Muthoni v Republic (Criminal Appeal E011 of 2022)
[2024] KEHC 12812 (KLR) (8 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12812 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E011 OF 2022

DKN MAGARE, J

OCTOBER 8, 2024

BETWEEN

AYUB KIMITA MUTHONI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from conviction and sentence given on 16/12/2021 in Nyeri CMCR Case No. 967 of 2019 by the Principal Magistrate Hon. J. Macharia given on 6/12/2021.

2. The Appellant was charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars were that on 27/3/2019 at around 2300 hours at Kiambogo village in Kieni West sub-county within Nyeri Country, unlawfully did grievous harm to Catherine Njeri Mwai.

3. The court heard a total of 9 witnesses for the State and the Appellant as the only witness for the defence. The Appellant was found guilty as charged and sentenced to 20 years imprisonment. He appealed and set out 8 grounds of appeal where he sought the sentence to be set aside and conviction quashed. The grounds were mainly that: -

    a. That the trial magistrate erred in law and facts by failing to consider that there was no eye witness in this instant case.

    b. That the trial magistrate erred both in law and fact when he failed to consider that prosecution tendered a single evidence to prove the case.

    c. That the trial magistrate erred in law and fact when he failed to appreciate that there was no exhibit brought before the court to prove the allegation.

d. That the trial magistrate erred in law and facts when he failed to consider that the medical evidence was not proved in a required standard thus, my right under Article 50(2) of the 2010 Constitution (sic).

e. That the trial magistrate erred in law and facts when he failed to consider that the evidence adduced by the prosecution side was from the family members.

f. That the trial magistrate erred in law and fact when he rejected Appellant's sworn evidence which was not challenged by the prosecution side.

4. The Appellant had been arrested on 20/7/2019 (Saturday) and arraigned in court on Monday 22/7/2017 before Hon W. Kagendo, CM, as she was then. He pleaded not guilty and was granted bond of Kshs. 100,000/= with a Surety of the same amount. Nevertheless, he did not pursue bond.

5. After some false starts the matter proceeded on 16/10/2019. The complainant [PW1] testified that she was the wife of the Appellant. She stated that they lived together and had one child. On the material day, 27/3/2019, at 10 pm, she prepared supper but the Appellant refused to eat. After refusing to eat, he slept on the coach. The Appellant was watching as PW1 was taking the child out to sleep and took clothes from the hanging line.

6. The Appellant demanded proceeds of sale of a cow from PW1 who indicated that she could give him money. However, as the complainant was going and coming into their house carrying clothes she had taken from the hanging line, Appellant hit her with a stone on the face. While hitting PW1, the Appellant was blocking her mouth to stop her from screaming.

7. The court observed a scar on her face. She testified that the Appellant indicated that he intended to kill the complainant. Subsequently, she found herself in Nyeri County Referral Hospital (PGH). She discovered that the Appellant cut her several times.

8. On cross examination, the complainant stated that it was not true that the complainant was involved in an accident. On the allegation from the Appellant that she was involved with another man, she refused the claims. It was her evidence that she did not accidentally get pregnant of another man and aborted. I was unable to understand how anyone can accidentally get pregnant and as a result have deep cuts.

9. PW1 denied bringing the stone that the Appellant used to beat her. She also denied having gone to bed with the Appellant. It was her evidence that it was only the two of them in the house and of course, the hapless child.

10. The trial magistrate was transferred and requisite directions were taken under Section 200(3) of the Criminal Procedure Code. The Appellant wanted the complainant recalled to ask her about custody and naming of their child. The court deferred this question. When the complainant was recalled, no useful question was asked.

11. PW2 Grace Wangui Mwai testified that she was the owner of the land where the Appellant and PW1 lived as husband and wife. She could hear the duo as they were in the house. In the morning as she was milking cows, she heard noises from the house coming from Jane who wanted to have PW1 taken to Hospital. She was with PW1's daughter Jane, who had come to visit PW2. She went to the house and knocked but it was not opened. Only PW1, the Appellant and the child were in the house. When they entered into the house, they found the complainant in a pool of blood. She called her two sons to come and find a vehicle to take PW1 to hospital. They took PW1 to PGH.

12. The witness continued that they reported the matter to Nairutia Police Station. The Appellant disappeared for 3 months and was thereafter arrested. She stated that the Appellant used to beat the

complainant. She recalled that on 28/3/2019, she heard noise from the house but could not open the door. She called children. Her child advised her to take PW1 to hospital.

13. On cross examination, she stated that the Appellant told her that there was a man, Gitonga who was in the house. She confirmed that they found the complainant in the house with blood oozing from the head. She stated that it was only the Appellant who was in the house with the complainant. On re-examination she stated that there was no love triangle.

14. Peter Weru testified as PW3. He was a son to PW2. He stated that PW1 was his sister. He stated that PW1 and the Appellant had been married for 2 years. The two are said to live in PW2's house. On the material date, the witness heard PW4 screaming and went to the Appellant and complainant's house.

15. They found PW4 crying that PW1 was injured. They took her to PGH and reported the matter to Nairutia Police Station. He was cross examined on how he used the police to follow the Appellant to Nakuru to arrest him. According to the witness, the Appellant disappeared for 3-4 months before being tracked and arrested far away in Nakuru.

16. Jane testified as PW4. Though an adult given her age, I will use only one name. She was an adult daughter of the complainant together with 2 other children, including the 2-year-old who was in the house on the material date as PW4 was in PW2's house. She stated that the Appellant was the mother's lover from 2017 to 2019. They used to stay in the same since 2017 to 2019 when the incident occurred. She had gotten permission to sleep at PW2's house on the material night and only came in the morning.

17. It was her evidence that she went home and could not open the door. She decided to enter the house through the window, which was not closed. She found her mother had been cut several times and was bleeding. She opened the door from inside and screamed. Members of the public, including PW2 and neighbours came and took PW1 to hospital.

18. It was her evidence that when she left the house, the Appellant and other men were in the house. On cross examination she stated that PW1 was not attacked by other men. She stated that it was the Appellant who was in the house when she left the previous night and was in the house in the morning.

19. PW5 Samuel Mwai testified that PW1 was his sister. The witness knew the Appellant who was residing together with PW1 in PW2's house. His evidence was that he was called by PW3 to the said house as there was a problem. He found PW2 and others in the house where PW1 was bleeding.

20. They found a vehicle and took the complainant to PGH. PW1 informed them that it is the Appellant who assaulted her. He stated that the accused fled and was arrested after concerted efforts with the police. On cross examination the witness stated that the police and the family tracked the Appellant using his phone.

21. The next witness was Dr. Muriuki Muhia a clinical officer at PGH. He had a degree in Medicine and Surgery from University of Nairobi and had worked at PGH since 2017. He filled a P3 form for PW1 for assault, which he produced as exhibit 1. He testified that the patient had been beaten by a person known to her. He stated that PW1 had multiple scalp laceration. It was his evidence that some of the wounds were 10 cm deep. She had a degloving injury at the back of the head and fractures of the skull. He produced the P3 forms, which I have perused. He stated that he could not tell which weapon caused the injuries.

22. PW7 was 59348-Corporal Peter Muthinja of Solai Police Station. He stated that they received a report on the whereabouts of the Appellant and a request for assistance of the police for the arrest of the Appellant. The Appellant was identified, fished from his hideout and arrested. The police officers from

Nairutia Police Station were called to take the Appellant away. He identified the Appellant who was in the docket.

23. PW8 -107109 PC Silas Chilimo was attached to Solai Police Station. He called for assistant for arrest of the Appellant who had been identified by PW5. It was his evidence that he handed the Appellant to Nairutia Police Station. He identified the Appellant. No useful cross-examination was done.

24. PW9 110713 PC(W) Hannah Kinyanjui testified that a report of assault of PW1 was lodged at Nairutia police station. She booked the report and issued a P3 form. She recorded a statement from PW3 on the incident. The witness also recorded statements from witnesses which she recounted in court. She stated that the Appellant was the last person seen with the complainant. She stated on cross examination that she found a stone inside the house. They did not produce it as evidence.

25. The Appellant was found to have a case to answer and placed on his defence. He indicated he was ready and tendered unsworn evidence.

26. He stated that he did not commit the offence. He stated that the wife called him after one week (he did not indicate who the wife was or after what event). Instead it is the brother who came with the police. He stated that he was told that he had beaten someone which was false. He stated that the offence was fabricated.

27. The court found the Appellant guilty of the offence on 6/12/2021. He denied committing the offence in his mitigation. The court proceeded to sentence the Appellant to 20 years in prison immediately thereafter. The court did not find the Appellant remorseful. This must have informed the decision not to call for pre-sentence report. The lack of remorse was evident even in the hearing of the appeal.

Analysis

28. The court shall ignore the fact that the appeal is filed in form of a Memorandum of Appeal instead of a Petition of Appeal.

29. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusion. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows: -

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

30. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the court on a first appeal:

> " 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] E. A. 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 Peters v. Sunday Post, [1958] E. A. 424."

31. The issue in this case is whether the prosecution proved its case to the required standard. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

32. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme Court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

33. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

34. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

35. The offence of grievous harm is set out in Section 234 of the Penal Code as follows:

> " Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

36. Therefore the matter has 3 issues, that is: -

    a. Whether the state proved its case beyond reasonable doubt.

    b. Whether the court ignored the Appellant's defence.

    c. Whether the sentence was harsh and unreasonable.

37. As I analyze the evidence, I note with amazement how the Appellant's defence mutated as follows:

    a. Defence of provocation by another man in the house (one Gitonga).

    b. Self-inflicted injuries and

    c. Accident.

    d. Abortion.

    e. He then abandoned them for a non-defence. His defence relates to a week to arrest. This was July 2019. He sets no defence for March 2019.

38. This however did not remove the duty placed on the prosecution to prove the case they set out to prove the case against the Appellant. Part of the defences were justifying the beating while the other were blaming others for the events.

39. The questions the state was to prove are: -

    a. The injuries that were suffered were grievous.

b. The injuries were caused by reckless regard to life or had intention to cause the injuries.

c. The Appellant was the perpetrator.

40. The evidence by PW1 was that she was with the Appellant and the minor. This was corroborated by PW2, 3 and 4. They found the Appellant in the site. He was also the last person seen with and expected to remain with the Appellant. His conduct in the morning was inconsistent with his innocence.

41. The evidence surrounding the assault, even if PW1 could not testify, there was sufficient evidence to convict. For circumstantial evidence to work, it must be inconsistent with the accused's innocence. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, court had this to say on circumstantial evidence:

> " However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

42. The evidence of PW1 was cogent and believable, according to the court. PW6 confirmed the injuries. The events were premeditated. The court noted that PW1 was attacked and was unconscious for several days. The court found that the Appellant did not tell anyone what transpired. The Appellant refused food only to quarrel about a cow, which was not even his from the evidence.

43. He was a temporary tenant just enjoying consort in a free rent house, provided by his future and now, never-to-be mother in law. The Appellant had a false sense of self entitlement. He proceeded to cut the appellant several times including the face.

44. The scars were over 10 cm deep leaving ugly scars on the face. The court found that the Appellant disappeared immediately after the incident. There are no facts displacing the presence of the Appellant in the locus in quo. It is thus clear that the Appellant was reckless as to the results of the inflicted injuries. PW1 was already a woman with 3 children of her own staying in her mother's house, when he welcomed the Appellant who later inflicted injuries which were life threatening. The evidence was overwhelming and was not replaced.

45. There was no basis laid on bias of witnesses against the Appellant. The Appellant bounced on a hapless PW1, when she was getting clothes from the cloth line in her home. This was not a flare of anger but calculated and premeditated action. PW2 places the Appellant in the locus in quo. The Appellant was in the house throughout the night, with PW1 and the small 2-year-old child.

46. The Appellant beat his love, injured her and bled profusely while he watched. He was in the house watching. He then walked away majestically to Nakuru. He has no regard even of the children who were left for weeks without their mother. He did not find it necessary to take PW1 to hospital. He instead remembered that he has a long lost sister in Solai Nakuru, who needed visiting for 4 months.

47. The State tendered irresistible evidence that the Appellant was the only person who had opportunity and no other person was in position to beat and maim the Appellant on the material date. In a very

uncharitable way, he was trying to place the girlfriend at a point where her morality is in question after beating her.

48. I agree with the court below that there was no evidence that there was a love triangle. The evidential line shows that the Appellant committed a beasty act and fled. Instead of taking PW1 to hospital he ran away for 4 months. It is only other people who took the wife to hospital.

49. PW3 placed the Appellant being drunk on the previous day, 26/10/2019. The evidence places the Appellant in the house with PW1 from 27/3/2019. Surely such evidence needed to be displaced. It remained intact.

50. What constitutes the offence was set out in the case of Pius Mutua Mbuvi v Republic [2021] eKLR, where Odunga J, as he was then stated as follows:

> " For the appellant to be convicted of the offence of doing grievous harm contrary to section 231 as read with section 234 of The Penal Code, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;
>
> a. The victim sustained grievous harm.
>
> b. The harm was caused unlawfully.
>
> c. The accused caused or participated in causing the grievous harm.
>
> 15. Concerning the first element, bodily "harm" means any bodily hurt, disease or disorder whether permanent or temporary. The nature of grievous harm is defined by section 4 of The Penal Code as any harm which amounts to a maim or dangerous harm or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement or to a permanent or serious injury to any external or internal organ, membrane or sense.
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> 16. The specificities of "grievous harm" therefore are; (1) in the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, to amount to bodily harm, the injury to health need not be permanent (2) a mental injury may amount to grievous harm but not to bodily harm (3) the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health."

51. The prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

a. PW1 sustained grievous harm.

b. The harm was caused unlawfully.

c. The accused caused or participated in causing the grievous harm.

52. Concerning the first element, bodily "harm" means any bodily hurt, disease or disorder whether permanent or temporary. The nature of grievous harm is defined by section 4 of the Penal Code as any harm which amounts to a maim or dangerous harm or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement or to a permanent or serious injury to any external or internal organ, membrane or sense.

16. The specificities of "grievous harm" therefore are;

(1) in the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, to amount to bodily harm, the injury to health need not be permanent.

(2) a mental injury may amount to grievous harm but not to bodily harm.

(3) the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health.

53. 10 cm deep cut wounds in the head are such injuries that are likely to be permanent or cause death. The court saw a permanent scar. There was a percent fracture of the skull. These were injuries that were proved. These injuries were not inflicted during lawful war or surgery. They were thus unlawful injuries. The evidence of the examining doctor was not impeached. It was cogent and scientific.

54. The Appellant was the last person seen with the complainant. I did not find the postulations related to visit to his sister credible. The defence raised was bogus and as such was not worth to be considered.

55. It should be recalled that Section 111(1) of the *Evidence Act* provides as follows:

> "(1)When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.
>
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: -Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt to the guilt of the accused person in respect of that offence."

56. The Appellant was with a 2-year old child and PW1. There are only two people who will know this, that is, the 2-year-old and the Appellant. It is common sense that the 2-year old could not carry out the act. It was only the Appellant who perpetuated the offence. The evidence irresistibly points to his guilt.

57. Testimony of a single witness, can safely be accepted, if it is free from the possibility of error. In this case, we did not have a single witness but 9 witnesses. The evidence tendered was cogent and gelled into each other. On this aspect of a single witness this court is guided by Abdalla Wendo v Republic (1953) 20 EACA 166 where it was held that:

> "Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

58. Circumstantial evidence, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Appellant and

none else. In the case of Abanga alias Onyango v. Republic CR. App NO. 32 of 1990(UR), the Court of Appeal stated as follows: -

> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

59. It must be remembered that to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the Appellant. In the case of Sawe Vs. Republic [2003] KLR 364, the Court of Appeal, posited as doth:

> "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 upon. 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 remain with the prosecution. It is a burden which never shift to the party accused."

60. I do not find any contradiction in evidence. There could be a few discrepancies which are expected from the nature of knowledge each witnesses had. Each party gave evidence on the points in time and place that they played. No two witnesses witnessed the same thing. The way to treat contradictions in a case was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA, 6 where it was held that:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

61. The appellant was the last person seen with the complainant. In *Musimbi v Republic (Criminal Appeal 107 of 2020)* [2023] KECA 287 (KLR) (17 March 2023) (Judgment) the Court of Appeal [MSA Makhandia, AK, Murgor & GWN Macharia, JJA] stated as follows: -

> "In another Nigerian case of Stephen Haruna v The Attorney-General of The Federation (2010) 1 iLAW/CA/A/86/C/2009, the Court in considering the same doctrine opined thus:
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> "The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such

circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."

62. Further, it is important to note that it is not enough to rely on circumstantial evidence. The gaps should be answered. However, in this case there were no event, fanciful doubt on what happened on the material date in the locus in quo. In the case of Ramreddy Rajeshkhanna Reddy & Another v State of Andhra Pradesh, JT 2006 (4) SC 16 the Court held:

> "That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration."
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> *Kimani v Republic (Criminal Appeal 41 of 2022)* [2023] KECA 1390 (KLR) (24 November 2023) (Judgment), the Court of Appeal [K Murgor, S Ole Kantai & PM Gachoka, JJA] stated as doth: -
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> Having analyzed the evidence above, we are in agreement that indeed, it was the appellant who caused the death of the deceased and that the trial court properly applied the doctrine of 'last seen'. The doctrine of 'last seen alive' is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before their death was responsible for his or her death and the accused is expected to provide an explanation as to what happened. In the instant case, the appellant picked the deceased and her brother, together with his own brother on the material day. He was the last person to be seen with the deceased. The body was recovered in their compound hours later. There is no break in the chain as PW5 went to the home of the appellant 30 minutes after he picked up the three children. Two of the children were in the appellant's home, despite his allegation that even the other child, T was not there when indeed PW5 could see T in the compound. He also did not justify why he lied to PW5 about the deceased and her brother, having gone to mama Wanja's place because this turned out not to be true. Concomitantly, he did not explain away the reason why, when he asked PW4 about the whereabouts of his brother and PW4 pointed in the direction of his brother, he took the opposite direction. Whereas the burden to prove the case rests entirely on the prosecution, the explanation given by the appellant as to what happened after he took the deceased is full of gaps and contradictions and being the last person seen with her he had a duty to give a proper explanation, in the terms spelt out by section 111 of the *Evidence Act*.
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> 32. The chain of events that points to the guilt of the appellant is strengthened by the recovery of the threatening note in their family house. Though he initially denied writing the note, he later changed the story and stated that he was threatened by three strange men. It is not in doubt that he wrote the threatening note boasting about the murder of the deceased and this was confirmed by the PW8 the handwriting expert.

63. The threshold as stated in R vs Kipkering Arap Koske [1949] 16 EACA 135 is that such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In Sawe vs Rep [2003] KLR 364, the Court of Appeal expressed that:

> "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 upon. 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 remain with the prosecution. It is a burden which never shift to the party accused."

64. On the issues of a witness not called, there is none that was left out. In any case section 143 of the *Evidence Act* provides as follows: -

> No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

65. The prosecution is not bound to call a plurality of witnesses to establish a fact. In Donald Majiwa Achilwa and 2 other v R (2009) eKLR the court stated:

> " The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

66. There were no witnesses that were not called. In any case, the superfluity of witnesses, was addressed in the case of Keter v Republic [2007] 1 EA 135 where the court held inter alia:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

67. It is noteworthy that PW5 never lost faith in having the perpetrator arrested. PW4 was the complainant's daughter. She lived with the Appellant and complainant for over 2 years. She knew the Appellant well. She knew that complainant and the Appellant insulted each other. She saw him in the house from the previous day. There was no change of circumstances. Indeed, the Appellant was in the house and only fled to Nakuru after PW2, PW3, PW4 and PW5 knew of the happening during the night.

68. The Appellant did not create any doubt whatsoever. He did not even set up a plausible alibi. In the case of Erick Otieno Meda v Republic [2019] eKLR, the Court of Appeal, [Asike Makhandia, Kiage & Otieno-Odek JJA] posited as follows regarding an alibi: -

> 18. In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of Kiarie – v- Republic [1984] KLR, this Court stated:
>
> > "An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable....."

19. In the recent case of Victor Mwendwa Mulinge –v- R, [2014] eKLR this Court rendered itself thus on the issue of alibi:

> "It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution...."

20. Comparatively, in the South African case of S -v- Malefo en andere 1998 (1) SACR 127 (W) at 158 a - e the court set out five principles with respect to the assessment of alibi evidence:

    (a) There is no burden of proof on the accused to prove his alibi.

    (b) If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.

    (c) An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."

    (d) If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").

    (e) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.

21. In another persuasive South African case of R - v - Biya 1952 (4) SA 514 (A) at 521C - D Greenberg JA said:

> 'If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.'"

69. The Appellant attempted to raise an alibi. It was not an alibi at all. An alibi raises a specific defence. An accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer. In the case of Kimotho Kiarie v Republic [1984] eKLR relied on by the Appellant, the court of appeal stated as follows: -

> " An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable; Said v Republic [1963] EA 6. The judge erred in accepting the Senior Resident Magistrate's finding in the alibi because the finding is not supported by any reasons."

70. Nevertheless, the alibi is not solid at all. It is a sieve that requires no response. He raised issues relating to a week before arrest on 20/7/2019. The dates in issue have no alibi. The court correctly proceeded in this matter. The rest of the issues raised in submission have been addressed.

71. It was proved beyond reasonable doubt that the Appellant was the perpetrator. The purported alibi was too weak to even consider. There was no possibility of mistake. Witnesses placed the Appellant in the locus in quo. The Appellant had an opportunity and did commit the offence. There was no factors co-existing with the Appellant's innocence. His only defence is how he was arrested. The alibi is not

useful, a month earlier. He not only did not answer the case put to him and particulars thereof, he did not set even an alibi.

72. The evidence of a week before arrest is irrelevant to what happened 3 months prior hereto. In the circumstances the appeal on conviction lacks merit and is accordingly dismissed in limine.

Sentence

73. The appellate court can only interfere with sentence if it is severe or certain factors, which are decisive in character were ignored or irrelevant factors considered. In Ogalo S/O Owuora Versus Republic 1954 24 EACA, the court of appeal for Eastern Africa stated as thus: -

> " An appellate court has the power to interfere with the sentence passed by the trial court if there is evidence that the learned magistrate or Judge acted on wrong principles, overlooked some relevant material or factors or that the sentence passed is illegal or manifestly excessive or punitive or too low as to occasion a miscarriage of justice."

74. In the case of George Mbaya Githinji v Republic [2019] eKLR, the court set forth grounds to be applied in sentencing as hereunder; -

a) Age of the offender;

b) Being a first offender;

c) Whether the offender pleaded guilty;

d) Character and record of the offender;

e) Commission of the offence in response to gender-based violence;

f) Remorsefulness of the offender;

g) The possibility of reform and social re-adaptation of the offender;

h) Probation Officer's Pre-sentencing Report

i) Any other factor that the Court considers relevant.

75. The foregoing were factors set out in the case of *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015* (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment).

76. The sentencing guidelines 2023 provide for the following: -

> " In determining the appropriate sentence, courts must assess a number of issues starting with the degree of both culpability and harm.
>
> 4. 5.2 The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or, where a plea is entered, through the prosecution summary of facts. Aggravating and mitigating features surrounding the offence may be advanced by the prosecution and the accused person (or his/her representative).
>
> 4. 5.3 Where an offence is committed by more than one offender a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence.

4. 5.4 The assessment of harm may be based on testimony, or the summary of facts presented and also by a PW1 impact statement where that has been obtained.

4. 5.5 Mitigating factors refers to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender.

4. 5.6 Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.

4. 5.7 n/a

4. 5.8 Having heard all relevant submissions and considered any reports advanced by either prosecution or defence, or the probation or children's officer (where applicable), and any PW1 impact statement, the court should: i. Decide as to whether a custodial or a non-custodial sentence should be imposed in line with these guidelines.

ii. In the case of sexual offences, before the terms of a custodial sentence are determined, the court must have recourse to relevant probation reports as required in sections 39 (2) and (4) of the *Sexual Offences Act* No.3 of 2006 that contain provisions about post-penal supervision of dangerous sexual offenders."

77. Nevertheless, sentence is a question of fact. In a decision relied upon by the state I noted that sentence is a matter of discretion of the trial court. In Bernard Kimani Gacheru V Republic [2002] eKLR, the court of appeal [Chunga, C.J, Shah & Bosire, JJ.A] stated as hereunder: -

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

78. In the case of PMM v Republic [2018] eKLR Mwongo J stated as follows regarding the meaning of the following terms.:-

19. What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of Opoya -v- Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in James -v- Young 27 Ch. D. at p.655 where North J. said:

"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".

We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are "shall be sentenced to death".

21. Guided by the decision in Opoya -v- Uganda (1967) EA 752 and the persuasive dicta of North J. in James -v- Young 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female PW1 is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.

17. As stated in the Opoya Case (supra) cited in the above decision of MK (supra), the Court of Appeal for East Africa interpreted and clarified and gave legal meaning to the words "shall be liable" to mean as follows: "shall be liable on conviction to suffer death" means that the court has discretion "to provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment".

79. In the case of Barasa *v Republic (Criminal Appeal 219 of 2019)* [2024] KECA 324 (KLR) (15 March 2024) (Judgment), the Court of Appeal stated as follows: -

> "Given the circumstances in which the offence was committed, the complainant being a young girl whom the appellant as the stepfather ought to have protected but instead violated, the appellant deserved a deterrent sentence. The sentence of life imprisonment was an option which was available in the exercise of discretion in sentencing and would in our view have been appropriate.
>
> 13. In accordance with our decision in Evans Nyamari Ayako v Republic (supra), translating life imprisonment to a term sentence of 30 years' imprisonment, we allow the appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant with a term sentence of 30 years' imprisonment. The sentence of 30 years shall be calculated from the date the appellant was first arraigned in court in accordance with Section 333(2) of the Criminal Procedure Code."

80. In *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment), the Court of Appeal sitting in Malindi (Nyamweya, Lesiit and Odunga, JJA) held that life imprisonment is unconstitutional and substituted the same with 40 years. They stated as follows: -

> "We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature...
>
> ... We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence.

> We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

81. The court gave 20 years' imprisonment as opposed to life imprisonment. The same was the discretion of the court below. There is no evidence that the sentence is harsh. On the contrary the sentence is lenient. The nature of the injuries, the intensity thereof, the heinousness of the crime and raison d'être, all point to pointless cruelty.

82. The Appellant left his wife bleeding from 11 pm to morning when she was taken to hospital. In Gabriel Kamau Njoroge v Republic [1987] eKLR the duty of the first appellate court was restated as follows:

> "It is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this." See also the case of Kagori Kaboi v Republic [2020] eKLR.

83. The sentence of 20 years is very lenient and is proper. I do not find the same harsh or unreasonable. The sentence of 20 years shall run as per Section 333(2) of the Criminal Procedure Code from date of arrest excluding any time the Appellant was on bond. The said Section 333(2) of the Criminal Procedure provides as follows: -

> "Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

84. In the circumstances, the sentence should run from the date of arrest on 20/7/2019 pursuant to Section 333 (2) of the Criminal Procedure Code. Save otherwise as for the foregoing, the Appeal on sentence and conviction is dismissed.

Order

85. The consequence upon the foregoing is that I make the following orders; -

    a. The appeal on conviction is dismissed.

    b. The appeal on sentence is equally dismissed. However, sentence of 20 years' imprisonment shall run from 20/7/2019, the date of arrest.

    c. Right of appeal 14 days.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 8TH DAY OF OCTOBER, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Mwakio for the State

Appellant – present

Court Assistant – Jedidah