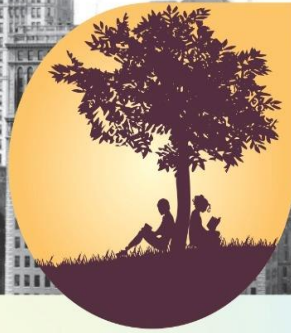


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Tackling the Challenge of Prosecuting No-Body Murder Cases in Kenya: Legal Guidance from South Africa and Australia

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Abstract

This paper provides a comprehensive examination of the intricate challenges and complexities involved in prosecuting no-body murder cases. Focusing on the legal, evidential, and procedural aspects, the discussion explores the fundamental concept of corpus delicti, the burden of proof, and the critical role of circumstantial evidence. By drawing insights from international experiences in South Africa and Australia and assessing Kenya's current legal framework, this paper offers valuable lessons and guidance for enhancing the pursuit of justice in such cases. It underscores the significance of victimology and motive, providing a roadmap for legal practitioners, policymakers, and scholars to navigate these challenging legal landscapes.

Keywords: *No-Body Murder Cases, Corpus Delicti, Evidential Challenges, Circumstantial Evidence, Legal Framework, Justice, Criminal Law, Prosecution, Kenya*

1. Introduction

Tackling the challenge of prosecuting no-body murder cases is a complex and demanding endeavour within the realm of criminal law¹. In the context of Kenyan jurisprudence, where legal guidance

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¹ DiBiase, T.A. (2023). No-Body Homicide Cases: A Practical Guide to Investigating, Prosecuting, and Winning Cases When the Victim Is Missing

often draws from international precedents, including countries like South Africa and Australia, the pursuit of justice in such cases takes centre stage. This discussion delves into the legal intricacies, evidential challenges, procedural hurdles, and the current legal framework in Kenya, while also drawing invaluable lessons from the experiences of South Africa and Australia in handling no-body murder prosecutions.

The legal problem posed by no-body murder cases revolves around the fundamental concept of *corpus delicti*, which essentially requires the prosecution to establish both the fact of the crime and the identity of the victim.² The absence of the victim's body poses a significant hurdle in meeting this requirement, and it is here that the principles of *corpus delicti* rule, evidential challenges, and the use of circumstantial evidence come into sharp focus.

Within the courtroom, discharging the burden of proof falls squarely on the shoulders of the prosecution, necessitating a meticulous and compelling presentation of evidence to convince the court of the accused's guilt.³ Procedural challenges further complicate the path to justice, including the charge to prefer and the decision to opt for single or cumulative charges, making each case a unique legal puzzle⁴ In examining the current legal framework in Kenya, it becomes evident that there are no express provisions in the Penal Code addressing no-body murder cases, revealing a potential gap in the

(2nd ed.). CRC Press. <https://doi.org/10.4324/9781032618098> accessed 27 October 2023

² Ibid

³ Ibid

⁴ Academic.oup.com

<https://academic.oup.com/edited-volume/45636/chapter/396152318> accessed 23 January 2024

law. The Criminal Procedure Code, while lacking direct provisions, does offer some tools that could be relevant in such prosecutions. Additionally, the Evidence Act does not provide specific guidelines for handling cases where the victim's body is not recovered.

Drawing from the experiences of South Africa and Australia, this discussion provides valuable insights into the opportunities and challenges presented by no-body murder prosecutions. South Africa's case law, exemplified by *the state v MA 082/2017*, showcases the judicial approach to such cases and the significance of circumstantial evidence in securing convictions. Meanwhile, the Australian cases of *The Lane case*, *Bruce Allan Burrell*, and *the Claremont serial killings* illustrate the complexities of prosecuting no-body murders, including the role of motive, circumstantial evidence, and victimology.

The lessons learnt from these international examples provide a roadmap for Kenya, offering guidance on how to navigate the legal intricacies and evidential challenges inherent in no-body murder cases. This discussion aims to shed light on the multifaceted nature of these prosecutions, with the ultimate goal of enhancing the pursuit of justice in Kenya's legal landscape.

2. The Legal Problem Posed by No-Body Murder Prosecutions

2.1 The *Corpus Delicti* Rule

The *Corpus Delicti* Rule is a fundamental principle in criminal law that refers to the body of the crime.⁵ In essence, it establishes that there must be sufficient evidence to prove that a crime has occurred before

⁵ Ibid

someone can be convicted of it. This rule ensures that convictions are based on concrete evidence rather than mere suspicion or conjecture.⁶ In the context of no-body murder cases, the *Corpus Delicti* Rule presents a significant challenge. In traditional murder cases, the body of the victim serves as crucial evidence to establish the fact of the crime, the cause of death, and the identity of the victim.⁷ However, in cases where the victim's body has not been found, proving the crime becomes much more complicated.⁸

One of the main challenges is establishing that the victim is, in fact, deceased.⁹ In traditional murder cases, the presence of a body provides clear evidence of death. In no-body cases, other forms of evidence, such as circumstantial evidence or forensic evidence, may be used to demonstrate that the victim is deceased.¹⁰

Even if it can be proven that the victim is dead, determining the cause of death can be challenging without a body.¹¹ This may require extensive forensic analysis and expert testimony. Identifying the victim is also complicated when there is no body.¹² DNA evidence,

⁶ Ibid

⁷ DiBiase TA, 'No-Body Murder Case Statistics' [2023] No-Body Homicide Cases 57

⁸ Ibid

⁹ Death investigation: A guide for the scene investigator <https://www.ojp.gov/pdffiles/167568.pdf> accessed 23 January 2024

¹⁰ Ibid

¹¹ Forensic Autopsy--a Body of Clues' (Officer, 6 July 2012) <https://www.officer.com/investigations/article/10249533/forensic-autopsya-body-of-clues> accessed 23 January 2024

¹² 'No-Body Homicide Cases: A Practical Approach' (FBI, 9 November 2016) <https://leb.fbi.gov/articles/featured-articles/no-body-homicide-cases-a-practical-approach> accessed 23 January 2024

dental records, or other means of identification may be used.¹³ No-body cases often rely heavily on circumstantial evidence, which can be more challenging to present convincingly in court.¹⁴ Prosecutors need to build a strong case based on such evidence, connecting the accused to the crime beyond a reasonable doubt.¹⁵

In the context of Kenya, it can be beneficial to look at legal guidance from countries with experience in prosecuting no-body murder cases, such as South Africa and Australia. These countries have faced similar challenges and have developed legal strategies and precedents that may be relevant in Kenyan cases.

2.2 Evidential Challenge

The evidential challenge in no-body murder prosecutions primarily revolves around the absence of the victim's body, which is a critical piece of evidence in traditional murder cases.¹⁶ Without a body, several evidential challenges arise in the following contexts:

2.2.1 Circumstantial Evidence

Circumstantial evidence plays a pivotal role in no-body murder prosecutions as it often constitutes the primary means of establishing

¹³ Hinchliffe J, 'Forensic Odontology, Part 1. Dental Identification' (Nature News, 12 March 2011) <https://www.nature.com/articles/sj.bdj.2011.146> accessed 23 January 2024

¹⁴ Evidence law: Convictions based on circumstantial evidence <https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1043&context=judgesbook> accessed 23 January 2024

¹⁵ *Ibid*

¹⁶ Canberra Law Review' (AustLII) <https://www5.austlii.edu.au/au/journals/CanLawRw/2022/9.html> accessed 23 January 2024

guilt.¹⁷ Circumstantial evidence involves drawing inferences from facts or circumstances that indirectly suggest the commission of a crime.¹⁸ In no-body murder cases, where direct evidence (e.g., the victim's body) is missing, circumstantial evidence takes centre stage.¹⁹ Circumstantial evidence doesn't directly prove the accused's guilt but relies on inferences.²⁰ Prosecutors must present a chain of circumstances that reasonably leads to the conclusion that the accused committed the crime²¹. Establishing motive, means, and opportunity is crucial in no-body cases.²² Circumstantial evidence may be used to demonstrate that the accused had a motive to commit the crime, the means to do so, and the opportunity to carry it out.²³

Eyewitnesses or individuals who can provide information about the victim's interactions with the accused before their disappearance can provide essential circumstantial evidence²⁴. Testimonies regarding disputes, threats, or unusual behaviour can help establish motive and opportunity²⁵. The defence may present an alibi as circumstantial

¹⁷ Ferguson C, Pooley K, Australian no-body homicides: Exploring common features of solved cases, *Journal of Forensic and Legal Medicine*, <https://doi.org/10.1016/j.jflm.2019.06.007> accessed 27 October 2023

¹⁸ Ibid

¹⁹ Ibid

²⁰ Circumstantial Evidence (Legal Information Institute) https://www.law.cornell.edu/wex/circumstantial_evidence accessed 23 January 2024

²¹ Jellema H, 'Reasonable Doubt from Unconceived Alternatives' [2022] *Erkenntnis*

²² Ibid

²³ Ibid

²⁴ Thomas Edison State University and Sanchez D, 'Eyewitness Testimony and Memory Biases' (An Introduction to Social Psychology) <https://opened.tesu.edu/introsocialpsychology/chapter/eyewitness-testimony-and-memory-biases/> accessed 23 January 2024

²⁵ Ibid

evidence to challenge the prosecution's case.²⁶ Alibi witnesses can testify that the accused was not present at the scene of the crime when it allegedly occurred.²⁷

Circumstantial evidence can include forensic findings like bloodstains, DNA evidence, or weapon analysis²⁸. These findings can help build a case against the accused by linking them to the crime scene or the victim.²⁹ Evidence related to the accused's behaviour, such as inconsistent statements, attempts to conceal evidence, or unexplained changes in lifestyle, can be used as circumstantial evidence indicating guilt.³⁰ Evidence of prior acts or criminal behaviour may be introduced to establish a pattern or *modus operandi*, suggesting that the accused is likely responsible for the crime.³¹

Circumstantial evidence can be used to establish causation, connecting the accused to the cause of death or the circumstances leading to the victim's disappearance.³² Multiple pieces of

²⁶ Cowan S [2021] Is an alibi a paper shield? an investigation of the factors that influence alibi credibility judgments

²⁷ Ibid

²⁸ Qureshi S, Prakash R and Gupta SC, 'Role of DNA Profiling in Criminal Investigation Based Leading Case Laws' (2021) 16 *Journal of Mountain Research*

²⁹ Ibid

³⁰ Van Oorschot RAH; Szkuta B; Meakin GE; Kokshoorn B; Goray M, 'DNA Transfer in Forensic Science: A Review' (*Forensic science international. Genetics*) <https://pubmed.ncbi.nlm.nih.gov/30399535/> accessed 23 January 2024

³¹ Ibid

³² Circumstantial Evidence (Legal Information Institute) https://www.law.cornell.edu/wex/circumstantial_evidence accessed 23 January 2024

circumstantial evidence, when considered together, can strengthen the prosecution's case.³³ The more aspects of the case that circumstantial evidence covers, the more compelling the overall argument becomes.³⁴ Expert witnesses, such as forensic experts and psychologists, can provide opinions and interpretations of circumstantial evidence, making it more understandable and persuasive to the jury.³⁵

2.2.2 Discharging the Burden of Proof

Discharging the burden of proof is a critical aspect of any criminal trial, including no-body murder prosecutions.³⁶ In such cases, where the victim's body is missing, the burden of proof remains on the prosecution to establish the accused's guilt beyond a reasonable doubt.³⁷

As previously discussed, circumstantial evidence plays a significant role in no-body murder cases. The prosecution must use this evidence to construct a convincing case that demonstrates the accused's guilt. This involves presenting a clear and coherent narrative that links the accused to the crime. To discharge the burden of proof, the prosecution should show that the accused had a motive to commit the crime, the means to do so, and the opportunity to carry it out. This

³³ Ibid

³⁴ 2.4 the Burden of Proof' (Criminal Law, 17 December 2015) <https://open.lib.umn.edu/criminallaw/chapter/2-4-the-burden-of-proof/> accessed 23 January 2024

³⁵ Ibid

³⁶ Rhode C, 'The Burden of Proof' [2023] *The Burden of Proof upon Metaphysical Methods* 35

³⁷ 'Guilt beyond a Reasonable Doubt' (Legal Information Institute) <https://www.law.cornell.edu/constitution-conan/amendment-5/guilt-beyond-a-reasonable-doubt> accessed 23 January 2024

can be achieved through witness testimonies, evidence of prior conduct, and other circumstantial evidence.³⁸

In cases where the cause of death is in question, the prosecution must discharge its burden by providing evidence that directly or indirectly links the accused to the cause of death, even without the victim's body.³⁹ This might involve presenting medical or forensic evidence. The prosecution's case should leave no reasonable doubt about the accused's guilt.⁴⁰ If the court has any significant doubts or uncertainties about the case, they should acquit the defendant.⁴¹

2.3 Procedural Challenge

2.3.1 The Charge to Prefer

The charge to prefer in no-body murder prosecutions is the formal accusation or charge brought against a defendant, specifying the offense they are alleged to have committed.⁴² In these cases, several procedural challenges come into play:

The charge should be specific, clearly identifying the offense of murder, and it should provide as much detail as possible about the alleged crime, considering the absence of the victim's body.⁴³ It

³⁸ Ibid

³⁹ Republic Vs Michael Mucheru Gatu [2002] Eklr

⁴⁰ Beyond doubt: The case against not proven)
<https://wrap.warwick.ac.uk/156002/7/WRAP-Beyond-doubt-the-case-against-Not-Proven-2021.pdf> accessed 23 January 2024

⁴¹ Ibid

⁴² Ibid

⁴³ Ibid

should outline the circumstances of the disappearance, any evidence of foul play, and other relevant details.⁴⁴

The charge should use language that reflects the absence of direct evidence, such as "causing the death of [victim's name] by unknown means" or a similar formulation that acknowledges the unique circumstances of the case.⁴⁵ Depending on the evidence, the prosecution may consider alternative charges, like manslaughter, in addition to the primary murder charge, allowing for flexibility in the event that the evidence does not support a murder conviction.⁴⁶

The charge should include allegations related to motive and intent, providing reasons why the accused is believed to have committed the crime based on the available evidence.⁴⁷ The charge may explicitly reference the circumstantial evidence that will be presented during the trial, helping to clarify the prosecution's case.⁴⁸ If new evidence arises during the trial, the charge may be amended to reflect the evolving understanding of the case, following proper legal procedures and court approval.⁴⁹

⁴⁴ Häkkänen-Nyholm H, Weizmann-Henelius G, Salenius S, Lindberg N, Repo-Tiihonen E. 'Homicides with mutilation of the victim's body'. *Journal of Forensic Science*. 2009

⁴⁵ Judiciary of Kenya Criminal Procedure Bench Book <http://kenyalaw.org/kl/fileadmin/pdfdownloads/JudiciaryCriminalProcedureBenchBook.pdf>

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Direct and circumstantial evidence distribute and reasonably believed ... https://us.sagepub.com/sites/default/files/upm-assets/68103_book_item_68103.pdf accessed 23 January 2024

⁴⁹ Ibid

It must include all jurisdictional and legal elements required by the applicable criminal law, such as the location of the crime, the identity of the accused, and the *mens rea* necessary for a murder conviction.⁵⁰ The charge should adhere to established legal standards and precedents relevant to no-body murder prosecutions to meet the requirements of the legal system.⁵¹

2.3.2 Single or Cumulative Charges

In no-body murder prosecutions, the prosecutor may choose to file either single or cumulative charges against the accused. Single charges involve accusing the defendant of a specific offense, such as murder.⁵² In no-body murder cases, this means charging the accused with only one count of murder based on the available evidence.⁵³ The focus is on proving the accused's guilt for the primary charge beyond a reasonable doubt. Single charges can simplify the trial process, but they may be riskier if the evidence for the primary charge is insufficient.⁵⁴

Cumulative charges involve accusing the defendant of multiple offenses, often including a primary charge (e.g., murder) and

⁵⁰ Mens Rea - a defendant's mental state - findlaw <https://www.findlaw.com/criminal/criminal-law-basics/mens-rea-a-defendant-s-mental-state.html> accessed 23 January 2024

⁵¹ Ibid

⁵² No-Body Homicide Cases: A Practical Approach (FBI, 9 November 2016) <https://leb.fbi.gov/articles/featured-articles/no-body-homicide-cases-a-practical-approach> accessed 23 January 2024

⁵³ The Felony Murder Rule in Criminal Law' (Justia, 16 October 2023) <https://www.justia.com/criminal/offenses/homicide/felony-murder/> accessed 23 January 2024

⁵⁴ Ibid

alternative charges (e.g., manslaughter or concealment of a body).⁵⁵ In no-body murder cases, cumulative charges provide flexibility in the event that the evidence for the primary charge is weak.⁵⁶ It allows the court to consider other potential offenses. If the evidence supports multiple charges, the accused may be convicted of one or more offenses. Cumulative charges can provide a more robust legal strategy for the prosecution.⁵⁷

The choice between single or cumulative charges depends on the strength of the evidence and the legal strategy of the prosecution. Single charges can simplify the case but carry the risk of acquittal if the evidence for the primary charge is insufficient.⁵⁸ Cumulative charges provide more options for conviction but may complicate the trial and require careful management by the prosecution.⁵⁹ Ultimately, the decision should be made based on the specific circumstances and evidence of the case.⁶⁰

⁵⁵ Hlr, 'Stacked: Where Criminal Charge Stacking Happens - and Where It Doesn't' (Harvard Law Review, 1 May 2023) <https://harvardlawreview.org/print/vol-136/stacked-where-criminal-charge-stacking-happens-and-where-it-doesnt/> accessed 23 January 2024

⁵⁶ Person, A.(Tad) T and DiBiase, 'No-Body Homicide Cases: A Practical Guide to Investigating, Prosecuti' Taylor & Francis, 13 November 2023) <https://www.taylorfrancis.com/books/mono/10.4324/9781032618098/body-homicide-cases-thomas-tad-dibiase> accessed 23 January 2024

⁵⁷ Ibid

⁵⁸ Mitchell, Ojmarrh, Daniela Oramas Mora, Tracey L. Sticco, and Lyndsay N. Boggess. "Are progressive chief prosecutors effective in reducing prison use and cumulative racial/ethnic disadvantage? Evidence from Florida." *Criminology & Public Policy* 21, no. 3 (2022)

⁵⁹ Ibid

⁶⁰ Ibid

3. The Current Legal Framework for Prosecuting No-Body Murder Cases

3.1 Penal Code

The absence of express provisions in the Penal Code for no-body murder cases can indeed present challenges in the legal framework. When laws do not explicitly address unique situations, it can create uncertainties in how such cases should be handled and may lead to potential gaps in the law.⁶¹

However, the Penal Code provides that any person who, when a woman is delivered of a child, endeavours by any secret disposition of the dead body of the child to conceal the birth, whether the child died before, at or after its birth, is guilty of a misdemeanour.⁶² The provision is relevant to the discussion of no-body murder cases. This provision recognizes cases where individuals attempt to conceal the birth of a child, and it can be applied in situations where there is an attempt to hide the fact that a child was born and, in some cases, that the child may have died.

In the context of no-body murder cases, this provision may be used to address the act of concealing the birth and potentially the death of a child, which could be a key element of the case.⁶³ However, it's important to consider that this provision addresses a different offense (concealment of birth) rather than murder. To establish a murder

⁶¹ Republic v Lewis (Criminal Case E077 of 2021) [2021] KEHC 272 (KLR) (Crim) (1 November 2021) (Ruling)

⁶² Penal Code, Cap 63, Laws of Kenya, sec 227

⁶³ Corpus delicti?: Forensic dimensions of the no-body murder https://www.researchgate.net/publication/365407807_Corpus_Delicti_Forensic_Dimensions_of_the_No-Body_Murder accessed 23 January 2024

charge, additional evidence, such as the intent to kill and the causation of death, would typically be required.

3.1 Criminal Procedure Code

The code provides that when a person is charged with the murder or infanticide of a child or with killing an unborn child and the court is of the opinion that he is not guilty of any of those offences, and if it appears in evidence that the child had recently been born and that the person did, by some secret disposition of the dead body of the child, endeavour to conceal the birth of that child, he may be convicted of the offence of endeavouring to conceal the birth of that child although he was not charged with it.⁶⁴ While it doesn't directly relate to murder cases, it demonstrates that the legal system recognizes circumstances where an offense may be related to concealing a body or circumstances of death.

The court also provides for directions in the nature of *habeas corpus*. The High Court may whenever it thinks fit direct that the body of a defendant within those limits be brought in on a return of *cepi corpus* to a writ of attachment.⁶⁵ This provision can be relevant in no-body murder cases if there are concerns if a defendant's body needs to be produced.

3.2 Evidence Act

The Evidence Act typically provides rules and guidelines for the admissibility and use of evidence in legal proceedings.⁶⁶ While it may not contain specific provisions related to "no-body murder cases," it still plays a crucial role in how such cases are handled.

⁶⁴ Criminal procedure code, Cap 75, Laws of Kenya, sec 181 (4)

⁶⁵ *Ibid*, sec 389

⁶⁶ Evidence Act, Cap 80, Laws of Kenya

The Evidence Act is relevant in establishing the admissibility of circumstantial evidence, which is often central in no-body murder cases. It sets out the rules and standards for presenting circumstantial evidence and its probative value.⁶⁷In cases where forensic or medical evidence is presented to establish the cause of death or other crucial aspects, the Evidence Act may provide guidelines for the admissibility and presentation of expert testimony.⁶⁸

The Act contains rules concerning the admissibility of hearsay evidence, which can be particularly important in cases where witnesses may testify about statements or actions of individuals who are not present, such as the victim in a no-body murder case.⁶⁹The Act also addresses issues of relevancy and the weight given to different types of evidence. This is critical in determining which evidence is admissible and how much weight it carries in the case.⁷⁰

4. Opportunities for Prosecuting No-Body Homicides: Legal Guidance from South Africa and Australia

4.1 No-Body Murder Prosecutions in South Africa

4.1.1 Brief Overview

No-body murder prosecutions in South Africa, as in many other jurisdictions, present unique challenges due to the absence of the victim's body. South Africa, like many countries, relies on its existing legal framework for murder prosecutions. While the law may not specifically address no-body murder cases, it provides a basis for charging and prosecuting individuals when there is substantial

⁶⁷ Ibid, sec 164

⁶⁸ Ibid, sec 48, 49, 63

⁶⁹ Ibid, sec 63

⁷⁰ Ibid, Ch 2

evidence of their involvement in a murder, even in the absence of the victim's body.⁷¹

The South African legal system recognizes the value of circumstantial evidence.⁷² In no-body murder cases, circumstantial evidence is often the primary means of proving guilt.⁷³ This can include evidence related to motive, opportunity, and the accused's behaviour before and after the alleged murder. Expert witnesses, such as forensic pathologists, forensic scientists, and behavioural experts, can play a critical role in providing opinions and interpretations that support the circumstantial evidence and help establish the case against the accused.⁷⁴

Over time, South African courts have had the opportunity to consider and decide no-body murder cases, creating legal precedents and standards for how such cases should be handled.⁷⁵ These precedents can provide guidance to legal professionals and help ensure consistency in the legal approach. Prosecutors in South Africa have the opportunity to develop strategies for presenting strong

⁷¹ van der Linde, Delano. (2022). 'No *corpus delicti* in Murder Cases: A Review of South African Judgments Dealing with Murder Cases without a Body'. 36. 165.

⁷² 'Circumstantial Evidence Revisited: Tony Healy and Associates' (Tony Healy and Associates | Labour Law | Labour Relations | Labour Consultants, 6 February 2019) <https://tonyhealy.co.za/circumstantial-evidence-revisited/> accessed 23 January 2024

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ (No corpus delicti in murder cases: A review of South African judgments ...)

https://www.researchgate.net/publication/362620350_No_corpus_delicti_in_Murder_Cases_A_Review_of_South_African_Judgments_Dealing_with_Murder_Cases_without_a_Body accessed 23 January 2024

circumstantial cases in no-body murder trials. This involves careful planning, the presentation of compelling evidence, and the ability to address the challenges posed by the absence of the victim's body.⁷⁶

4.1.2 The State v MA 082/2017⁷⁷

In the case of *The State v MA*, the accused, Mr. MA, was charged with the murder of his wife, Ms. NA, even though her body had not been found. The State alleged that on the evening of March 13, 2015, Mr. MA assaulted and killed Ms. NA and then concealed or hid her body, subsequently reporting her as missing. The case presented a classic example of a no-body murder prosecution, where the primary challenge was to prove not only that the victim was dead but that she had been murdered, all without the presence of the victim's body.⁷⁸ The prosecution relied on circumstantial evidence to build its case, including:

Blood Evidence: Blood traces found in a room, on Ms. NA's track pants, and a pillowcase were introduced as evidence. Experts indicated that the blood on the floor and her pants indicated that something had been moved or smeared. The blood on the pillowcases was found to be a mixture of the accused's and Ms. NA's blood.⁷⁹

Witness Testimonies: Neighbours testified that they heard screams coming from the accused's residence during the time of the alleged assault. Additionally, other witnesses provided insights into the

⁷⁶ Ibid

⁷⁷ *The state v MA 082/2017* available at <https://www.saflii.org/za/cases/ZAGPJHC/2018/695media.pdf> accessed 26 October 2023

⁷⁸ Ibid

⁷⁹ Ibid

physically abusive nature of the relationship between the accused and Ms. NA.⁸⁰

Protection Order: Evidence showed that Ms. NA had obtained an interim protection order against the accused due to assaults she had suffered during their marriage.⁸¹

Borrowed Car: The accused borrowed a car from a former romantic partner, and his reasons for borrowing it were found to be misleading. The distance he travelled with the car raised suspicions. Inconsistent Statements: The accused's statements and actions were inconsistent with the circumstances of Ms. NA's disappearance.⁸²

Ultimately, the court considered the circumstantial evidence and held that the absence of the victim's body was not an insurmountable obstacle to finding the accused guilty of murder. The court relied on established legal principles, including the requirement that circumstantial evidence must have the necessary probative force to warrant a conviction. It concluded that the evidence, consisting of many probative factors, pointed to the accused having planned and committed the murder, disposing of the victim's body, and that only he knew its location.⁸³

As a result, the court found the accused guilty of murder and defeating or obstructing the course of justice.⁸⁴ This case underscores the challenges and complexities of no-body murder prosecutions and

⁸⁰ Ibid

⁸¹ Ibid

⁸² Ibid

⁸³ Ibid

⁸⁴ Ibid

demonstrates how circumstantial evidence can be used to establish guilt when the victim's body is missing. It also highlights the importance of applying legal principles and standards in such cases.

4.1.3 The State v Nkuna⁸⁵

In this case, the court ruled on issues related to circumstantial evidence and the prosecution of murder cases when the victim's body is not found. The case is often cited as a reference in South African legal discussions about no-body murder prosecutions.

In "The State v Nkuna," the court held that the absence of the victim's body (*corpus delicti*) is not an insurmountable bar to finding an accused guilty of murder.⁸⁶ The court emphasized that there must be a reasonable explanation for why the body is missing, and it is proper for a court to convict an accused on circumstantial evidence, provided it has the necessary probative force to warrant a conviction. The case clarified the principles and standards that apply in cases where murder is alleged, but the victim's body has not been recovered.⁸⁷

The principles established in this case, as well as similar cases, have been influential in shaping the legal framework for prosecuting no-body murder cases in South Africa. They underscore the importance of evidence that excludes reasonable doubt and demonstrate how circumstantial evidence can be used effectively to prove guilt when direct evidence, such as the victim's body, is not available.

4.1.4 Lessons for Kenya

⁸⁵ *The state v Nkuna* 2012 (1) SACR 167 (8)

⁸⁶ *Ibid*

⁸⁷ *Ibid*

4.1.4.1 Similar-Fact Evidence

Indeed, there are valuable lessons from South African cases that can be applied to no-body murder prosecutions in Kenya. One such lesson pertains to the use of similar-fact evidence. Similar-fact evidence, also known as evidence of other bad acts or prior misconduct, involves presenting evidence of a defendant's previous actions or conduct that are similar to the alleged offense⁸⁸.

South African cases demonstrate that similar-fact evidence can be a powerful tool in prosecuting no-body murder cases. Evidence of prior abusive behaviour, threats, or assaults in the accused's relationship with the victim can establish a pattern of conduct that supports the prosecution's case.

Similar-fact evidence can serve to corroborate the circumstantial evidence presented in the case. It helps to establish a consistent pattern of behaviour or motive that supports the prosecution's theory of the crime.⁸⁹

Courts should carefully evaluate the admissibility of similar-fact evidence. In both Kenya and South Africa, the evidence must meet a balancing test, ensuring that its probative value outweighs any potential prejudice to the accused. Courts should consider the relevance, necessity, and fairness of admitting such evidence. Similar-fact evidence can strengthen the circumstantial case and increase the chances of a successful prosecution. The courts in Kenya

⁸⁸ van der Linde, Delano. (2022). 'No *corpus delicti* in Murder Cases: A Review of South African Judgments Dealing with Murder Cases without a Body'. 36. 165.

⁸⁹ Ibid

should recognize its importance and allow it when it meets the legal criteria.

4.1.4.2 Instrumental Role of Victimology

The instrumental role of victimology is another valuable lesson that can be applied to Kenya from South African cases involving no-body murder prosecutions. Victimology is the study of victims and their experiences in the context of criminal investigations and trials.⁹⁰

Victimology involves a comprehensive understanding of the victim's life, background, and relationships. This information can help build a profile of the victim and provide insights into their vulnerability, social interactions, and potential motives for the crime.⁹¹

Examining the victim's history and relationships can shed light on potential motives for the crime. Understanding any conflicts, disputes, or tensions in the victim's life can help establish a motive for the alleged murder. Victimology can corroborate witness testimonies and other evidence in the case. For example, if there is evidence of prior abuse or threats, victimology can provide context for this behaviour and strengthen the prosecution's case.⁹²

Victimology can offer insights into the psychological impact of the crime on the victim's family and loved ones. This can help the court better understand the emotional and psychological consequences of the alleged murder. Victimology can also inform legal advocacy strategies. Prosecutors can use victimology to build a compelling

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid

case, while defence attorneys can use it to challenge the prosecution's narrative and evidence.⁹³

Victimology also plays a critical role in providing support to the victim's family during the legal process. It can help address their needs, concerns, and emotional well-being, ensuring that they are informed and involved in the legal proceedings. In Kenya, recognizing the instrumental role of victimology in no-body murder cases can lead to more comprehensive and effective investigations and legal proceedings. It can help ensure that the victim's voice is heard, even when their body has not been recovered, and that justice is served not only for the accused but also for the victim and their loved ones. Legal professionals, law enforcement, and victim support organizations can collaborate to implement victimology in the legal process effectively.

4.1.4.3 Strategic Use of Case Theory

The strategic use of case theory is a critical lesson that can be applied to Kenya from South African cases involving no-body murder prosecutions. Developing a well-structured and persuasive case theory is essential in such cases. A case theory provides a structured and coherent narrative of what happened. In no-body murder cases, the prosecution must construct a plausible narrative that explains the alleged crime, the motive, and the method used to dispose of the victim's body.⁹⁴

The case theory should be consistent with the available evidence, whether it's direct, circumstantial, or similar-fact evidence. It should align with the facts established during the investigation and presented at trial. Clearly outline the motive for the crime and how

⁹³ Ibid

⁹⁴ Zeffertt and Paizes *the South African Law of Evidence* (2017) 101-135

the accused had the opportunity to commit the murder. In many no-body cases, the prosecution relies on circumstantial evidence related to the accused's actions, behaviour, and the victim's background to establish motive and opportunity.⁹⁵

If experts, such as forensic pathologists or behavioural analysts, are part of the case, the theory should integrate their testimonies effectively. Expert opinions should support the overall narrative. The case theory should anticipate and address alternative explanations for the evidence or the absence of the victim's body. Being prepared to counter the defence's arguments is essential.⁹⁶

By strategically using a well-constructed case theory in no-body murder cases, the prosecution can present a clear and persuasive narrative that relies on the available evidence to prove the accused's guilt. Effective case theory development is crucial for ensuring that justice is served in these challenging cases. It also helps maintain the fairness and integrity of the legal process.

4.2 No-Body Murder Prosecutions in Australia

4.2.1 Brief Overview

No-body murder prosecutions in Australia, like in many other countries, pose unique challenges due to the absence of the victim's body. Australia's legal framework for murder prosecutions, like South Africa, relies on existing laws that do not specifically address no-body murder cases. However, the law provides a basis for charging and prosecuting individuals when there is substantial

⁹⁵ Ibid

⁹⁶ Ibid

evidence of their involvement in a murder, even without the victim's body.⁹⁷

Just like in South Africa, circumstantial evidence plays a central role in these cases. The prosecution relies on building a case based on circumstantial evidence, such as motive, opportunity, behaviour, and the accused's actions before and after the alleged murder. Expert witnesses, including forensic scientists, pathologists, and behavioural experts, are often called upon to provide specialized knowledge that supports the circumstantial evidence and helps establish the case against the accused.⁹⁸

Over time, Australian courts have had opportunities to consider and decide no-body murder cases, leading to the establishment of legal precedents and standards for handling such cases. These precedents provide guidance for legal professionals and ensure consistency in legal approaches. Prosecutors in Australia work on strategies to present strong circumstantial cases in no-body murder trials. This involves careful planning, the presentation of compelling evidence, and addressing the challenges posed by the absence of the victim's body.⁹⁹

4.2.2 The Lane case¹⁰⁰

The case of Keli Lane is a prominent example of a no-body murder prosecution in Australia. Keli Lane was convicted of murdering her

⁹⁷ Ferguson C, Pooley K, Australian no-body homicides: 'Exploring common features of solved cases', *Journal of Forensic and Legal Medicine*, <https://doi.org/10.1016/j.jflm.2019.06.007> accessed 27 October 2023

⁹⁸ *Ibid*

⁹⁹ *Ibid*

¹⁰⁰ *Lane v R* [2013] NSWCCA 317 (13 December 2013) available at <https://www.ruleoflaw.org.au/keli-lane-case-note/> accessed 26 October 2023

two-day-old daughter, Tegan Lane, in a case that relied entirely on circumstantial evidence, as Tegan's body was never found.¹⁰¹

Tegan Lane was born on September 12, 1996, but she was last seen two days later when Keli Lane left the hospital with her. Tegan's disappearance went unnoticed for several years until a social worker discovered that her birth had never been registered, leading to a police investigation and a Coronial Inquest. The prosecution's case against Keli Lane was based on circumstantial evidence, as there was no direct evidence of the murder or the discovery of Tegan's body. The absence of the victim's body raised questions about the intent and the manner of Tegan's death.¹⁰²

The Crown argued that Keli Lane had multiple secret pregnancies in the 1990s, two of which ended in termination and two in adoption. This pattern of behaviour was presented as evidence of her motive and intent. Lane provided several inconsistent statements about what had happened to Tegan when she left the hospital in 1996. The Crown argued that these inconsistent statements indicated a guilty conscience and a desire to keep the birth of Tegan a secret. The Crown suggested that Lane's motive for the murder was to keep the birth a secret and protect her reputation. The inconsistent statements were presented as lies, further supporting the prosecution's case.¹⁰³

Lane's defence argued that the Crown failed to prove that Tegan was dead, let alone that Lane was responsible for her death. Lane maintained that she had given Tegan to her natural father, who could not be located. Keli Lane's case went to trial in the Supreme Court of

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

New South Wales, where she was convicted of murder and false swearing charges. She was sentenced to 18 years of imprisonment, with a non-parole period of 13 years and 5 months. Lane appealed her murder conviction to the Court of Criminal Appeal, but her appeal was dismissed. She was not able to secure bail pending the outcome of her appeal.¹⁰⁴

The case highlights the use of strong circumstantial evidence to secure a conviction, even in the absence of the victim's body. The Court of Appeal emphasized that a motive is not essential to prove murder, and evidence of motive was just one element in a circumstantial case.

This case underscores the complexities of no-body murder prosecutions and the significance of circumstantial evidence. It demonstrates that, with a strong case built on circumstantial evidence and expert testimony, it is possible to secure a murder conviction, even when the victim's body is never found. The legal process, including the trial and appeals, played a crucial role in determining Keli Lane's guilt or innocence.

4.2.3 The *Burrell* case¹⁰⁵

Bruce Allan Burrell's case is indeed an example of a no-body murder prosecution in Australia, and it illustrates the challenges and legal proceedings associated with such cases. Bruce Allan Burrell was convicted of the double murder of Dorothy Davis in 1995 and Kerry Whelan in 1997, neither of whose bodies were ever found. Additionally, he was charged with the kidnapping of Kerry Whelan. Kerry Whelan's disappearance was linked to a high-profile kidnapping case, where her husband received a \$1 million ransom

¹⁰⁴ Ibid

¹⁰⁵ *Bruce Allan Burrell v R* [2007] NSWCCA 65; *Burrell v The Queen* [2008] HCA 34; *Burrell v R* [2009] NSWCCA 163

note. Despite the ransom note, Kerry Whelan's body was never located.¹⁰⁶

Burrell's legal proceedings included charges being dropped and then re-instated in 2002 after a formal inquest. His first trial in 2005 ended with a hung jury, but he was convicted on the second trial in 2006. Burrell received a life sentence for the murder of Kerry Whelan and a 16-year jail sentence for the kidnapping charge. Burrell appealed his conviction and sentence. The case reached the High Court of Australia, which held that the Court of Criminal Appeal had made factual errors and remitted the matter back to that court. In the case of Dorothy Davis, Burrell was charged with her murder and found guilty by a jury. Financial gain was cited as a motive for the murder. Burrell received a 28-year prison sentence with a non-parole period of 21 years. Burrell's appeals against his conviction and sentence were dismissed, and his request for special leave to appeal to the High Court was refused.¹⁰⁷

The Burrell case highlights the difficulties faced by the prosecution in no-body murder cases and the legal complexities involved in securing convictions in the absence of the victim's body. It also emphasizes the importance of evidence, motive, and circumstantial factors in building a case against the accused. Despite these challenges, successful prosecutions can be achieved, as illustrated in Burrell's case.

4.2.4 The *Edward* case¹⁰⁸

The case of Bradley Robert Edwards, known as the Claremont serial killings case, is another notable example of a complex criminal

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ *The State of Western Australia - V-Edwards* [2020] WASCSR 49

prosecution in Australia. This case involved a series of murders and abductions of young women in the Claremont area of Perth during the mid-1990s. The case involves the disappearance and presumed murders of three young women: Sarah Spiers, Jane Rimmer, and Ciara Glennon. All three women went missing after nights out in the Claremont entertainment district in Perth between 1996 and 1997.¹⁰⁹ Bradley Robert Edwards was arrested in 2016 and charged with the wilful murders of Jane Rimmer and Ciara Glennon. He was also charged with the abduction and rape of a 17-year-old girl in Claremont in 1995 and the indecent assault of an 18-year-old woman in 1988. Edwards' trial took place in the Western Australia Supreme Court, lasting from November 2019 to June 2020. The case against Edwards relied on four key pieces of evidence. These included Edwards' confession to the rape of the 17-year-old girl and the assault of the 18-year-old woman, both of which occurred in Claremont. DNA evidence linked Edwards to these crimes.¹¹⁰

Edwards' DNA was also found under Ciara Glennon's thumb and middle fingernail during testing in 2008. Edwards admitted the DNA was his but claimed not to know how it got there. The state argued that his confession to the other crimes cast doubt on his denial of involvement in the Claremont killings. The state presented evidence of 98 critical fibres found on the victims, which matched the unique colour of "Telstra navy." This matched the pants Edwards would have worn as a Telstra technician in the 1990s. Fibres found in the victims' hair also matched the seat insert and carpet fabric used in a 1996 VS Holden Commodore, the same make and model of car Edwards drove at the time.¹¹¹

¹⁰⁹ Ibid

¹¹⁰ Ibid

¹¹¹ Ibid

Edwards had a history of violence during emotionally distressing times. He was involved in an assault on a social worker during his employment as a Telecom technician. Edwards was found guilty of the murders of Jane Rimmer and Ciara Glennon but acquitted of the murder of Sarah Spiers. He was also convicted for the other crimes he had confessed to. He received a life sentence for the murders. While it was more challenging for the prosecution to prove a connection between Edwards and Sarah Spiers, the state argued that his ambush-style attacks on the 17- and 18-year-old women were similar to the modus operandi in Spiers' case.¹¹²

This case is significant not only for its successful conviction but also because it is one of Australia's most high-profile criminal investigations, spanning many years. It demonstrates the importance of strong evidence, DNA analysis, and forensic evidence in complex criminal trials. The conviction of Edwards for two of the Claremont serial killings marked a significant moment in the long-running case. Bradley Robert Edwards' acquittal in the case of Sarah Spiers, one of the Claremont serial killings, underscores the unique challenges that prosecutions face in "no-body" murder cases where the victim's body is never found. In such cases, the absence of a body makes it difficult to establish key elements of the crime and can create significant hurdles for the prosecution. It also emphasizes the importance of strong and compelling evidence in cases where physical evidence (the victim's body) is lacking. Edwards' acquittal in the Spiers case highlights how the legal system demands a high standard of proof, and the absence of a body can create reasonable doubt in the minds of jurors and judges. This aspect of the case serves as a poignant

¹¹² Ibid

illustration of the complexities and difficulties involved in prosecuting no-body murder cases.

4.2.5 Lessons for Kenya

4.2.5.1 The Key Role of Victimology

The key role of victimology, as demonstrated by the Australian cases, is an important lesson for Kenya in handling no-body murder cases. Victimology plays a pivotal role in understanding and presenting these cases effectively.

In the Australian cases, a deep understanding of the victims' backgrounds, behaviours, and relationships was crucial. Victimology involves delving into the lives of the victims to build a comprehensive profile. This understanding helps establish motives, relationships with the accused, and patterns of behaviour, which can be critical in proving the case.

Victimology can help establish motives for the crime. Knowing the victims' personal histories, relationships, and any potential conflicts can shed light on why they may have been targeted. It also helps in establishing the accused's opportunity to commit the crime.

Victimology can reveal patterns in the accused's behaviour, especially in cases where there are multiple victims. Understanding the similarities between cases can help strengthen the prosecution's argument and establish a *modus operandi*.

Victimology assists in creating a narrative that connects the accused to the crimes. It helps in presenting a coherent and compelling story

to the court, which can be crucial in establishing guilt beyond a reasonable doubt.

In no-body murder cases, understanding the victims' lives and the circumstances of their disappearance becomes even more critical. Victimology can help address the challenges posed by the absence of a body by providing a detailed account of the victims' last known activities and relationships, which can indirectly point to their demise.

In Kenyan legal practice, understanding the key role of victimology can help improve the investigation and prosecution of no-body murder cases. This entails thorough research into the lives of the victims, their relationships, and the circumstances of their disappearance. It can provide prosecutors with a powerful tool to build compelling cases even when the victim's body is never found. Additionally, victimology can enhance empathy and understanding of the emotional toll on the victims' families, which can be a crucial factor in the courtroom.

4.2.5.2 Circumstantial Evidence

The lesson on circumstantial evidence is indeed significant when dealing with no-body murder cases, as demonstrated by the Australian cases. Circumstantial evidence can be powerful and persuasive in establishing guilt in no-body murder cases. It may be the primary form of evidence available, especially when the victim's body is not recovered.

To secure a conviction, it's essential to meticulously build a strong circumstantial case. This involves connecting multiple pieces of evidence to create a compelling narrative that points to the accused's

guilt. Circumstantial evidence can help establish patterns of behaviour on the part of the accused. This may include similarities between the current case and past crimes or behaviours that suggest motive and opportunity.

Circumstantial evidence can be used to demonstrate the accused's motive and opportunity to commit the crime. This can involve proving a history of conflict or demonstrating that the accused was in the vicinity at the time of the victim's disappearance. Circumstantial evidence can therefore help address the challenges posed by the absence of the victim's body. It allows the prosecution to present a comprehensive case even when there is no direct physical evidence of the crime.

Expert witnesses can be valuable in explaining the significance of circumstantial evidence to the court. This can include forensic experts, behavioural analysts, and other specialists who can interpret the evidence. In no-body murder cases, the burden of proof remains high. Circumstantial evidence should be presented in a way that leaves no reasonable doubt about the accused's guilt.

In Kenyan legal practice, the lesson on circumstantial evidence highlights the importance of skilfully using the available evidence to build a convincing case. While the absence of the victim's body may present challenges, a well-constructed circumstantial case can be compelling and lead to a conviction. It underscores the need for a thorough and comprehensive investigation that connects various pieces of evidence to demonstrate guilt beyond a reasonable doubt.

4.2.5.3 Focus on the Suspect's Motive

Focusing on the suspect's motive is a critical lesson from the Australian cases for Kenya, particularly in the context of prosecuting

no-body murder cases. Investigating and presenting the suspect's motive is essential. Motive provides a plausible reason for the accused to commit the crime. It helps in answering the "why" behind the crime, which can be persuasive in court.

Motive can be a highly persuasive element in establishing guilt, especially in cases where direct evidence is lacking. It helps create a coherent narrative that connects the accused to the crime. By focusing on the suspect's motive, the prosecution can build a compelling story for the court. This narrative should align with the evidence and provide a clear and logical explanation for the crime. Examining the suspect's past behaviour and history can reveal patterns that support the motive. This includes any prior conflicts, relationships, or actions that indicate a motive for the crime.

Alongside motive, it's crucial to establish that the accused had the opportunity to commit the crime. Motive alone may not be sufficient; the prosecution should demonstrate that the suspect was in a position to act on their motive.

Utilizing expert witnesses, such as behavioural analysts or psychologists, can help explain the significance of the suspect's motive to the court. These experts can provide insights into human behaviour and motivations. In cases where the victim's body is not found, focusing on motive becomes even more vital. It helps compensate for the lack of physical evidence and provides a logical explanation for the crime.

In Kenyan legal practice, the lesson on focusing on the suspect's motive underscores the need for a thorough and comprehensive investigation that goes beyond the physical evidence. Understanding and presenting the motive can be instrumental in securing

convictions in no-body murder cases. It is an essential element of the prosecution's case that helps create a coherent and compelling narrative for the court, even when the victim's body is not recovered.

5. Conclusion

The pursuit of justice in no-body murder cases presents unique and intricate challenges within the legal systems of various countries, including Kenya, South Africa, and Australia. This comprehensive discussion has provided a deep exploration of the legal and evidential complexities involved in prosecuting cases where the victim's body is never recovered. It has also drawn valuable lessons from international experiences to guide legal practitioners, policymakers, and scholars in Kenya.

The legal problem posed by no-body murder cases hinges on the principle of *corpus delicti*, which requires the prosecution to establish not only the fact of the crime but also the identity of the victim. In the absence of the victim's body, the *corpus delicti* rule becomes a focal point, demanding that the prosecution produce sufficient evidence to prove the crime beyond a reasonable doubt.

Evidential challenges in no-body murder prosecutions are manifold, as they necessitate a heavy reliance on circumstantial evidence. The meticulous assembly of such evidence and its presentation in a compelling manner become crucial elements in securing convictions. The burden of proof lies with the prosecution, making it imperative to build a robust case that persuades the court of the accused's guilt. Procedural challenges further complicate these cases, with considerations ranging from the charge to prefer to the decision of pursuing single or cumulative charges against the accused. Kenya's current legal framework, notably the Penal Code, does not provide

specific provisions for no-body murder cases, highlighting a potential gap in the law.

In contrast, South Africa and Australia offer valuable insights into the opportunities and challenges of prosecuting such cases. The South African case of *The State v MA* exemplifies the importance of circumstantial evidence in securing convictions, while Australian cases like *the Lane case*, *Bruce Allan Burrell*, and *the Claremont serial killings* illustrate the complexities of prosecuting no-body murders. They underscore the vital role of motive, circumstantial evidence, and victimology in building a compelling case before the court.

The lessons drawn from these international experiences offer guidance to Kenya in its quest for justice in no-body murder cases. They emphasize the need for a nuanced understanding of motive, the strategic use of circumstantial evidence, and the key role of victimology in building a persuasive case. By addressing the challenges and drawing upon these lessons, Kenya can enhance its legal framework and practices for prosecuting no-body murder cases, ensuring that justice is served even when the victim's body remains elusive.

The pursuit of justice in no-body murder cases is a testament to the resilience and adaptability of the legal system. It underscores the importance of continuous learning and the application of international experiences to refine legal procedures, thereby fostering a more just and equitable legal landscape. As Kenya continues its journey in the realm of criminal law, the insights shared in this discussion can serve as a guiding light for the pursuit of justice, even in the face of the most challenging of circumstances.

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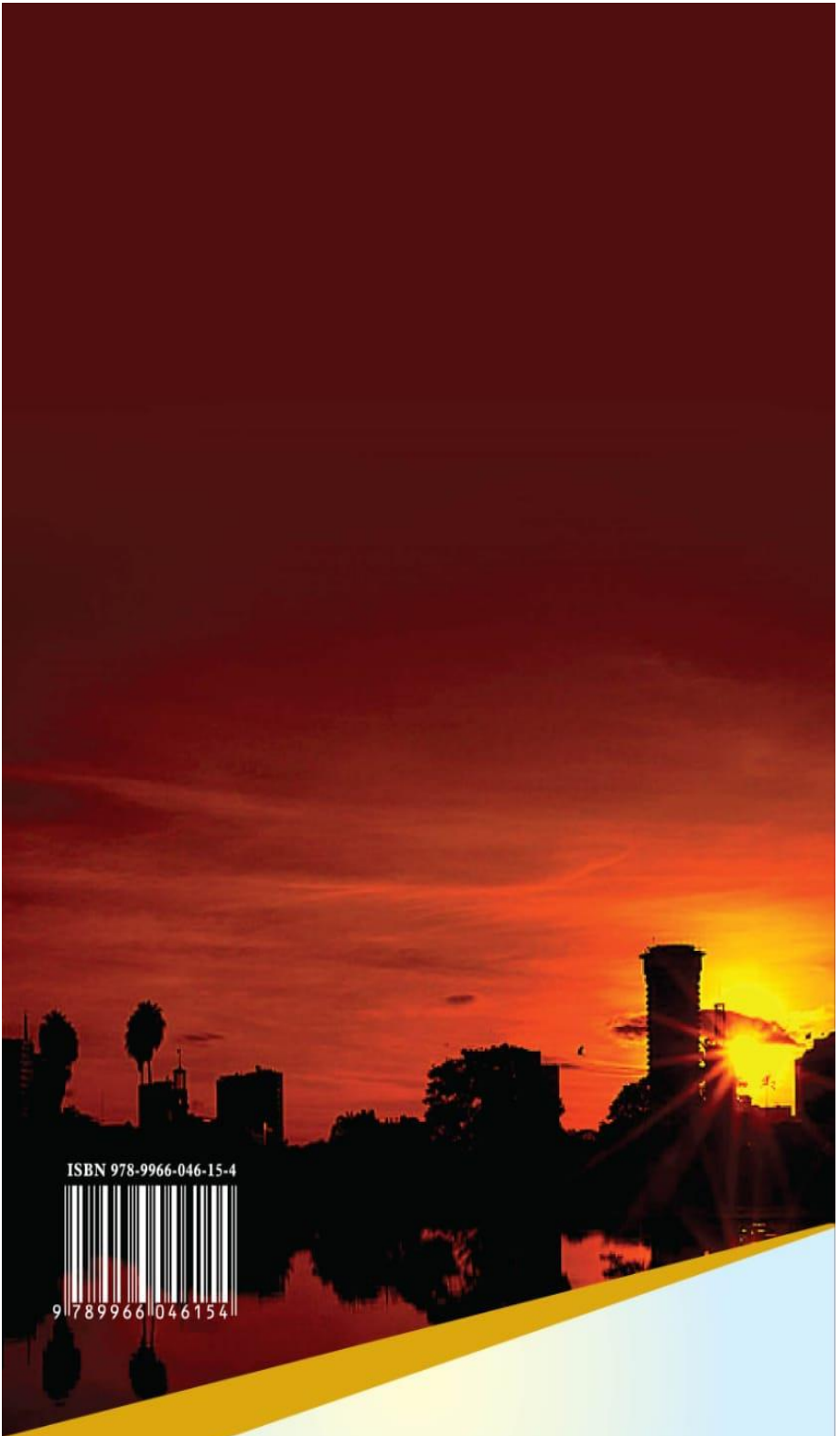
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