



**Wanyama v Republic (Criminal Appeal 53 of 2020)  
[2025] KECA 1894 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1894 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 53 OF 2020  
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA  
NOVEMBER 7, 2025**

**BETWEEN**

**ELIAS JUMA WANYAMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at  
Bungoma, (Aroni, J.) dated 9th November 2018 in HCCRC No. 02 of 2015)*

**JUDGMENT**

1. This is a first appeal against the judgment of the High Court of Kenya at Bungoma (Aroni J.), delivered on 9<sup>th</sup> November 2018 in Criminal Case No. 2 of 2015. The appellant, Elias Juma Wanyama, was therein charged, tried and convicted on the information of murder. Upon conviction he was subsequently sentenced to life imprisonment.
2. The facts that led to the information were that on the morning of 17<sup>th</sup> September 2014, the lifeless body of one, Sharon Machuma Wanyonyi, “the deceased”, was discovered in her house adjacent to Starehe Corner Bar, in Nalondo Market, Bungoma County where she used to work. The deceased was found lying in a pool of blood with bruises, cuts and stab wounds on the hands, mouth, head and neck. Following investigations, the appellant who was allegedly her boyfriend was arrested and subsequently charged with the information as already stated. The prosecution essentially relied on circumstantial evidence to link the appellant to the offence. This is how it played out.
3. Felistus Wanjala Mamalina (PW1), a close friend to the deceased, had gone to Nalondo Market and opted to visit the deceased at her house. Upon arrival, she found the back door open and, upon entry, discovered deceased’s body in a pool of blood. She immediately alerted deceased’s sister, Elizabeth Soita alias Elizabeth Nabangala (PW7) (Elizabeth; and the owner of Starehe Corner Bar, Godfrey Wafula Wayongo (PW3) Geoffrey. PW1 had been with the deceased and the appellant the previous evening



- in the deceased's house. She also confirmed that the appellant had been staying with the deceased for three days prior to her death.
4. According to Everlyne Nangunda (PW2), another sister of the deceased when she came to the scene, she saw knife stab wounds on deceased's body. She maintained that the deceased had previously expressed fear for her life, accusing the appellant of being too possessive, violent and threatening.
  5. Godfrey, the proprietor of Starehe Corner Bar, confirmed that the deceased was his employee and lived with the appellant in a house adjacent to the bar. On the morning of the incident, upon receiving a phone call from PW1, he went to the deceased's house and saw the deceased's body. He confirmed that the appellant and deceased had cohabited for about five months in the very house; and that the appellant occasionally assisted him with bar-related errands.
  6. Oscar Wanjala Wayongo (PW4), a brother to PW3, and a former employee in the bar as well, was informed of deceased's death while at home and came to the scene. He confirmed seeing blood at the scene and injuries on the deceased's body. He otherwise did not know the appellant.
  7. Jacob Wanyonyi Walukaya (PW5), the deceased's father, stated that the deceased was not married but had a boyfriend, the appellant. He identified the deceased's body for postmortem purposes by Dr. Philip Kosgei. However, the report was tendered in evidence by Dr. Haron Ombongi (PW6), as Dr. Philip Kosgei was away at Moi referral hospital pursuing further studies. The report indicated that the cause of death of the deceased was severe head injury secondary to blunt force trauma.
  8. Elizabeth, the deceased's sister, who also used to work in the same bar had interacted with the deceased and appellant on the day prior to the murder. She treated the appellant as a brother-in-law. According to her, the deceased and appellant frequently fought and that she suspected the appellant was responsible for the murder, as he was the last person she saw with the deceased.
  9. PC Richard Tuwei (PW8), the investigating officer, received a report of the murder and immediately visited the scene where he found the deceased's body in a pool of blood. He established that the appellant had stayed with the deceased for three days prior to her death and had disappeared immediately thereafter. He later caused his arrest five months later at Bungoma hospital Mortuary while he was picking the body of his grandfather for burial. The witness confirmed that the appellant had been seen leaving the bar with the deceased on the night of the incident. Being satisfied that the appellant was responsible for the murder of the deceased, he preferred the information against the appellant.
  10. Placed on his defence, the appellant denied the offence or any romantic liaisons with the deceased. He claimed to have last visited Starehe Corner Bar sometimes back and was served by the deceased. He was however arrested whilst collecting the body of his grandfather for burial. He maintained that he was at his place of work at Sirare on the day of the incident; and had no knowledge of deceased's death until his arrest.
  11. In its judgment, the trial court found the prosecution witnesses credible and concluded that the circumstantial evidence, including the appellant's cohabitation with the deceased, his disappearance so soon after the incident, and his failure to offer a plausible explanation, formed a complete chain pointing irresistibly to his guilt. The appellant was accordingly convicted and subsequently sentenced to life imprisonment as already stated.
  12. Aggrieved by the conviction and sentence, the appellant, has appealed the decision to this Court arguing that the trial court relied on weak and tenuous circumstantial evidence in convicting him; wrongly evaluated the evidence tendered; wrongly invoked the doctrine of last seen with; failed to resolve contradictions and inconsistencies in the prosecutions in his favour; and that the sentence



imposed was harsh and excessive. Penultimately, he prayed that the appeal be allowed, the conviction quashed and the sentence imposed set aside.

13. The appeal was prosecuted solely through written submissions.  
When it was called out for plenary hearing, the appellant appeared through Mr. Ogenga, learned counsel while the respondent was represented by Ms. Mwaniki learned Senior Principal Director of Public Prosecutions.
14. Counsel for the appellant submitted that the conviction was unsafe and ought to be set aside as circumstantial evidence, particularly the invocation of “last seen” doctrine, was tenuous and did not satisfy the legal threshold required in order to sustain a conviction. That there were material gaps regarding the time of death and whether the appellant was with the deceased at the actual moment of her demise. Counsel cited the case of *Ramreddy Rajeshkhanna Reddy & Another v. State of Andhra Pradesh*, JT 2006 (4) SC 16, where the Supreme Court of India held that even where the time gap between the accused being last seen with the deceased and the discovery of the body is minimal, courts must still seek corroboration before drawing an inference of guilt. Such corroboration was lacking in the circumstances of this case, counsel submitted.
15. On circumstantial evidence, counsel relied on the cases of *Ndiku v Republic* [2023] KECA 954, *Mwambegu v Republic* [2023] KECA 866, and *Marita v Republic* [2023] KECA 580, to assert the need for cogent and corroborated circumstantial evidence in order to sustain a conviction. According to counsel, this was lacking in the circumstances of this case. Counsel further submitted that the prosecution’s case was riddled with material inconsistencies and contradictions, particularly regarding the nature of the relationship between the appellant and the deceased, and the number of people living or working near the scene of crime. Counsel cited the case of *John Mutua Musyoki v Republic* [2017] eKLR, where this Court quashed a conviction due to material inconsistencies in the prosecution’s case. He also maintained that such contradictions should have been resolved in favour of the appellant.
16. On sentence, counsel argued that the trial court failed to consider the appellant’s mitigation as a first offender with a young family. He submitted that the sentence of life imprisonment was in the circumstances unduly harsh and disproportionate. He relied on the Supreme Court’s guidelines in *Muruatetu & Another v Republic; Katiba Institute & 4 Others (Amicus Curiae)* [2021] KESC 31, that emphasize the need for courts to consider mitigating factors such as age, remorse, potential for reform, and the offender’s personal circumstances when imposing sentence in murder cases. In conclusion, counsel urged this Court to allow the appeal as prayed.
17. In opposing the appeal, Ms. Mwaniki submitted that the conviction and sentence imposed by the trial court on the appellant were sound and justifiable in law. The conviction was based on overwhelming circumstantial evidence that met the legal threshold. Counsel argued that all the three elements for the offence of murder were proved. That the death of the deceased was undisputed and confirmed by multiple witnesses being PW1, PW2, PW3, PW4, and PW7, while the cause of death was medically established by PW6 as due to severe head injury due to blunt trauma. Counsel emphasized that the appellant was last seen with the deceased, had a history of domestic violence with her, and disappeared immediately after her death, only to be arrested five months later. This conduct, coupled with the evidence of PW1, PW2, and PW7, was sufficient to place the appellant at the scene of crime and infer guilt.
18. Regarding malice aforethought, counsel cited the case of *Joseph Kimani Njau v Republic* [2014] eKLR, where this Court held that intent to cause death or grievous harm, or knowledge of the risk of such harm, satisfies the requirement of malice aforethought. She submitted that the nature and



location of the injuries sustained by the deceased demonstrated intent to cause death or the very least grievous harm. Consequently, malice aforethought was established.

19. In support of circumstantial evidence, counsel cited the case of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, where this Court affirmed that circumstantial evidence can be as probative as direct evidence if it forms a complete chain pointing unerringly to the accused's guilt. That the evidence led by the prosecution pointed to the guilty of no other than the appellant in the commission of the offence.
20. On the doctrine of "last seen," counsel cited the Nigerian case of *Stephen Haruna v Attorney-General of the Federation* [2010] 1 iLAW/CA/A/86/C/2009, which held that where an accused is last seen with the deceased and fails to offer a satisfactory explanation after he is found dead, the court is justified in inferring his guilt. Counsel argued that the appellant failed to discharge this burden.
21. On alleged contradictions and inconsistencies in the prosecution's case, counsel relied on the case of *Joseph Maina Mwangi v Republic*, Criminal Appeal No. 73 of 1993, in which it was held that minor discrepancies in the prosecution evidence do not vitiate a conviction unless they are substantial and cause material prejudice to the accused. In this case, counsel maintained that the contradictions and inconsistencies, if any, were minor and did not undermine the prosecution's case.
22. Finally, on sentence, counsel cited the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR, where this Court held that sentencing is a discretionary function of the trial court, and appellate court's interference is only warranted where the sentence is manifestly excessive or based on wrong principles. Counsel submitted that the life sentence imposed was appropriate given the aggravating factors, including the domestic nature of the violence and the vulnerability of the deceased. In conclusion, counsel urged the Court to dismiss the appeal in its entirety.
23. This being a first appeal, the duty of this Court is to re-evaluate, re-analyze, and re-consider the evidence adduced before the trial court and draw its own conclusions, whilst bearing in mind that it did not have the benefit of seeing and hearing the witnesses who testified in the trial court firsthand and make due allowance. See *Okeno v Republic* [1972] EA 32.
24. Having carefully reviewed the record, the submissions by both parties, the authorities cited and the law, the following issues arise for determination, whether the trial court erred in: convicting the appellant based on circumstantial evidence; invoking the doctrine of "last seen"; holding that the prosecution proved the charge of murder against the appellant; and whether the sentence imposed was lawful and proportionate in the circumstances.
25. On the first issue, we appreciate that before circumstantial evidence can form the basis of a conviction, it must satisfy several perimeters which are designed to ensure that it unerringly points to the accused, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990, this Court set out those perimeters 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.”

26. In addition, the prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt. In the case of *Dhalay Singh v Republic*, Cr App. No. 10 of 1997, this Court reiterated this principle as follows:

“For our part, we think that if there be other co- existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”

27. In this case, the evidence on record shows that the appellant was the last person seen with the deceased by some witnesses either in her house or as they left the bar on the fateful night, he had a history of domestic violence against the deceased besides being possessive, and disappeared from the scene immediately after the incident not to be seen again until after five or so months later. These pieces of evidence taken cumulatively, form a cogent chain pointing to guilt of the appellant.

28. In the case of *Daniel Munyui Chiragu & another -vs- Republic* [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 V. The State* (2007) LPELR- CA/IL/42/2006. The court, while considering the ‘last seen alive with’ doctrine held: ‘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.’”

29. In yet another Nigerian case, the same doctrine was reiterated in *Stephen Haruna V. The Attorney-General of The Federation* (supra), 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 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.”

30. In the case at hand the appellant was the last person seen with the deceased leaving the bar. In the morning of the following day, she was found dead. The appellant then disappeared from the scene of crime for close to five months before he is arrested. When arrested, he offered no explanation as to what happened to the deceased who was found dead in her house that she had last shared with the appellant. Instead, he offered a spurious alibi defence that could not hold, given that the evidence overwhelmingly placed him at the scene of crime. Given all the foregoing, we are satisfied that the doctrine of “last seen” was properly invoked.



31. We now turn to consider whether the prosecution proved the information of murder against the appellant beyond reasonable doubt. In such an information, the prosecution must prove:
- i. the death of the deceased and its cause;
  - ii. that the death was caused by the accused either by an act of omission or commission; and
  - iii. that the accused acted with malice aforethought in executing the murder.
- See Republic v Kibet [2025] KEHC 4371 (KLR).
32. The death of the deceased and its cause was never in dispute.
- Indeed, the death was confirmed by multiple witnesses, being PW1 all through to PW8 save for PW7. The postmortem report produced by PW6, attributed the cause of death to blunt force trauma. The perpetrator of the crime as already stated from the circumstantial evidence was none other than the appellant.
33. The nature and location of the injuries were on the head, neck, and mouth which are in sync with malice aforethought, as defined in Section 206 of the Penal Code. In the case of Joseph Kimani Njau v Republic [2014] eKLR, the Court held that malice aforethought can be inferred from the severity and location of injuries.
34. The prosecution's failure to call certain witnesses or produce forensic exhibits did not negate the strength of the prosecution evidence presented. As held in the case of Julius Kalewa Mutunga v Republic, Criminal Appeal No. 31 of 2005, the prosecution is not bound to call a multiplicity of witnesses if the evidence on record is sufficient. Given the foregoing we are satisfied just like the trial court that the prosecution discharged its obligation and proved its case against the appellant beyond reasonable doubt.
35. Lastly, on sentence, we opine that sentencing is a discretionary function of the trial court, and an appellate court of whatever cadre's interference is only warranted where the sentence is illegal, manifestly excessive or based on wrong principles. In the case of Bernard Kimani Gacheru v Republic [2002] eKLR, this Court held:
- “It is now settled law that sentencing is a matter for the discretion of the trial court. The appellate court will not normally interfere with the exercise of discretion unless it is shown that the court acted on wrong principles or overlooked material factors.”
36. The appellant was a first offender and pleaded for leniency, citing his young family. However, the trial court considered the gravity of the offence, the vulnerability of the deceased, and the prevalence of domestic violence in this country in imposing the sentence. The Supreme Court in the case of Muruatetu & Another v Republic; Katiba Institute & 4 Others [2021] KESC 31, clarified that while mitigation must be considered in imposing appropriate sentence, nonetheless life imprisonment still remains lawful sentence under Section 204 of the Penal Code. Given the foregoing, we are satisfied that the trial court exercised its discretion properly and imposed a sentence that was lawful and proportionate.
37. Having re-evaluated the evidence and considered the applicable law as required of us, we are satisfied that the trial court properly assessed the evidence, applied the correct legal principles, and arrived at a sound decision on both conviction and sentence. Accordingly, the appeal is devoid of merit and is hereby dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2025.**



**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**H.A. OMONDI**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

