Ochieng & another v Republic (Criminal Appeal E020 of 2022)
[2025] KECA 1774 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1774 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E020 OF 2022

MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA

OCTOBER 24, 2025

BETWEEN

BENARD OCHIENG ..... 1ST APPELLANT

REPHIUS OKINYI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Homabay, (Majanja J.), dated 6th May, 2016 in HCCRC No. 23 of 2012 Formerly Kisii HCCRC No. 34 of 2010)

JUDGMENT

1. This is a first appeal by Benard Ochieng and Rephius Okinyi, "the appellants", who jointly faced the information charging them with murder contrary to Section 203 as read with Section 204 of the Penal Code in the High Court of Kenya at Homabay. The particulars of the information were that on 24th April 2010, at Rachar Village, Ndhiwa District, Homa Bay County, the appellants unlawfully caused the death of John Aran Orondo who apparently was their father. His body was found inside his house, lying in a pool of blood, with a deep cut wound to the back of his head.

2. Prior to his death, the appellants and their mother had fought the deceased causing him to be admitted to hospital. The fight was over the desire of the deceased to sell a portion of his land to a third party which transaction the appellants disapproved. Two days after his discharge from the hospital, the deceased swore to have the appellants arrested if ever they set foot on his land. Two and half weeks later the deceased body was found as aforesaid.

3. According to Paul Onyango alias Raila, (PW4), a son of the deceased was on the material day inside the homestead cooking when he suddenly heard a commotion emanating from the deceased's house. Concerned, he rushed to investigate, only to encounter a masked figure wielding a panga. The individual confronted him, forcing him to flee. After a few moments later, PW4 cautiously trailed

the masked individual towards the house and observed three other people wearing caps leaving the premises. After they disappeared into the nearby sugar cane plantation, PW4 entered the deceased's house, only to find him lying lifeless with a deep cut wound on the back of his head.

4. PW4 noticed several missing items in the house, including a radio, Seiko wristwatch, Nokia 1200 mobile phone, and a black bag all belonging to the deceased. He immediately alerted the neighbourhood who soon thronged the scene. It is important to note however, that in the course of his testimony, this witness was declared a hostile witness by the court.

5. On the same night at around 10:00 Pm, a clan elder Michael Asienyo Nyalwal (PW3) received information from Vitalis Magambo, a fellow clan elder, that the deceased had been killed. Immediately, the two proceeded to the deceased's homestead, where they found him lying dead in his bedroom. Appreciating the gravity of the situation, PW3 reported the incident to Chief of the location, Thomas Odhiambo Omboka (PW5), who mobilized administration police officers and proceeded to the scene. Strangely, the deceased's wife and her two sons, the appellants were absent. Subsequent thereto PW5 summoned police officers from Ndhiwa Police Station.

6. Upon arrival, the police officers led by the Investigating Officer, PC Justin Munene (PW7) noticed that the deceased's body was in a pool of blood, his head injury still oozing blood. The house appeared ransacked, suggesting that a struggle had ensued and some possessions stolen.

   PW4 informed PW7 that the deceased had been attacked by masked individuals. The deceased's wife and the appellants were still nowhere to be seen. The officers evacuated the body to Homa Bay County Referral Hospital Mortuary for post-mortem purposes.

7. The post-mortem was conducted by Dr. Ayoma Ojwang after the body of the deceased was identified to him by Dishon Oketch Kungu (PW1) and Daniel Ariwa (PW2) both who were nephews to the deceased. By the time of the trial however, Dr Ayoma Ojwang had passed on and the post mortem report was therefore tendered in evidence by Dr Fredrick Ochieng (PW6) under the provisions of section 77 of the *Evidence Act*. The report opined that the deceased had suffered a deep, rugged cut wound at the back of the head, leading to bleeding into the brain. The cause of death was determined to be a head injury.

8. The Arresting Officer PC Benson Nderitu (PW8) of Ndhiwa Police Station was instructed by the Officer Commanding Police Station to collect the appellants from Rodi AP Camp and bring them to the station. Members of the public had apparently arrested them on suspicion of having killed their father, the deceased and handed them over. On searching them PW8 recovered several items belonging to the deceased. From the 1st appellant he recovered a Nokia 1200 phone without a line, two Safaricom pouches with a new line 0700×××796 which had not been activated. The other line which was activated was no. 075×××375.

9. He also recovered two note books; a tattered one and a new one with the name of the deceased. From the 2nd appellant, he recovered a Safaricom pouch and a voter's card in the deceased's name, an MPESA registration and acceptance certificate bearing the name of the deceased, hand written documents and a search for land parcels K/K/Kadwet/906 and K/K/Kadwet/895 in map No. 32 belonging to the deceased. PW8 further testified that in the room in which the duo had been detained at the AP Camp there was a black bag which had been brought by members of the public which contained assorted items some belonging to the deceased, which he secured. He took all the exhibits and escorted the appellants to Ndhiwa Police Station and handed them over to PW7, the investigating officer who later produced them as exhibits in court.

10. This is the evidence that informed the decision by the respondent to prefer an information charging the appellants jointly with murder as already stated.

11. Put on their defence, the appellants opted to give sworn statements of defence in which they denied involvement in the death of the deceased. Infact they all raised alibis. They all claimed that on the material day, they were far away in Sori fishing. That they only became aware of the death of their father when they were arrested by members of the public on suspicion of killing him. They all denied any disagreements with their father. The 1st appellant went on to state that indeed he was arrested with the black bag which had items but which did not belong to the deceased. That the mobile phone recovered from him was his though the line was registered in the name of the deceased as he did not have the national identity card then. He also asserted that the black bag belonged to him. On his part the 2nd appellant accepted that upon being searched, he was found in possession of a piece of paper written K/K/Kadwet, an MPESA registration form which contained a number he did not know, a voting card and a search for land parcels K/K/Kadwet/906 and K/K/Kadwet/895 in map No. 32 belonging to the deceased.

12. After considering the evidence by both the prosecution and the defence, the trial court determined that there was sufficient proof that the appellants were involved in the death of the deceased. Consequently, it returned a conviction in respect of each appellant. Upon conviction, the appellants were each sentenced to death.

13. The appellants, being dissatisfied with the trial court's judgment, filed this appeal on the grounds that the trial court erred in law and fact by: convicting them based on circumstantial evidence that did not meet the threshold; wrongly invoking the doctrine of recent possession; failing to properly evaluate the credibility of the prosecution witnesses; not appreciating that the prosecution failed to prove malice aforethought; not properly considering the appellants' alibi defences; not appreciating that the trial was marred by procedural irregularities, including the failure to summon crucial witnesses who would have aided in the fair determination of the case and finally that the sentence meted on them was manifestly harsh, excessive and unconstitutional.

14. When the appeal came up for plenary hearing, the appellants were represented by Ms. Owiti, learned counsel, whereas Ms. Opiyo, learned counsel appeared for the respondent. Both parties opted to entirely rely on their written submissions that they had earlier filed and exchanged.

15. Counsel for the appellants submitted that the trial court erred in convicting them solely on circumstantial evidence, whose evidentiary chain was so weak and flawed, that it unfairly led to their conviction. Counsel emphasized that PW4 had been declared a hostile witness, arguing that his testimony should therefore not have been relied upon in convicting the appellants. Counsel relied on the case of Shiguye v Republic [1975] EA 191, in which it was held that declaring a witness hostile renders his entire evidence unreliable and untenable. Furthermore, she challenged the credibility of the prosecution's case, submitting that the exhibits that formed the basis for the conviction of the appellants were either not properly introduced or lacked evidentiary clarity, rendering them unreliable.

16. Counsel also challenged the invocation of the doctrine of recent possession by the trial court, arguing that it was not sufficiently proved, as theft of the properties from the deceased had not been established in the first place. She contended that, in any event, it was unclear whether the alleged items were stolen or taken before, during or after the killing, casting doubt on the prosecution's narrative. Citing Geoffrey Kipngeno v Republic [2012] eKLR, counsel argued that circumstantial evidence must be subjected to strict scrutiny to rule out other reasonable possibilities. Moreover, she raised concerns about the burden of proof, asserting that the trial court improperly shifted the burden onto the

appellants by relying on the weaknesses in their defences rather than assessing the strength of the prosecution's case.

17. Counsel maintained that the appellants' right to fair sentencing was violated, citing Article 25(c) and 50(2)(p) of *the Constitution* of Kenya in support of her contention. It was submitted that the trial court should have considered alternative sentencing, especially given that the appellants had spent nine years of incarceration pending trial and their demonstrated rehabilitation efforts. She highlighted their acquisition of vocational skills, including certificates in masonry, carpentry, and theology, which had transformed their lives and equipped them for reintegration into society. Counsel referred to the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, in asserting that the mandatory nature of the death sentence prescribed under Section 204 of the Penal Code had been declared unconstitutional, as it deprived courts of discretion in sentencing. Ultimately, the appellants prayed that the appeal be allowed in its entirety.

18. In opposition to the appeal, counsel for the respondent submitted that the appellants' conviction was properly entered based on strong circumstantial evidence and the proper application of the doctrine of recent possession. Counsel maintained that the prosecution had successfully discharged its burden of proof, establishing beyond a reasonable doubt that the appellants were involved in the murder of the deceased. Counsel submitted that, the fact that there was no direct eyewitness to the murder was not fatal to the prosecutions' case, as courts have consistently convicted an accused on circumstantial evidence where the links are strong and unbroken. Counsel cited the case of Neema Mwandoro Ndunya v Republic CRA 466 of 2007, to posit that circumstantial evidence, if properly scrutinized, could prove a proposition with mathematical precision. Counsel contended that the circumstantial evidence presented in this case was well-founded, more so after the appellants were found in possession of the deceased's items shortly after his death.

19. Regarding the treatment of PW4 as a hostile witness, counsel referred to the case of Allan Chebore Chemosit v Republic [2022] eKLR, where it was held that once a witness is declared hostile, his testimony generally loses evidentiary value and cannot be relied upon. However, counsel argued that the trial court did not rely solely on PW4's testimony to convict the appellants but instead invoked the doctrine of recent possession, which provided a conclusive link between the appellants and the deceased's death.

20. Counsel further defended the application of the doctrine in the circumstances of this case, citing the case of Isaac Ng'ang'a Kahiga & Another v Republic [2006] eKLR, in support thereof. Counsel submitted that the appellants were found in possession of the deceased's stolen items so soon after the incident which were positively identified by PW1 and PW4 as belonging to the deceased. The appellants' explanation regarding their possession was found wanting. Counsel ruled out the claim that these items may have been planted on the appellants by members of the public, emphasizing that PW8 personally searched the appellants at the time of their re-arrest and recovered the stolen items. In any event, what would members of the public would have stood to gain from planting the items on them!

21. On burden of proof, counsel argued that the trial court acted within legal parameters and did not unfairly shift the burden of proof on the appellants as claimed. According to counsel, once the doctrine of recent possession was invoked, the appellants bore an evidentiary burden to explain how they acquired the deceased's items, a position stressed in the case of Republic v E.O.O. [2019] eKLR. The court therein held that the accused must rebut the inference that possession of stolen goods implies involvement in the crime. Counsel asserted that the appellants failed to provide a satisfactory explanation, leading to the inference of their guilt. The calling upon the appellants to explain the possession cannot be said that the prosecution thereby shifted the burden of proof to the appellants. That demand is a legal prerequisite.

22. Regarding sentence, counsel conceded that the mandatory nature of the death sentence was declared unconstitutional by the Supreme Court in the case of Francis Karioko Muruatetu & Another v Republic (supra). That in this case, the trial court imposed the death sentence on the basis that it was mandatory and only sentence, which was not necessarily correct. Ultimately, counsel prayed for the death sentence be set aside and the case be remitted to the High Court for re-sentencing where the appellants would then present their mitigation arguments in line with fair trial principles and thereafter appropriate sentence be meted out. Otherwise, counsel urged for the dismissal of the appeal on conviction.

23. This is a first appeal and our jurisdiction has been clearly demarcated in law. In the case of Okeno v Republic [1972] EA 32, this Court dealing with such jurisdiction stated thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination... The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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."

24. Guided by this mandate, the issues for our determination in this appeal are in our view, whether: the trial court erred in relying on circumstantial evidence to convict the appellants; the doctrine of recent possession was properly invoked; the trial court erred in relying on the testimony of PW4 having been declared a hostile witness; malice aforethought was proved, the trial court failed to consider the appellants' alibi defence; and whether the sentence imposed was excessive, harsh and unconstitutional.

25. On the first issue, the law is settled. Circumstantial evidence, though indirect, can sustain a conviction if it meets the requisite legal threshold. In the case of Abanga alias Onyango v Republic Cr. App No. 32 of 1990, this Court held that circumstantial evidence must satisfy three tests: the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; and 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.

26. Similarly, this Court held in the case of Sawe v Republic [2003] KLR 364, thus:

> "In order to justify a conviction based on circumstantial evidence, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."

27. Lastly, in Kipkering arap Koske & Another [1949] 16 EACA 135, the former Court of Appeal for Eastern Africa emphasized that:

> " The burden of proving facts that justify the inference of guilt, to the exclusion of any reasonable hypothesis of innocence, rests on the prosecution and never shifts."

28. In the present case, the deceased was found dead in his house with a deep cut wound to the back of the head. The appellants, who were his sons and their mother were not found in the homestead when the body was discovered. PW4 had the previous night been attracted by the commotion in the deceased's house and going there he came across three or so masked people leaving the deceased's house whom he could not immediately identify. Upon entering the house, besides the deceased's body, he also noticed that several of the deceased's personal effects had been taken, missing or stolen. The appellants were

traced two days later in Sori in possession of some of the deceased's possessions. These items were positively identified by PW1 and PW4, the deceased's other children as belonging to the deceased.

29. It is also noteworthy that two or so weeks prior to the death, the appellants and their mother had been involved in a physical fight with the deceased over the intention of the deceased to sell a portion of his land to a third party which did not sit well with the trio. Small wonder that the appellants were upon search by PW8, found in possession of a piece of paper written K/K/Kadwet, and a search for land parcels K/K/Kadwet/906 and K/K/Kadwet/895 in map No. 32 belonging to the deceased. All these parcels of land were owned by the deceased. It is not therefore difficult to fathom that it was out of any of these parcels that the deceased intended to sell a portion thereof to a third party. Further, the appellants' conduct of fleeing the homestead soon after the incident, failing to report the death, and attempting to conceal their whereabouts strengthens the inference of guilt. These pieces of circumstantial evidence form a tight chain of circumstantial evidence pointing irresistibly to the appellants' involvement in the murder.

30. Unlike cases where multiple accused persons are implicated through confessions or financial trails, the present case relies on physical possession of stolen property, proximity to the crime, and conduct inconsistent with innocence. The chain of circumstantial evidence does not extend to any other individual beyond the two appellants. The chain of events was unbroken and pointed unerringly to the appellants. We find that the circumstantial evidence was cogent and sufficient to support a conviction.

31. Regarding the doctrine of recent possession, this Court in the case of Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic [2006] eKLR held that where an accused person is found in possession of recently stolen property and fails to offer a reasonable explanation, a rebuttable presumption of fact arises that he is either the thief or has received the goods knowing them to be stolen. Further, as regards the circumstances under which the doctrine of recent possession may apply, in the case of Athuman Salim Athuman vs. Republic [2016] eKLR, this Court held that:

> " The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how be came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. (See Malingi V. Republic (1989) KLR 225 H.C and HASSAN V. REPUBLIC (2005) 2 KLR 151). The circumstances under which the doctrine will apply were considered in Isaac Ng'ang'a Kahiga Alias Peter Ng'ang'a Kahiga v. Republic, CR. APP. No. 272 of 2005, where this Court stated:
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> > 'It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other.'"

32. The question therefore is whether the ingredients of the doctrine of recent possession were satisfied in this case. It was established that the deceased, was the owner of the mobile phone, voter's card, land documents, and other personal effects recovered from the appellants. These items were positively identified by PW1 and PW4, as belonging to the deceased, as they had prior knowledge of the deceased's possessions. At the material time, the deceased had been found dead in his house and the items missing. The appellants and their mother, who were deceased's sons and wife respectively, were nowhere to be

seen. However, the appellants were traced two days later in Sori, where they were found in possession of the deceased's aforesaid properties. The recovery of the items was by PW8, who documented the chain of custody and confirmed the items were recovered from the appellants.

33. We are satisfied that the possession of the items was positively proved, the items were clearly identified as belonging to the deceased, they were either taken or stolen in the course of the murder, and they were recovered shortly thereafter. The time lapse between the theft and recovery was sufficiently proximate to invoke the doctrine. The trial court therefore correctly invoked the doctrine of recent possession. We find no error in its reasoning or conclusion therefor.

34. As to the testimony of PW4, who was declared a hostile witness, the appellants argued that his evidence should have been disregarded all together. However, a well-established position in law is that the testimony of a hostile witness is not automatically inadmissible. This Court in the case of Kinyatti v Republic [1984] KLR 763 clarified that once a witness is declared hostile, the court may still rely on his evidence if it is corroborated by other independent and credible evidence. The Court stated:

> " The evidence of a hostile witness is not necessarily rejected. It is for the trial court to assess its probative value in light of the entire record."

35. This principle was further reaffirmed in the case of Mwangi v Republic [2004] 2 KLR 28, where this Court again held that the trial court is entitled to consider the prior statement of a hostile witness,especially where the witness recants in court but their earlier statement is consistent with other prosecution evidence. In this case, PW4's initial statement identifying the stolen items was corroborated by the recovery of stolen items made by PW8 and the chain of custody maintained by PW7. The trial court did not therefore rely solely on PW4's oral testimony but considered the totality of evidence. We find no error in the treatment by the trial court of PW4's evidence.

36. On the question of malice aforethought, Section 206 of the Penal Code defines it amongst others to include intent to cause death or grievous harm. The nature of the injury which included a deep cut to the back of the head was deliberate and fatal. In the case of Republic v Tubere s/o Ochen [1945] 12 EACA 63, the court held that the nature of the weapon used and the part of the body targeted are indicative of intent. Given the brutality of the attack, the nature of the injuries sustained and the familial relationship, we find that malice aforethought was proved beyond reasonable doubt as the appellants had no other intention other than to kill or at the very least cause grievous harm to the deceased.

37. The appellants in their defences maintained that they were out there fishing in Sori at the time of the murder. The trial court rejected these defences. In the case of Kiarie v Republic [1984] KLR 739, this Court held that the burden of proving the falsity of an alibi lies with the prosecution. The prosecution adduced evidence showing the appellants were arrested with the deceased's items shortly after the murder. Their alibi was uncorroborated and upset by the strong circumstantial evidence. We agree with the trial court's rejection of the alibi therefor.

38. Finally, the appellants challenged the mandatory death sentence imposed on them by the trial court. In the case of Francis Karioko Muruatetu & Another v Republic (supra), the Supreme Court held that the mandatory nature of the death sentence under Section 204 of the Penal Code was unconstitutional as it deprives the court of discretion in sentencing. This opened the way for the trial courts to exercise judicial discretion to impose any other appropriate sentence apart from death. However, death still remains the ultimate sentence in appropriate cases such as where the crime is premeditated and extremely heinous.

39. We are satisfied that by the appellants killing their own father in a brutal and premeditated manner, qualifies as an extreme case warranting the harshest possible sentence.

40. In light of the circumstances of this case, the nature of the crime, and the aggravating factors, we are satisfied that the death penalty was the appropriate sentence in the circumstances. As a parting shot, we must state that as much as blood ties may be unbreakable, yet in the shadow of betrayal, the law stands as the final arbiter, casting judgment where kinship once ruled, and transforming grief into the solemn language of justice. The appeal is accordingly dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 24TH 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