Case Number:	Criminal Appeal 2 of 2002
Date Delivered:	06 Jun 2003
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Emmanuel Okello O'Kubasu, Abdulrasul Ahmed Lakha, Richard Otieno Kwach
Citation:	Joan Chebichii Sawe v Republic [2003] eKLR
Advocates:	-
Case Summary:	**Joan Chebichii Sawe *v* Republic** Court of Appeal, at Nairobi June 6, 2003 Kwach, Lakha & O'Kubasu JJ A Criminal Appeal No 2 of 2002 (An appeal from a conviction & sentence in the High Court at Nairobi (Etyang J) dated 16th March, 2001 in HCCRC No 61 of 1999) ***Evidence*** *– Circumstantial evidence – as distinguished from direct evidence – legal requirements of circumstantial evidence – circumstances justifying conviction on the basis of circumstantial evidence – when inference of guilt points to one to the exclusion of all others – burden of proof in cases of circumstantial evidence - whether strong suspicion can be a basis for inferring guilt.* ***Evidence*** *– burden of proof– proof of facts which justify the inference of guilt – burden on*

prosecution.

Evidence *– proof of facts – proof of general custom which court intends to rely on – requirement that existence of a custom must be proved in evidence – Evidence Act (cap 80) section 5.*

The appellant was convicted, by the High Court, of murder of her husband contrary to section 203 and 204 of the Penal Code (cap 63). The prosecution's case was that the appellant, with malice aforethought, caused the death of the deceased. The High Court received no eye-witness accounts as there were mo such witnesses.

The prosecution set out to piece together certain events, which it placed before the Court as circumstantial evidence connecting the appellant with the death of the deceased.

The High Court held that the prosecution had proved beyond reasonable doubt that the appellant had started the fire which caused the death of the deceased. The Court also came to the conclusion that the prosecution had proved beyond reasonable doubt that the appellant had caused the death of the deceased with malice aforethought. The appellant lodged an appeal against the conviction on the ground that the judge had erred in law and fact when he found against the weight of the evidence that the appellant caused the death.

Held:

1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the

	exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused. 4. The existence of any general custom, which the Court intends to rely on must be proved by evidence. 5. The circumstantial evidence in the instant case did not irresistibly point to the appellant to the exclusion of all others so as to justify conviction. 6. The evidence used to convict the appellant did not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant. 7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt. *Appeal allowed, conviction quashed and sentence set aside.* **Cases** 1. *Hassan v Nathan Mwangi Kamau Transporters & 4 others* [1986] KLR 457; (1982-88) 1 KAR 946 2. *R v Kipkering Arap Koske & another* (1949) 16 EACA 135 3. *Gichira, Mary Wanjiku v Republic* Criminal Appeal No 17 of 1998 **Statutes** 1. Penal Code (cap 63) section 203, 204 2. Evidence Act (cap 80) section 5 **Advocates** *Dr Githu Muigai* for the Appellant
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi

Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed, conviction quashed and sentence set aside
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kwach, Lakha & O'Kubasu JJ A)

CRIMINAL APPEAL NO. 2 OF 2002

JOAN CHEBICHII SAWE…….. APPELLANT

VERSUS

REPUBLIC…….…….RESPONDENT

(An appeal from a conviction & sentence in the High Court at

Nairobi (Etyang J) dated 16th March, 2001 in

HCCRC No 61 of 1999)

JUDGMENT

Joan Chebichii Sawe, the appellant, was on 16th January 2001 convicted of murder by Etyang J, and sentenced to death. She faced a charge of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that between 1st and 2nd day of September, 1998 at Nairobi West Civil Servants Estate within Nairobi area, she murdered Alexander Kiptanui Sawe (hereinafter called "the deceased").

The appellant is a trained nurse having qualified in 1974. At the time of her arrest, she was Public Health Nurse at the Kenya Medical Research Institute (KEMRI). She joined KEMRI in June 1985. She is now aged 54 or thereabouts. She was the deceased's wife and they had a son now a student in England. The deceased came from Torongo in Mosop, Eldama Ravine District in Rift Valley Province. The couple got married at the African Inland Church, Eldama Ravine, on 26th August, 1978 and their only child born on 8th June 1979. After the birth of their son, the couple was unable to get any more children due to some medical complications on the part of the appellant. She underwent several operations in an attempt to correct the problem but all these proved unsuccessful. In 1994, her gynaecologist advised against any further operations. The appellant's inability to bear more children created tensions within the family as the deceased's father, Jonah Sawe (PW 1) and his daughters Judith Chelagat (PW 22) and Jane Jopchirchir (PW 26) blamed it all on the appellant.

At the time of his death, the deceased was a Permanent Secretary in the Office of the President. Although the deceased hailed from Torongo, for some reason he had no rural home there, but they had a farm at a place called Muberes near Equator within Eldama Ravine District, and that was the place they went to whenever they were on leave or a short break from Nairobi. There was a feeling on the deceased's side of the family that the appellant was responsible for deceased's failure to have a rural home at Torongo. Apart from their desire that the deceased should have more children, it was also

strongly felt that since the deceased's parents were old and sickly they needed someone to stay with them at home and minister to their daily needs. It was felt that since the appellant was living in Nairobi and had no residence at Torongo, someone else had to be found who could fit into that role. The deceased's father and his sisters, Judith and Jane decided, with the knowledge and apparent consent of the deceased, which was not enthusiastic initially, to find anther wife for him. The woman they found was Rose Chelegat Maiyo (PW 21). In her evidence in chief she told the judge that she was the deceased's wife and that he married her in July 1998. She too hailed from Torongo. She had two children one aged 7 and the other just over one year. She met the deceased in 1997.

She said one Kipkirui Kiprop is the father of her fist son while the deceased was the father of her second son. She knew the deceased had a wife but she had never met her. She started sleeping with the deceased in 1997.

At dawn on 2nd September 1998 the maisonette in which the appellant and the deceased lived caught fire. The time of the fire has been put at between 5.30 am and 6 am by various witnesses. At that hour most of Nairobi is already awake and the guards that were assigned to guard the deceased's house had already left to return to their quarters. Only the appellant and the deceased were inside the house. Katana Mwaringa Ngowa (PW 2), a neighbour who lived in the house directly opposite saw the fire through his window at 6 am. It was a serious fire. He woke up his family and got out of the house because of the close proximity to the deceased's house. He instructed his wife to dial 999 and report the fire to the police and she complied. He turned off the main electrical switch in his house. His wife and maid woke up neighbours who were still asleep or unaware of the fire. Before the fire brigade arrived they heard screams from the burning house and suspected it was the appellant who was screaming. He called out for the deceased and other neighbours called out the appellant but there was no response.

The fire brigade arrived and they gained entry into the burning house through the roof. The evacuated the appellant and she was driven away in an ambulance. No one else was rescued from the house. The fire was put out. The police arrived and took over the scene. A dead body was recovered from the debris and it turned out to be the deceased. Paul Waweru Kangethe, (PW 4), a government analyst attached to the Government Chemist Department in Nairobi collected samples from the debris for analysis. He took them from four points – the deceased's bedroom near the main door; from the same bedroom but near the door leading to the balcony; from the floor in the same bedroom and from one of the smallest bedrooms. From his chemical analysis he found that the sample from the deceased's bedroom near the door to the balcony contained lead and bromine. The sample from the floor in the deceased's bedroom was found to contain lead but not bromine. He concluded that the presence of lead and bromine in those samples could be due to residues of lead tetraethyl bromite, a petrol anti-knock agent. And that petrol was a possible accelerant for the fire.

On 15th January, 1999 the appellant was examined by Dr Zephania Kamau (PW 14) at Nairobi Area Police Headquarters. She had been taken there by police officers from Langata Police Station. She had healed burns on the forehead, scalp, below the eyes, right ear, right temple area, left ear lobe, back of the right arm, over the right and left forearms, both legs and part of the thighs and both feet. The examination took place more than 4 months after the fire as the appellant had been previously undergoing treatment at Nairobi Hospital for her injuries. Dr Kamau assessed the degree of the injuries as grievous. Otherwise, he found the appellant to be mentally fit.

The postmortem examination on the body of the deceased was conducted by Dr Alex Kirasi Olumbe (PW 15), Specialist Forensic Pathologist and at the material time Head of Forensic Services in the Medico-Legal Department in the Ministry of Health. He found the body extensively charred with pugilistic posture and multiple heat fracture. He found regular skeletal injuries to the ribs in the right and lower

chest which could have contributed to his death. He said the injury on the right chest was associated with an incised wound on the diaphragm and was caused by a sharp object.

There was significant soot material in the airways and pink discolouration of the blood. The soot material was due to inhalation of fumes and the pink discolouration of the blood was due to inhalation of carbon dioxide.

He concluded that the death of the deceased was due to fire exposure attended by lower chest injury bilaterally. The prosecution's case was that the appellant, with malice aforethought, caused the death of the deceased. As only the appellant and the deceased were in the house when it caught fire, there was no eye witness account as to what exactly happened. But the prosecution set out to piece together certain events which it placed before the learned judge as circumstantial evidence connecting the appellant with the death of the deceased. In receiving that evidence, the learned judge remarked:-

"There are several facts which the prosecution has invited the Court to hold that they do form a series of circumstances leading to an inference or conclusion of the accused's guilt. I have accepted this invitation provided that as this is a case dependent upon circumstantial evidence the prosecution must show that these circumstances from which the inference of guilt is to be drawn are, in the first instance, proved beyond reasonable doubt. This simply means that the prosecution must prove on the required standard the existence of such fact."

The first fact which the prosecution set out to prove was that the deceased did not build a home on his ancestral land at Torongo on a piece of land given to him by his father Jonah arap Sawe. And that he had settled on the appellant's shamba at Muberes which was contrary to the customs of the Tugen tribe to which both the deceased and the appellant belonged.

This old man told the judge that he wanted the deceased to take a second wife, a village wife, who would live at home with him as the appellant was unable to do so. Jane Sawe (PW 26) in cross-examination said:-

"The deceased and the accused had a farm in Muberes. This is in fact where the accused comes from. The deceased and the accused had set up their matrimonial home in Muberes. The deceased had been given a share of the family land by our father in Torongo. He had not put up a home on that land. Everybody in our home was not amused because the deceased had gone to live on his wife's farm. This contravened our Tugen culture."

The appellant is the registered proprietor of the Muberes farm. The fact that the appellant and the deceased had been married for more than 20 years and yet he had no rural home in Torongo caused the deceased's father and his sisters a great deal of concern. They all appeared determined that the deceased should return to Torongo and put up a home on his ancestral land complete with a new wife who would reside there.

On this first issue the learned judge was satisfied that the deceased's failure to comply with the wishes of his father and his sisters offended the Tugen customary law and the deceased had therefore decided to build a rural home for his prospective wife at Torongo.

The second fact which the prosecution set out to prove was that the deceased needed a second wife who would take care of his ageing parents and to prove this, the learned judge relied on the testimony of the deceased's two sisters Judith and Jane. They claimed, and the learned judge accepted, that the deceased had told them that he wished to take a second wife because he wanted somebody who could

stay at home and look after his ageing parents. The learned judge expressed the view that

African children, who are able to do so, have a duty to take care of their aged parents. For this proposition he relied on a passage from the judgment of Nyarangi JA (as he then was) in the case of *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters* (1988) 1 KAR 946. But that was a case where a father claimed damages as a dependant from the owner of the motor vehicle, which had fatally injured his son. Evidence had been placed before the Court that the father received regular financial support from his son. The trial judge expressed the opinion that the son was under no obligation to support his father. It was this attitude that earned the trial judge the rejoinder from Nyarangi JA. In the present case the learned judge held that Jonah Sawe expected the deceased, who was capable and in a senior Government post, to maintain him and he had a right to demand to be maintained by the deceased and the deceased was obliged to provide such support. In this regard the learned judge said:

“Therefore there was that obligation on the part of the deceased to provide for his father. He told his sisters that he wanted to marry a second wife through whom he would make that provision. I therefore accept that evidence.”

The last reason, according to the prosecution, why the deceased wanted to marry a second wife was that he wanted to have more children. It was Jane’s evidence that she had discussed the matter with the deceased in a number of conversations both at her house in Nakuru and over the telephone, and the deceased had told her he wanted more children. The appellant in her testimony confirmed that Jonah Sawe told her in the presence of the deceased at a meeting in Torongo that he wanted more grandchildren and for that reason, the family had decided that the deceased should marry a second wife. As evidence of the fact that the deceased too wished to have more children, the learned judge relied on the fact that the deceased took the appellant for major operations and that the couple at one point even toyed with the idea of adopting children but this was abandoned. The judge said that the deceased made a personal choice that he needed more children and to that end he had to marry a second wife. In

order to turn this desire into reality, said the judge, the deceased decided to marry Rose Chelagat Maiyo (PW 21) but the deceased died before the marriage could take place. But to all intents and purposes, Rose Chelagat Maiyo considered herself to be the second wife of the deceased and that was her testimony in court. The learned judge was satisfied that but for the death of the deceased in the fire that engulfed his house on 2nd

September 1998, the deceased would have gone ahead and married Rose Maiyo as his second wife.

It was also the prosecution’s case that the relationship between the appellant and the deceased seriously deteriorated and tension built up because of the decision the deceased had taken to marry a second wife. According to the deceased’s sisters, Jane and Judith, the deceased had told them that the appellant had found out that he had decided to take a second wife and she had threatened him with dire consequences. According to these witnesses, they took the alleged threat so seriously that at one point they advised the deceased to stop staying in the same house with the appellant and look for alternative accommodation. The appellant denied that there was any tension between her and the deceased and maintained to the end that their relations were cordial. It was her evidence that she had discussed the matter with the deceased who had assured her that he had abandoned the idea.

Yet another piece of circumstantial evidence which the learned judge took into account as showing that the appellant intended to cause harm to the deceased was the letter she had written to her son Nicolas in August 1998.

This letter was inside a bible found in the sitting room by AP CPL Maurice Anyira (PW 30). In the letter, the appellant explained to her son the problems she was having with the deceased over his decision to marry a second wife. She vowed to continue to fight to defend:-

“Our right as the only nuclear family of *Baba* Kiptum. So I am the enemy to them all, *Baba*, his sisters, parents and relative.”

There was also found inside the envelope a sum of Shs 5,500/= which the appellant instructed her son to use for his immediate needs and transport back home to Muberes incase of trouble. In a post-script she said:-

“I am not killing myself but I expect any trouble from them. I want to stand for our marriage vows till the end of this. One husband, one wife in times of joy or sorrow.”

In an attempt to prove that the fire did not start accidentally, the prosecution led evidence which showed that it was not caused by an electrical fault.

The learned judge also examined the evidence the prosecution relied on to prove that the cause of the fire was not accidental. It was the evidence of James Nalianya Makila (PW 9), a fire prevention officer in the Ministry of Public Works and Housing, that the fire had spread very fast which could only have been due to an accelerant. He also thought that the fire was caused by a naked light eg a matchbox introduced into the environment of the master bedroom. The learned judge held that the fire in the deceased’s house was not accidentally caused and that it was caused by a deliberate act on the part of someone. He said that since it was a flaming fire an accelerant must have been used to start it. He found as a fact that the accelerant used to start the fire was petrol and that the seat of the fire was in the deceased’s master bedroom. After examining in detail all these pieces of circumstantial evidence, including the fact that there was no one else in the house on that fateful night except the appellant and the deceased, the learned judge held that the prosecution had proved beyond reasonable doubt that the appellant had started the fire which caused the death of the deceased. He then proceeded to look for evidence of malice aforethought.

In this connection, the learned judge took into account the fact that the appellant was very bitter about the deceased’s intention to marry Rose Maiyo. He also referred to the letter which the appellant had written to her son vowing to defend her marriage vows to the end. Then there was the fact that the appellant applied for her leave on 31st August, 1998 virtually on the eve of the tragedy. He said that the appellant must have intended to cause the deceased’s death or she must have known that by setting the house on fire, the deceased would be consumed by flames or would inhale carbon monoxide, collapse and become unconscious and in that state of immobility he would be burnt to death. The learned judge came to the conclusion that the prosecution had proved beyond reasonable doubt that the appellant had caused the death of the deceased with malice aforethought. He convicted her of murder and imposed the mandatory death sentence against which the appellant now appeals to this Court.

The memorandum of appeal lodged on behalf of the appellant by her learned counsel, Dr Githu Muigai, contains 9 grounds of appeal. After considering the evidence led at the trial and submissions of counsel both here and in the Superior Court, we think that there is only one substantial ground of appeal and that is ground 5. The complaint in ground 5 of appeal is:-

“(5) That the learned judge erred in law and in fact when he found, against the weight of the evidence, that the prosecution had proved beyond reasonable doubt that the fire that caused the death of the deceased had been caused by the appellant.”

As we have already pointed out, the evidence in this case was entirely circumstantial. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.

The prosecution made a lot of capital out of a number of circumstances in a bid to establish that the appellant had a motive to kill the deceased. Let us recall some of these to see whether they had any substance. First, there was this business about the deceased not establishing a rural home at Torongo. It was said that the deceased's failure to do so was a breach of Tugen customary law. For some strange reason, the deceased's father and sisters blamed the appellant for the deceased's failure to comply with what they claimed to be an important custom of the Tugen tribe and the learned judge accepted this. We do not believe that the appellant was to blame for the deceased's failure. There was no evidence that she actively resisted any attempt by the deceased to build a home on his ancestral land at Torongo. So the learned judge's suggestion that she obstructed him was purely speculative. Apart from this, the so called customary law of Tugen tribe was not proved by evidence as required by section 5 of the Evidence Act (cap 80) which states:-

"51 (1) When the Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are admissible."

The prosecution submitted, and the learned judge agreed, that because the appellant was opposed to the deceased's decision to marry a second wife, she became so bitter that she decided to take the deceased's life.

There was evidence that after getting her first and only child, the couple were advised that the appellant could not have any more babies. What we find quite strange is the fact that because of this, the deceased's father and his two sisters ganged up to put pressure on the deceased to marry a second wife. The appellant and the deceased were Christians and their marriage was solemnized in church. If for any reason the deceased thought that the appellant had committed any matrimonial offence, it was open to him to petition for divorce.

What no one seems to have given any consideration including the learned judge, is the fact that as long as the deceased's marriage to the appellant subsisted, the deceased had no capacity to contract another marriage either under the statute or African customary law with any other woman. The deceased had no capacity to marry Rose Chelagat Maiyo as long as he was still married to the appellant. The appellant being validly married to the deceased was perfectly entitled to protest, and even to do so vigorously, against any attempt to impeach the integrity of her own marriage. She was right to stand up and tell her father in law and his daughters to stop inducing the deceased to marry a second wife. It was, in our view, quite improper for the learned judge to take this against the appellant. It was unreasonable to expect the appellant to remain silent in the face of this malicious onslaught.

It seems to us that the learned judge read more into the letter the appellant wrote to her son than was justified. The learned judge did not see anything wrong with the manner in which the deceased's father and sisters behaved towards the appellant. In failing to censure them he appears to have lent legitimacy to this totally disgraceful behavior. The appellant was entitled to resist any attempt by her husband's relatives to break her marriage.

The appellant was also criticized for advising her son to return to Muberes in case of trouble and not to go to Torongo. The evidence on record shows that the only home the boy had and to which he could return was Muberes.

The appellant and the deceased did not have a home at Torongo. The only structure on the piece of land the deceased's father gave him was said to be a store. We are entitled to ask whether the poor boy was supposed to go to Torongo and live in a store among people who had rejected his mother and appeared not to have any love for him. We think we have said enough about the evidence of motive and in our judgment it was not worth a candle.

We now turn to the evidence of actual killing. The prosecution's case, right from the beginning, was that the appellant murdered the deceased before setting the house on fire. The import of this was that the deceased was either dead, or so totally immobilized, that he could not escape from the fire. To this end, evidence was led of the discovery in the main bedroom of some Somali swords but the prosecution did not prove that the injuries which caused the death of the deceased were inflicted by these swords. In rejecting this angle of the prosecution's case the learned judge said:-

"The learned Deputy Director of Public Prosecutions also submitted that the accused had stabbed the deceased on the chest several times with swords which were found inside the master bedroom. Medical evidence as to the cause of the injuries noted on the deceased's chest was to the effect that sharp objects from the burning roof could have caused those injuries. In my view the prosecution has failed to exclusively show that the accused immobilized the deceased by stabbing him with these swords."

The deceased died in the fire. There is no evidence that he made any attempt to escape. The bedroom door was not locked. There was no evidence that the appellant made any attempt to escape either. She ran into the bathroom from where she was rescued by members of the fire brigade. They had to cut a hole in the roof in order to reach her. The medical report on the appellant shows that she sustained injuries of utmost severity. We have not had the benefit of the learned judge's comment on this point. If the appellant set the house on fire either to kill the deceased or to conceal evidence of murder, the fact that she made no attempt to save her own life should have been explained because left as it is, it is open to two possible interpretations, and in the absence of any comment from the learned judge, we cannot speculate on the version he would have settled for. It is not for us at this stage to determine whether, if the appellant started the fire, as found by the judge, she might have been trying to take her own life. This is because the case was presented on the basis that the appellant set the house on fire specifically to kill the deceased.

The learned judge held that the appellant caused the death of the deceased by starting the fire. With respect, we are unable to agree. It is common ground that this was a case of circumstantial evidence and there was therefore no direct evidence. Again, it is common ground that there was indeed a fire in the residence of the deceased which must have occurred between 5.00 am and 6.00 am on the night of the 1st and 2nd September, 1998. There is also no doubt that the deceased was burnt to death in that fire. There is also no doubt that the deceased was burnt to death in that fire. The appellant herself was burnt in the fire and she was rescued therefrom and taken to Nairobi Hospital.

On the fateful night two administration policemen were guarding the house. The evidence of witnesses from the neighbourhood who testified was that there was no fire before 5.00 am. Dorcas Mumo (PW 12) said she woke up at 4.00 am and there was no fire. She was supported by Constance Jira (PW 13) and the entire neighbourhood. It was their evidence that the fire started between 5.00 am and 6.00 am. Korir (PW 11) told the

Court that they left duty at 5.45 am Kungu (PW 36) said they left 5.30 am. Kungu also said there was light in the deceased's house when they left. It was their evidence that there was no fire but every other neighbor who was called said there was fire about that time (5.30 am). In this state of the evidence, the two watchmen are not excluded from being persons who might have started the fire or for that matter any intruder might have done so. If that be the case, then the evidence does not irresistibly point to the appellant to the exclusion of all others within the meaning of *R v Kipkering arap Koske & Another* 16 EACA 135 where it held, *inter alia*, that:-

"In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt".

In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge's view that the prosecution had proved its case against the appellant beyond any reasonable doubt.

That being our view of the matter, we allow this appeal, quash the appellant's conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless she is otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of June, 2003

R.O. KWACH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR