Koi v Republic (Criminal Appeal 278 of 2019)
[2025] KECA 1633 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1633 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 278 OF 2019

MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA

OCTOBER 3, 2025

BETWEEN

ENOCK OKOTH KOI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from conviction by the High Court of Kenya at Kisii Crc. No. 76 of 2010 (Majanja, J.) and resentencing in Migori (Mrima, J.) dated 11th day of October 2018 in HCCRC No. 10 of 2014)

JUDGMENT

1. The background to this appeal is that the appellant, Erick Okoth Koi was charged jointly with another with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. It was alleged that on the night of 1st and 2nd August, 2010 at North Kanyamkago Location in Uriri within Migori County, jointly with others not before the court, murdered Titus Wamwiri Wanyoro (the deceased).

2. The appellant pleaded not guilty to the charge and the case proceeded to a full hearing. The prosecution called a total of thirteen (13) witnesses in support of its case. Upon being placed on his defence, the appellant gave sworn testimony. In its determination, the trial court was satisfied that the evidence placed the appellant at the scene of crime and that all the circumstances, taken together, created a complete chain, making it clear that the appellant committed the felonious act; he was accordingly found guilty of murder and was sentenced to death on 14th July 2016 (Majanja, J). On application for resentence, the death sentence was set aside and substituted with 30 years' imprisonment on 11th October 2018 (Mrima, J).

3. Aggrieved by the outcome, the appellant filed this appeal and raised 3 grounds in the memorandum of appeal that:

i. The learned judge erred in law and in fact to hold that the chain of evidence led against the appellant as outlined was strong, cogent and complete to only arrive at the hypothesis of him being unaware of the whereabouts and the subsequent shortcomings and demise of the deceased.

ii. The learned judge erred in law and in fact in dismissing the appellant's defence by holding that the appellant's denial was not an explanation reasonable enough to stand in the face of the testimony of PW12.

iii. The learned judge erred in law and in fact in holding that by virtue of the appellant being in possession of the motor vehicle that belonged to PW10 then it is without a doubt that the appellant was directly involved in the murder of the deceased herein.

4. Before the trial court, PW3, Sharon Anyango [Sharon] testified that on 5th August 2010 at about 11:00 am, she was going to the shamba when she saw a body floating in the waters of River Olasi (also known as River Ongito). She ran back home and informed the neighbors. PW8 Wilson Okello Otieno, a retired Chief, was the first to arrive. He told the court that upon arriving at the scene he noted that the person in the water had injuries and a rope was tied around his neck. He called and informed PW9, Asingo Keya [Keya], the Assistant Chief. When Asingo Keya arrived at the scene, he found members of the public gathered. He also noticed that the body had a rope tied around the neck. He called police officers from Migori who came the next day with the deceased's relatives.

5. PW14, Corporal Elijah Njeru (Corporal Njeru) informed the court that earlier on, the deceased's wife, Christine Nyawira Gachoki (Christine), who testified as PW2, accompanied by her relatives had made a report to Migori Police Station that her husband, the deceased herein, had been missing and was suspected to be in Migori. They had tried looking for him without success.

6. Upon receiving information that a body had been found at River Olasi, PW14 proceeded to the scene on 6th August 2010 with (PW11) PC Douglas Ongito (PC Ongito), (PW1) Lawrence Ngugi Njambi (Lawrence) and Christine amongst others. PC Ongito testified that at the river, they found a body in the water with a rope tied around his neck and injuries on the head. When the body was retrieved from the water, Christine confirmed that it was her husband, as he was wearing the clothes, she had last seen him in. Lawrence was able to identify the deceased's body and also noticed that the body had been tied with a rope around the neck with a stone and had what appeared to be a stab wound on the left side of the abdomen and an eye and an ear were missing.

7. Christine gave an account of the deceased's movements before his death. She testified that the deceased called her in the evening of 30th July 2010 to inform her that he was heading to Kisumu on a transport job. She did not manage to reach him on the phone after this conversation but he called her back the following Sunday to ask for Kshs.1,000 -. Since she did not have the money, she told him to wait but when she called back, he was offline. The deceased called again at about 8.00 pm to ask about the money then went off air. On Monday, she went to look for him at his place of work in Ongata Rongai and was informed by the deceased's cousin John Sila and another friend that he had gone with a customer to Migori. She was later informed that Lawrence, PW10 Patrick Kinyua (Patrick) the deceased employer and Sila had left for Migori to look for the deceased.

8. Christine testified further that Lawrence called to inform her that they were in Migori where they had found her husband's Pick-up. When the group returned, they informed her of what had transpired in Migori. Later on, she was informed through Rongai Police Station that a body had been found and that she should travel to Migori to identify it. She left for Migori with Lawrence, John Sila and other friends. At Migori, they were led to the river where she identified the body as that of her deceased husband.

9. After the body was recovered and identified it was taken to Rapcom Mortuary, Awendo, where PW13 Dr. Emmanuel Oyier (Emmanuel) conducted a post-mortem. On physical examination, the Doctor noted that the body was decomposing and estimated to be six days old. Key findings included facial cyanosis, protruding eyes and tongue, a 5 cm deep cut on the right parietal region, a rope around the neck with bruising, and a fractured cervical spine with spinal cord damage. The doctor concluded that death was caused by cardiorespiratory arrest due to lack of oxygen from strangulation.

10. Corporal Njeru told the court that before the discovery of the deceased body, he had proceeded with PC Ongito together with the area Chief to a homestead in Kajulu Sub-Location on instructions from the DCIO to make enquiries about a pick-up registration KAK 301K which was suspected to have been stolen. They went to the homestead where they found the Pick-up parked outside a house which was identified as belonging to PW12 Barrack Otieno Okik [Barrack]. An elder who was present informed them that the vehicle had been brought by the appellant. A young girl at the home retrieved the ignition keys from the house and handed them over to the officers.

11. Barrack confirmed that the appellant was living with him as he did not have his own house. He recalled that on the morning of 2nd August 2010 the appellant came to his home in the Pick-up accompanied by a driver whom he knew as Odhiambo. While the driver remained in the car, the appellant came into the house told him that he had been with Morris Okinyi Maenda in Thim Lich and that he had asked some people to kill a Kikuyu man. When Barrack sought to find out why the appellant had committed such an act, he began crying and said he did not ask them to kill the person. Thereafter, the appellant left saying that he was going to look for fuel as Odhiambo also left to go home.

12. On the evening of 3rd August 2010, Odhiambo returned to Barrack's home accompanied by Joseph Nyawanda Akoth [Joseph] who was the 3rd accused in the trial; and testified as DW3; and another person. They told him they wanted payment from the appellant for driving the vehicle to Barrack's home and for killing the person the appellant had instructed them to kill and that they had come to collect a cow as payment as agreed with the appellant. They left with Barack's cow, even though he informed them that the cow did not belong to the appellant. Barrack reported the incident to his uncle [PW4] Duncan Oloo Oringo (Duncan) who then reported to a village elder who in turn informed the Chief. The Chief came the following day with police officers and collected the Pick-up while he was away.

13. (PW6) Naftali Odoyo Onyango (Naftali) a village elder in Kanyodera Village told the court that on the morning of 3rd August 2010 he was called by his area Chief and instructed to proceed to the home of Barrack and inquire about a white pickup parked at his homestead. When he arrived in the compound, Barrack narrated to him what had transpired the previous day with the appellant and the people who came to take a cow. Naftali relayed the information to the Chief who came to the homestead after a while in the company of police officers. PC Ongito confirmed that they found the Pick-up at Barrack's homestead, where villagers said the appellant had brought it. After retrieving the keys, he discovered school documents belonging to Bush Karanja of Pinnache School inside and later took the vehicle to Migori Police Station.

14. On his part, [PW5] Daniel Ayugi (Daniel) stated that on 2nd August at about 5:00 am, he was woken up by Joseph Nyamwanda Akoth (Joseph) who requested him to assist in pulling a vehicle that was stuck on the road. He knew Joseph as a cousin and fellow villager. Joseph was accompanied by a driver he was not familiar with. He went to the road with his oxen and assisted in getting the vehicle out of the mud. He noticed that there was a sack by the vehicle and when he inquired about its contents, Joseph told him that it was part of a music system. The sack was later loaded onto the vehicle after which the

vehicle headed in the direction of River Kuja. He later heard that a body had been found in the river. He made a report to the CID officers who were making inquiries.

15. (PW7) Rosaline Auma, (Rosaline) Daniel's mother corroborated his evidence that Daniel went to help Joseph tow a vehicle with the help of his oxen and saw a vehicle drive by a short while later.

16. In his investigations, Corporal Njeru concluded that the appellant led the deceased to the place where he met his death after duping him into a transport deal knowing that he did not have money to pay for the transport services. He further stated that he arrested and charged Morris Okinyi Maende, a suspected witch doctor, believing that the appellant took the deceased to him for assistance and blessings in a ritual killing. He also implicated Joseph, stating that when the appellant's vehicle got stuck, Morris sought Joseph's help, and both had prior knowledge of the planned killing but failed to raise an alarm. Joseph Nyamwanda and Morris Okinyi Maende DW2, were charged in the matter and participated in the trial; and at the conclusion of the matter, the trial judge found that the evidence was based on a lot of suspicion which did not meet the threshold of proof in criminal cases, thus they got the benefit of doubt; and were acquitted.

17. Placed on his defence, the appellant stated that he could not remember what happened on 2nd August 2010 and only recalled being woken by Lawrence and others on the morning of 4th August. While admitting that Lawrence had connected him with the deceased for the transport arrangement, he insisted the deceased had returned safely to Nairobi, as Lawrence had confirmed. He denied Barrack's claim that he took the vehicle to his home, asserting he only saw it at the police station on 4th August 2010. He also pointed out that the girl said to have recovered the vehicle keys from Barrack's house was not called to testify. He admitted knowing the deceased and having previously engaged his services but maintained under cross-examination that the last time he saw him was in February 2010.

18. In support of the appeal, the appellant contends that the identification was not proper since none of the witnesses saw the appellant murder the deceased. Despite the court relying on circumstantial evidence, the learned judge failed to apply the required principles. Drawing from the case of *Mwangi & Another vs. Republic* [2004] eKLR 32 the appellant contends that from the records, the deceased died from a deliberate act of a third party and the prosecution failed to make any identification or connected it to the appellant; that the mere complaint that the appellant failed to pay the deceased did not create a link that involved him in the death which has to be proved demonstration of by malice aforethought; thus the complete chain linking the appellant to the death of the deceased was clearly missing.

19. It is contended that the learned judge based his decision on suspicion when he relied on the evidence of PW2 and PW10 about the disagreements on payments and phone calls which alone do not prove the offence. In his written submissions, the appellant did not make any arguments as regards the sentence.

20. In opposing the appeal, the respondent contends that the identification of the appellant was proper as he was identified as the person who requested for transport services and was linked to the deceased by Lawrence. Further, that since the deceased's only connection to Migori was through the appellant, and the appellant was the last known person seen with the deceased there, this established him as the perpetrator of the murder.

21. It is further contended that Barrack testified that the appellant admitted paying people to kill a Kikuyu, matching the profile of the deceased who had ferried him to Migori and was later found dead. The deceased's vehicle was found at the appellant's home. PW11 further stated that men came to collect cows as payment from the appellant for killing the deceased as such the circumstantial evidence implicated the appellant as the perpetrator.

22. Regarding malice aforethought, it is contended that the appellant was the last known person to be seen with the deceased; that the appellant, being the last person seen with the deceased clearly suggests that the deceased suffered the injuries in his hands. Further, the vicious injuries and the fact that the deceased's body was tied with a rope around the neck and thrown in the river clearly indicate malice aforethought.

23. On sentence, it is contended that considering the circumstances of the murder, this was a case deserving a mandatory sentence; that the appellant had an intention to kill or cause grievous harm to the deceased, which led to the death of the deceased, a man who had innocently accepted to ferry his goods from Nairobi to Migori. Considering the manner in which the appellant lured the deceased and the fact that the appellant has not shown any remorse, the sentence of 30 years imprisonment is proper in the circumstances.

24. This being a first appeal, this Court is mindful of its duty as was well articulated by this Court in the case of *Erick Otieno Arum vs. Republic* [2006] eKLR as follows:

> "It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance for the same."

25. Having carefully considered the submissions by counsel, the authorities cited, and the law, the issues that arise for determination are whether the offence of murder was proved beyond a reasonable doubt to sustain a conviction, and if so, whether the appellant's sentence should be interfered with.

26. The appellant was charged and convicted of the offence of murder.

Section 203 of the *Penal Code* provides as follows:

> "Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

27. To sustain a conviction on the charge of murder, the prosecution must prove that the death of the deceased occurred and its cause; that the death was caused by the appellant, and that the appellant had the required malice aforethought in doing so. These three essential ingredients must be proved beyond any reasonable doubt as outlined in the case of *Anthony Ndegwa Ngari vs. Republic* [2014] eKLR as follows:

> "...that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought."

28. There is no dispute that the deceased died. Indeed the appellant admits to this fact. The cause of death was confirmed by Emanuel, who conducted the autopsy on the deceased's body and opined that the cause of death was due to cardio-respiratory arrest due to lack of oxygen as a result of strangulation.

29. The question is who caused the death? And did the person have any malice aforethought? From the record, the appellant was not identified by any of the prosecution witnesses thus the prosecution's case

was hinged on circumstantial evidence. What this Court must, then, determine is whether the trial Judge made a sound and proper conviction based only on circumstantial evidence.

30. The principles applicable in regard to circumstantial evidence have been developed and distilled by this Court and its predecessor over the years. In *Republic vs. Mohammed & another* (Petition 39 of 2018) [2019] KESC 48 (KLR) the Supreme Court on the application of circumstantial evidence cautioned that;

> "(58) However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The court "should proceed with circumspection when drawing firm inferences from circumstantial evidence." The court should also consider circumstantial evidence in its totality and not in piecemeal. As the Privy Council stated in Teper v. R [1952] AC at p. 489 "Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another."
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> 59. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable, and not speculative, but also, in the words of the Indian Supreme Court, "the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established…." As was stated in the case of Kipkering Arap Koskei & Another v. R (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence, "…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, …"
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> 59. As was further stated in the case of Musili v. Republic CRA No.30 of 2013 (UR) "to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt." The chain must never be broken at any stage. In other words, there "must be no other co-existing circumstances weakening the chain of circumstances relied on" and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. "Suspicion however strong, cannot provide a basis for inferring guilt."

31. In the case of *Abanga Alias Onyango vs. Republic* Cr. App No.32 of 1990 (UR), this Court set out the parameters to be met in the application of circumstantial evidence in securing a conviction as follows:

    i. It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: 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 the 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 possibility the crime was committed by the accused and no one else."

32. Having regard to the above principles on circumstantial evidence, did the prosecution's evidence meet the threshold? It is not in dispute that none of the prosecution witnesses saw the appellant commit the offence. However, the appellant admitted having hired the deceased to ferry his luggage to Migori from Nairobi. He further admitted travelling together with the appellant but differed on the payments. Further, Lawrence testified that he introduced the appellant to the deceased when he approached him seeking transport services from Nairobi to Migori while George a friend of the appellant, took Lawrence, Patrick Kinyua [the pickup owner] and John Sila to Migori where he directed them to the appellant's house. Upon asking the appellant about the deceased's whereabouts, he informed them that the deceased had left for Nairobi. He also stated that the deceased had called him and informed him that the vehicle was impounded and was at Migori Police Station. Before that, Barack at whose homestead the vehicle had been parked by the appellant, told the court it was the appellant who brought it in the company of another person.

33. The circumstantial evidence sufficiently showed that the appellant travelled with the deceased to Migori before his lifeless body was discovered in the river with injuries. Further, the appellant did not give any plausible explanation as to how the deceased's car was found in his possession. In addition to the recovery of the deceased's lifeless body from the river with injuries indicating that his death was as a result of strangulation, the appellant who knew the deceased, had travelled with him to Migori in July 2010 as confirmed by the appellant himself; and was the last person seen with the deceased as they left for Migori; before his disappearance the deceased communicated with third parties, namely PW2 and PW10, that he was in Migori in the company of the appellant. The sum total of this makes the evidence of the appellant having been seen with the deceased shortly before the deceased disappeared crucial as he was the last person who was apparently seen with the deceased alive.

34. In *Daniel Munyui Chiragu & another vs. Republic*, (Criminal Appeal No. 104 of 2018) [2021] KECA 342, KLR, this Court addressing the 'doctrine of last seen' stated as follows:

> Regarding the doctrine of "last seen with" we will revert to Nigerian case of *Moses Jua vs. The State* (2007) LPELR-CA IL 42 2006. The court, while considering the 'last seen alive with' doctrine held:
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> " Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."

35. In yet another Nigerian case considering the same doctrine, in *Stephen Haruna vs. The Attorney-General of The Federation* (2010) 1 iLAW CA A 86 C 2009 the court opined thus:

> "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 de ceased 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."

36. Therefore, the parameters of circumstances linking the appellant to the offence were duly considered and met by the High Court as such the conviction was sound

37. Finally, on sentence, the appellant urged the Court to review the sentence terming it as excessively harsh. On the other hand, the respondent urged the Court not to disturb the sentence as it was very lenient. The appellant was sentenced to 30 years' imprisonment for the offence of murder. Although Section 204 of the *Penal Code* provides for a mandatory death sentence for any person charged and convicted of the offence of murder, in *Francis Karioko Muruatetu & Another vs. Republic* (2017) eKLR, the Supreme Court held that the mandatory nature of the death sentence prescribed for the offence of murder by Section 204 of the *Penal Code* was unconstitutional as it deprived the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case.

38. The crime was committed with deliberate planning, malice, and intent to kill, resulting in the deceased's death by strangulation, which was clearly linked to the appellant. The trial judge correctly exercised his discretion in imposing a 30-year prison term, and there is no ground to interfere with the sentence. We hold that the appeal is without merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF OCTOBER, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR