

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & ACHODE, JJ.A.)

CRIMINAL APPEAL NO. 212 OF 2018

BETWEEN

ELLIUS ONYANGO RIEBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Judgment of High Court of Kenya at
Migori, (Mrima, J.) dated 24th May, 2018*

in

Migori HCCRC. NO. 137 of 2017)

*** JUDGMENT OF THE**

COURT

[1] On the morning of 26th June, 2013, **Rose Osebe Nyaanga** “**the deceased**” was found dead in her bedroom at Mbwa Kali area, Rongo Township, Migori County. Her hands had been bound with a necktie, and another tie had been wrapped twice around her neck, blood oozed from her nose, an indication of an excruciating and painful death.

[2] The investigations led to the arrest of her husband, **Ellius**

Onyango Rieba, “the appellant”, who was subsequently charged on the information of murder contrary to **Section 203** as read with

Section 204 of the Penal Code. The particulars of the information were that on 26th June, 2013, at Mbwa Kali Estate, Kamagambo Central Location, Migori County, the appellant unlawfully caused the death of the deceased. The appellant entered a plea of not guilty to the information and thereafter his trial ensued.

[3]The prosecution presented a total of six witnesses in support of its case. These were **PW1, Cpl. Walter Chepkwony**, the arresting officer, **PW2, Agnes Kerubo Nyaga**, the deceased's sister, **PW3, Henry Nyabuto Mose**, a workmate, **PW4, Sandra Sonia**, deceased's daughter, **PW5, PC Daniel Choge**, the investigations officer and **PW6, Dr. Peter Asava**, consultant pathologist who conducted the post- mortem on the body of the deceased.

[4]The events leading to the death of the deceased revealed a history of domestic violence between the two. According to her daughter, PW4, the appellant had been involved in continuous domestic disagreements with the deceased for two weeks, and on the night before she met her death, the deceased had repeatedly asked him to leave their home. On the morning of her murder, PW4 went to school as usual, leaving both the deceased and the appellant in the house. However, when the deceased failed to

report to work, her colleagues

became suspicious. PW2 was puzzled when another staff member, Joslyn, opened the office doors, a duty always performed by the deceased. Concerned, PW2 called the deceased on her cell phone severally but her phone went unanswered. Growing increasingly alarmed, she reached out to PW3 and they went to PW4's school, hoping to retrieve the house keys from her so that they could access the deceased's house.

[5] However, PW4 had apparently left the keys at home. The duo then proceeded to the deceased's house, only to find it locked from the outside with a padlock. Peering through the sitting room window, they noticed some disorder inside the house. They then forced open the bedroom window, and saw the lifeless body of the deceased lying on the floor, hands bound, neck, tightly tied with a neck tie, and blood oozing from her nose. Shocked by the discovery, they both raised alarm, and at the same time rushed to report the discovery to Kamagambo Police Station.

[6] Following the report, police officers came to the scene, broke into the house and documented the crime scene. According to PW5, he recorded statements from several witnesses and gathered evidence, including the post-mortem report prepared by PW6. The

investigations led him to conclude that the appellant was responsible for the murder. However, the appellant had fled the scene immediately after the burial of the deceased, making his arrest difficult. It was only 20 months later that an informer tipped him regarding the appellant's whereabouts. Acting on information, PW1, managed to arrest the appellant in Migori town. The post-mortem conducted by PW6, determined that the cause of death was asphyxia due to nerve injury, resulting from a dislocation of the neck bones caused by an assault.

[7]PW4, lived with both the deceased and the appellant in their house in Rongo Township. According to her, on the night preceding the incident, she witnessed a heated argument between the appellant and deceased respectively, during which the deceased repeatedly asked the appellant to leave the house. The domestic tension had been ongoing on for two weeks. On the morning of 26th June, 2013, she departed for school, leaving behind both the deceased and the appellant. Later that day, she was informed by PW2 and PW3 at school that the deceased had not reported to work, and they asked her for the house keys so as to go and check on her. However, she told them that she had left the keys at home. PW4 later learned that the deceased had been found tied up and

strangled to death.

[8] Upon the close of the prosecution's case, the trial court placed the appellant on his defence. In his sworn testimony, the appellant stated that on the material day, he left his house at 3 am for his place of work as a matatu driver. Later in the day and as he was driving along the Kisumu-Migori highway, he received a call from PW2, informing him that the deceased was not answering calls and that their house had been locked from the outside. However, their conversation ended abruptly when PW2's cellphone went off. Upon reaching Kisumu, however, he contacted a neighbour who confirmed to him the deceased's death. He then rushed back to the house before proceeding to Hema Mortuary, where he confirmed deceased's passing. He thereafter actively participated in the funeral arrangements and was in constant touch with PW5, throughout the investigations. He denied allegations that he had fled from Rongo soon after the burial, stating that he had simply relocated to his rural home in Migori County.

[9] Having considered the evidence presented, the trial court found that the prosecution had established strong circumstantial case against the appellant. The court noted that the appellant was the last person seen with the deceased alive, and the evidence demonstrated that the couple had experienced serious domestic

tensions leading up

to the murder. The forensic findings confirmed that the deceased had suffered asphyxia due to neck bone dislocation caused by an assault, consistent with the manner in which her body was discovered. The trial court further observed that the appellant disappeared immediately after the burial of the deceased, only to be arrested more than 20 months later, an act suggestive of his consciousness of guilt. His alibi defence, could not counter PW4's testimony, which placed him in the house that morning. Additionally, his claim of being constantly in touch with PW5 did not align with the prosecution's evidence indicating that he was deliberately avoiding arrest.

[10] Based on these findings, the trial court found the appellant guilty of murder and sentenced him to life imprisonment.

[11] The appellant, aggrieved by the conviction and sentence, filed the instant appeal on grounds that the trial court erred in law and fact by: convicting him solely on circumstantial evidence; failing to properly evaluate the evidence; and failing to appreciate that the evidence presented during the trial was inconclusive as it was contradictory and inconsistent.

[12] When the appeal came up for hearing, the appellant was represented by **Mr. Anam Festus**, learned counsel, while **Ms.**

Ikol,

learned Prosecution counsel appeared for the respondent. Both counsel opted to solely rely on their respective written submissions that they had filed.

[13] The appellant's counsel submitted that the prosecution evidence failed to meet the threshold of proof beyond reasonable doubt. That the conviction was solely based on suspicion. That suspicion alone, however strong cannot form the basis of a conviction. He relied on the case of **Joan Chebichii Sawe v Republic [2003] eKLR**, for the proposition.

[14] Counsel further submitted that the trial court convicted the appellant solely on circumstantial evidence, which did not unerringly point to his guilt and which did not exclude all other reasonable hypotheses. He maintained that the prosecution failed to establish a direct link between the appellant and the crime, and that the trial court erred in relying on inference rather than concrete proof. He cited the case of **PON v Republic [2019] eKLR**, where the Court held that circumstantial evidence must form a complete chain, leaving no reasonable hypothesis consistent with innocence of an accused. Counsel further asserted that the prosecution had failed to link the appellant directly to the injuries sustained by the deceased, arguing

that no forensic evidence, such as fingerprints, was presented to prove his involvement. He cited the case of **John Bell Kinengeni v Republic [2015] eKLR**, where the court emphasized the necessity and importance of direct evidence in criminal trials.

[15] It was further submitted that the trial court improperly invoked the doctrine of last seen, contending that his mere presence at the scene of crime did not automatically translate to his culpability. He emphasized that the burden of proof remained with the prosecution, and that the court wrongly shifted the burden onto the appellant to explain the deceased's death.

[16] Counsel argued that the investigations in the case were shoddy and flawed, as the prosecution failed to present any neighbours or independent witnesses to confirm the appellant's whereabouts on the morning of the incident. Counsel relied on the case of **Francis Mwangi Wanjohi & Another v Republic [2020] eKLR**, where the Court underscored the duty of the prosecution to present all necessary witnesses to establish the truth and guilt of an accused.

[17] Counsel also submitted that the evidence presented was contradictory and inconsistent, particularly the testimony of PW4, who gave conflicting accounts regarding whether the appellant

had

left the house that morning as she went to school. He maintained that such inconsistencies created doubt as to whether the appellant was the perpetrator of the crime which doubts ought to have been resolved in favour of the appellant.

[18] In conclusion, the appellant urged this Court to allow the appeal in its entirety.

[19] In response, **Ms. Ikol** submitted that although no direct eyewitness evidence to the incident was presented, the circumstantial evidence overwhelmingly pointed to the appellant as the perpetrator of the crime. The deceased, the appellant, and PW4 were the only occupants of the house where the murder occurred. On the morning of the incident, PW4 went to school leaving behind the appellant and deceased in the house. They were therefore the only two people in the house at the time of the incident. Counsel submitted that this circumstantial evidence squarely placed the appellant at the scene, making him the last person seen with the deceased alive. Citing the case of **Rex v. Kipkering Arap Koske and Another [1949] EACA 135**, counsel emphasized that circumstantial evidence presented was consistent with the guilt of the accused and excluded any other reasonable explanation. Furthermore, PW4 testified that the deceased

and the appellant had ongoing domestic squabbles, with the deceased repeatedly asking the appellant to leave her house, which according to counsel provided motive for the murder.

[20] Counsel submitted that the doctrine of last seen was correctly relied upon by the trial court in convicting the appellant. That in doing so, the trial court referred to the case of **Chiragu & Another v Republic (Criminal Appeal 104 of 2018) [2021] KICA 342 (KLR)**, in which the court held that the last person seen with the deceased bears full responsibility to explain what became of him failing which he would be taken to be responsible for his death or disappearance. Counsel submitted that the appellant failed to offer a credible explanation regarding the death, leading to the inference that he must have in one way or another been involved in the death of the deceased. Counsel submitted that the post-mortem report confirmed the brutal nature of the murder, showing that the deceased's C2 and C3 neck bones were dislocated, and her hands and neck were tightly bound with neckties, hence proof of malice aforethought.

[21] Further evidence of malice aforethought was afforded by the fact that the house was locked from outside with a different padlock, suggesting an intentional effort to delay the discovery

of the body.

Counsel argued that only someone familiar with the house keys could have changed the padlock, further implicating the appellant. Counsel went on to submit that the appellant's presence in the house, coupled with the locked doors and the brutal injuries sustained by the deceased, demonstrated intent and premeditation to kill. Counsel further argued that the mode of killing by strangulation using neckties was deliberate, citing PW3's testimony, which confirmed that the deceased had been murdered using multiple neckties. Ultimately, counsel urged us to dismiss the appeal in its entirety.

[22] This being a first appeal, the duty of this Court is to re-evaluate, re-analyze, and re-consider the evidence tendered in the trial court afresh and reach its own independent conclusions while bearing in mind that the trial court had the distinct advantage of seeing and hearing the witnesses testify firsthand and therefore in a better position to assess their demeanor. This principle was well-articulated in the oft quoted case of **Okeno v Republic [1972] EA 32**.

[23] Having carefully considered the grounds of appeal, the submissions by both parties plus the authorities cited, exhaustively looked at and reappraised the record, only one

issue arises for our

determination: Whether the prosecution proved the offence of murder against the appellant beyond reasonable doubt.

[24] The appellant's first line of attack was that the circumstantial evidence relied on to convict him did not meet the necessary threshold. The law on circumstantial evidence in our view, is well settled. It is that when a case rests entirely on circumstantial evidence, three conditions must be satisfied before a conviction can be firmly grounded on such evidence, one, the circumstances from which an inference of guilt is sought to be drawn, must be cogently established, two, those circumstances should be of definite tendency pointing to the guilt of the suspect and no other and three, the circumstances taken cumulatively should form a complete chain that can only lead to the conclusion that the crime was committed by the suspect and no one else. See the case of **Abanga alias Onyango v Republic (Criminal Appeal No. 32 of 1990)**. However, the foundation of these principles was laid down earlier in the famous case of **R v Kipkering Arap Koske (supra)**.

[25] In the present case, the evidence tendered by PW4 placed the deceased and the appellant at the scene of crime when she left for school in the wee hours of the morning. She left duo in the

house.

This was contrary to the claim by the appellant in his defence that he left the house on the material day for work at 3am. There was also evidence that for over two weeks, the couple had been embroiled in vicious domestic squabbles which snowballed in the deceased asking the appellant to leave the house on the eve of her murder. This may have provided the motive for the appellant to commit the crime, not that motive is relevant in the commission of the offence anyway. However, in matters of circumstantial evidence it becomes relevant.

[26] The appellant's disappearance from the scene so soon thereafter only to be arrested 20 months later, further suggested conduct of a guilty mind as a result of his participation in the commission of the crime.

[27] The above circumstantial evidence is further boosted by the **doctrine of last seen**. The appellant was the last person seen with the deceased. This Court in the case of **Chiragu & Another v Republic (supra)**, citing with approval the Nigerian case of **Stephen Haruna v The Attorney General of the Federation (2010) LAW/CA/A/86/C/2009**, held that ***"The doctrine of "last seen" means that the law presumes that the person last seen with the 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 accused to give an explanation relating to how the deceased met her death in such circumstances. 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.” This is precisely what happened in the circumstances of this case. There is no doubt that the appellant was the last person seen with the deceased if the evidence of PW4 is anything to go by. A few hours later the deceased is found dead in the same house where PW4 had left the appellant and the deceased. The appellant is nowhere to be seen. It would then be expected that he would provide a satisfactory explanation as to the circumstances leading to the death of the deceased. He failed to do so. The irresistible conclusion then was and rightly so in our view, that he was responsible for the death.

[28] Having considered all the facts and applicable legal principles, we are satisfied just like the trial court that the circumstantial evidence presented by the prosecution was cogent, conclusive,

and met the

requisite legal threshold. Accordingly, the trial court did not err in convicting the appellant of the offence based on circumstantial evidence. Contrary to the submissions by the appellant that he was convicted on mere suspicion, there was overwhelming evidence tying the appellant to the crime. Of course, we are aware that in the case of **Joan Chebichii Sawe v Republic (supra)**, this Court held that suspicion, however strong, cannot found the basis of a conviction. However, this was not the case here as the trial court correctly found. There was sufficient circumstantial evidence connecting the appellant to the crime.

[29] As to whether the prosecution proved the offence of murder against the appellant beyond reasonable doubt, it is settled law that the standard of proof in criminal cases is beyond reasonable doubt, as stated in the case **Woolmington v DPP [1935] AC 462**. This principle dictates that the prosecution must prove every element of the offence in order to find a conviction. In the present case, the respondent was required to establish the elements of murder, being: the fact of death and its cause, the death was a result an unlawful act or omission by the appellant and that the appellant did so with malice aforethought.

[30] The fact of death was undisputed, as confirmed by the testimonies of PW2, PW3, PW5 and the appellant himself who saw the body of the deceased either at the scene of crime or Hema mortuary. Over and above the foregoing, the post-mortem report prepared by PW6, confirmed the death and its cause. The report indicated that the deceased suffered asphyxia due to vertebral dislocation caused by an assault, consistent with strangulation. These injuries demonstrated deliberate and forceful strangulation, ruling out any accidental cause of death.

[31] Regarding the appellant being responsible for the unlawful act or omission causing the death, we have extensively discussed this aspect when dealing with the issue of circumstantial evidence and we need not revisit the same.

[32] The final element is malice aforethought. Under **Section 206** of the Penal Code, some of the elements of malice aforethought relevant to this appeal are an intention to cause death or grievous harm, knowledge that the act will likely result in death, or an intent to commit a felony. The method of killing by strangulation using neckties resulting in broken neck bones was deliberate and forceful, indicating

an intention to cause death. It is obvious then that malice aforethought was evident as correctly held by the trial court

[33] Having carefully reviewed the evidence and applicable legal principles, we are satisfied just like the trial court that the prosecution discharged its burden of proof against the appellant for the offence beyond reasonable doubt. Accordingly, the trial court did not err in finding that the prosecution had proved the offence of murder against the appellant.

[34] As to whether the investigations were flawed and failed to establish the appellant's culpability, we are unable to agree with this complaint given what we have already stated in the preceding paragraphs of this judgment. However, on the aspect that the prosecution failed to present independent witnesses such as neighbours to confirm his whereabouts on the morning of the incident, the respondent in its submissions maintained that the absence of independent witnesses, such as neighbours, did not weaken its case, citing **Francis Mwangi Wanjohi & Another v Republic [2020] eKLR**, in support thereof. In this case, this Court held that the prosecution is not obligated to call a multitude of witnesses if the available evidence sufficiently proves the case.

[35] We are satisfied that the available evidence proved the case against the appellant beyond reasonable doubt. The absence of additional witnesses did not create a fatal gap in the prosecution's case, as the circumstantial evidence formed a complete and unbroken chain leading to the appellant's culpability. Further, the appellant did not name the neighbours he had in mind. In any event nothing stopped the appellant from calling them in support of his defence. Accordingly, we agree with the respondent's submissions that the investigations were adequate and the evidence was sufficient to nail the appellant.

[36] Regarding the appellant's defence, which was essentially an alibi as he maintained that he left home at 3:00 am and was driving along the Kisumu-Migori highway when he learned of his wife's death, we however upon re-evaluating the evidence, are satisfied just like the trial court that the appellant's defence could not withstand the onslaught by the prosecution evidence, particularly the testimony of PW4, which placed him at home at 6:30 am, directly contradicting his alibi. Given the foregoing, the appellant's defence was, hollow, inconsistent and unconvincing, failing to raise any reasonable doubt in the prosecution's case as correctly found by the trial court.

[37] In the ultimate, we are satisfied that the trial court properly convicted the appellant based on strong circumstantial evidence and “last seen with doctrine”. Accordingly, the appeal is devoid of merit and is accordingly dismissed in its entirety.

Dated and delivered at Kisumu this 3rd day of October, 2025.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

H.A. OMONDI

.....
JUDGE OF APPEAL

L. ACHODE

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR