not report the matter to the police and the police only came to learn of the matter from*** *PW4.*

The learned judge concluded:-

"***The only explanation is that the accused person was party to the death of the deceased and therefore did not want to reveal the presence of the body to the police."***

It is apt to remember that the superior court unlike us had the advantage seeing and hearing the witnesses and was able to observe the demeanor and assess the truthfulness of the witnesses. On this the superior court, as the trial court, is the sole judge and we cannot interfere with its findings based on the observations of the witnesses.

When one of the farmhands reported to the appellant what they had seen after opening the septic tank containing the body, the appellant's reaction was to persuade them not to reveal the discovery of the body in the septic tank. She made an immediate attempt to cover up the discovery of the body. One of the farmhands had to reflect and summon sufficient courage to report the discovery of the body to the police. She failed to report the finding of the body to the police immediately and it took the brave intervention of the farmhand and the police to have the septic tank reopened in her presence. Inspite of the superior court's finding that the evidence that the appellant had offered the farmhands Kshs.100,000 to buy their silence, was unreliable, we find that the appellant's failure to promptly report the discovery of the body to the police clearly points to an attempt to cover up the finding of the body and is consistent with the evidence of the farmhands' claim that their silence was being bought. This is not the conduct of an innocent person. After the finding of the body by the farmhands, one of the farmhands ***PW3*** had overheard the appellant tell her son as follows:-

"***I heard her calling her elder son Peter telling him to come quickly because the matter had become known. She told him if he did not come he would find her a prisoner."***

She had claimed that the deceased had locked her from outside the house yet she was able to undertake her routine work in the morning of the disappearance as if nothing had happened. The evidence against her is beyond suspicion.

In answer to the appellant's contention that she is not the only one who had the time and the opportunity to commit the crime, apart from the deceased whose key to the main gate was placed outside the door of the house in the morning of his disappearance, the only other person who had access to the house was the appellant. She had the key to the main gate. The deceased and the two workers went to sleep at 9.00 p.m. after she had left the house for Nyahururu town. The appellant's conduct before the disappearance of the deceased is in our view, the motive of committing the crime due to the deceased's extra marital affair with ***Wanjiru (PW9).*** The disappearance of the farm workers on 9th July 2007 was prompted by the appellant and not the workers. She clearly asked one of them to terminate his employment and the other one ***Mr Mugambi*** decided to terminate his employment in solidarity with ***Mwiti***. She clearly prompted their going away. They had no reason or motive to kill the deceased because there is evidence on record to the effect he was their best friend in that home. ***Mr Mwiti (PW7)*** gave evidence that the deceased's relationship with them was cordial. It follows therefore the only person who had the motive to kill, the opportunity and access to the house where the deceased was sleeping on the fateful night was the appellant and by extension others not before the court, who shared with her a common intention to kill the deceased.

We have evaluated the evidence as above, and the evidence on record, in our view, points irresistibly to the appellant's guilt and the evidence tendered is certainly beyond suspicion. While reaching this conclusion, we are, of course, aware of a number of this Court's decisions concerning conviction based exclusively on circumstantial evidence. In the case of ***MUCHENE v REPUBLIC [2002] 2 KLR 367*** this Court held;-

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

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

Again in the case of ***R v KIPKERING arap KOSKE & ANOTHER 16 EACA 135*** the predecessor of the 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."***

We find that the prosecution has proved beyond reasonable doubt such inculputary facts as the appellant's attempt to cover up by her reluctance to report to the police at the earliest opportunity; attempts to persuade the workers not to report the tracing of the body; the anger she expressed after the discovery of the body; her conversation with the son on phone when she lamented about the discovery of the body; the proof of prior warnings by her conveyed through relatives and to the deceased and the overwhelming evidence of a strained relationship with the deceased prior to his disappearance due to his extra marital relationship with a girlfriend; point to the guilt of the appellant. We think all these facts are not compatible with the innocence of the appellant. They are also not capable of explanation upon any other reasonable hypothesis than that of the appellant's guilt.

In the face of this evidence we find that the possibility of any of the farmhands, and in particular ***Mr Mugambi*** having committed the offence, as suggested by counsel, would not constitute a reasonable hypothesis taking into account the circumstances which prompted them to terminate their services.

The other fact which could point to the innocence of the appellant is the evidence surrounding the existence of two septic tanks and the alleged obstruction of one of the septic tanks by a pile of firewood. The argument here is that despite two earlier searches conducted in relation to the septic tank and the boreholes, the body could not be traced. Could the body have been "planted" by other people in the second septic tank after the earlier abortive searches? On this, those who conducted the earlier searches have consistently given evidence that they were not aware of the existence of the second septic tank due to it having been hidden by a pile of firewood. We find that the chances of the body having been "planted" in the second septic tank in between the earlier searches and its discovery are remote in that there is no proof of any other person having had access to the home other than the appellant and her workers. Again, these facts cannot constitute a reasonable hypothesis in favour of the appellant's innocence.

Instead, what emerges from the evidence as a whole is a premeditated plan, and a common intention to kill the deceased by the appellant and others not before the Court. We think that no other persons could have gained access to the house without being aided or assisted by the appellant in furtherance of the common intention, which was to kill the deceased. In law, the appellant need not have pulled the trigger or used a panga or any other instrument consistent to the injuries that caused the death. It was enough in our view, for the appellant to have been part of a common intention. The evidence as a whole discloses such a common intention.

The case of ***SAWE v REPUBLIC [2003] KLR 364*** was relied on by the appellant's counsel. However, the current case is clearly distinguishable from the said case, in that in the current case, we have particularized sets of facts and evidence which irresistibly points to the guilt of the appellant. No such facts were present in the ***SAWE*** case.

The appellant's phone discussion with her son and the evidence of the farmhands that the appellant had suggested that the "Government" knows of the murder, in our view reveals a common intention by the appellant and others not before the Court to commit the murder. From this evidence, there cannot be any other reasonable inference other than a common intention to commit the murder.

Common intention was defined by this Court's predecessor in the case of ***WANJIRO d/o WAMERIO v REPUBLIC, 22 EACA 521 at 5 and 3*** as follows:-

"***Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with."***

In our judgment, the evidence does satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction on the basis of the evidence on record.

In the result, the appeal is hereby dismissed and it is so ordered.

Dated and delivered at Nyeri this 10th day of July, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR