IN THE COURT OF APPEAL
AT KISUMU

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

CRIMINAL APPEAL NO. E027 OF

2021 BETWEEN

ELI ELISA ENDACHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of High Court of Kenya at Bungoma (Aroni, J.,) dated 2nd November, 2017

in

HCCRC No. 24 of 2010)
****

JUDGMENT OF THE COURT

[1] This is a first appeal by **Eli Elisa Endachi**, **"the appellant"**, who was arrested, tried, convicted and sentenced to death on the information charging him with murder contrary to **Section 203** as read with **Section**

204 of the Penal Code, by the High Court Kenya at Bungoma. The information presented by the respondent was as follows: *"ELI ELISA ENDACHI: On the 7th of April, 2010 at Kakurkit area of Kakurkit Sub-location within Teso North District of the Western Province,*

unlawfully

killed WILLIS WEPONDI, **‘the deceased’***”*. As expected, the appellant returned a plea of not guilty and his trial soon thereafter ensued.

[2] The prosecution’s case was founded on circumstantial evidence provided by five witnesses whose testimonies were sequentially presented and which collectively implicated the appellant in the unlawful killing of the deceased, a minor then aged seven years. This is how it played out!

[3] On 4th April 2010; Isaac Wekesa, (PW1) the father of the deceased was operating his hotel business at Akiramete shopping centre. The deceased was outside the business premises learning how to ride a bicycle. The appellant, a known customer of PW1, after having a meal thereat offered to train the deceased further. Both headed towards Lwakhakha river and out of sight of PW1. However, the deceased never returned. PW1 unsuccessfully mounted a search for the deceased. That night though, whilst asleep, the appellant came by shouting, that he had custody of the deceased. With the assistance of members of the public, they arrested the appellant and handed him to the Assistant chief of the area. He however later learned that the appellant had escaped from the custody of the Assistant Chief, PW2. In the meantime, on 7th April 2010, the deceased’s body was discovered floating in the Lwakhakha river,

whilst tied to a tree. It was retrieved therefrom and taken to Bungoma hospital Mortuary, where a postmortem was conducted before the body was released to PW1 for burial. Later he was contacted by PW2 to go to Amukura AP post to identify the appellant who had been arrested together with his bicycle. He did so.

[4] Boniface Wafula, (PW2) the area Assistant Chief, testified that he arrested the appellant at Amukura trading centre after a tip-off by a member of the public to whom he had confessed to the killing of the deceased. He had been accosted whilst riding PW1's bicycle. Upon arresting him, he handed him together with the bicycle over to Amukura police post. He then alerted PW1 who came and identified the appellant as the person who left with the deceased on the material day the deceased was disappeared. He also identified his bicycle that was found in possession of the appellant.

[5] Isaiah Makila Wamukota (PW3), a trader in the area, on the material day came across the deceased and the appellant together as the appellant was teaching the deceased how to ride a bicycle. He knew both very well. The following morning, upon learning of the deceased’s disappearance, he joined the search party and later also identified the

appellant at Amukura AP post as the person he last saw with the deceased.

[6] Sgt. Dickson Kimei, (PW4) then stationed at Moding police Patrol Base, confirmed receiving the initial report of the deceased's disappearance and later participated in the recovery of the body from the Ugandan side of the river Lwakhakha. Dr. Raymond Damba, (PW5) produced the postmortem report prepared by Dr. Olunga. The report indicated that the cause of death of the deceased was pulmonary arrest due to drowning.

[7] Put on his defence, the appellant, gave a sworn statement denying any involvement in the offence. He claimed that he was arrested while selling chicken at Amukura market and had no knowledge of the deceased or his father. He denied making any confession and thereby refuted the prosecution's narrative.

[8] The trial court in its judgment found that the prosecution had proved beyond reasonable doubt that the appellant unlawfully caused the death of the deceased, by invoking circumstantial evidence and the doctrine of recent possession. That the appellant was the last person seen with the deceased, failed to offer any explanation for his disappearance, and was later found in possession of the bicycle belonging to PW1 that the

deceased had been learning to ride. That Witness testimonies consistently placed the appellant with the deceased together shortly before his death, and the postmortem confirmed drowning as the cause of death. The court held that this chain of events pointed unerringly to the appellant's culpability and rejected his defence as implausible. It accordingly convicted him of the information and sentenced him to death as already stated.

[9] Aggrieved by the conviction and sentence, the appellant lodged this appeal on grounds that the trial court erred in law and fact by: convicting him on insufficient evidence; failing to adequately consider and evaluate his defence; relying on circumstantial evidence that did not meet the legal threshold; improperly shifting the burden of proof to him; relying on contradictory, uncorroborated, or unreliable prosecution evidence; and imposing a sentence that was manifestly harsh, excessive, and unwarranted in the circumstances.

[10] When the appeal was called out for plenary hearing, **Ms. Lumallas**, learned counsel appeared for the appellant whereas **Ms. Mwaniki**, learned Assistant Director of Public Prosecutions appeared for the respondent. Both parties opted to rely solely on their respective written submissions to ventilate the appeal.

[11] Ms. Lumallas submitted that the trial court imposed the mandatory death sentence on the appellant without affording him an opportunity to mitigate. It also failed to consider the appellant's personal circumstances namely, his youthfulness at the time of arrest (aged 20), his status as a first-time offender, and his expression of remorse before sentencing.

[12] Counsel relied on the Supreme Court decision in **Karioko Muruatetu & Another v Republic [2017] eKLR**, where it was held that the mandatory nature of death sentence under **Section 204** of the Penal Code was unconstitutional and that courts must consider mitigating factors before imposing sentence. Counsel further cited **William Okungu Kittiny v Republic [2018] eKLR**, where this Court affirmed that any sentence imposed without regard to mitigation was fatal omission as it undermines the fairness of the trial.

[13] Counsel argued that the trial court wrongly relied on circumstantial evidence which did not meet the legal threshold as set out in **Abanga alias Onyango v Republic Cr. App No. 32 of 1990** and **Mutuli Tulo v Republic Cr. App No. 30 of 2013**, which require that such evidence must form a complete and unbroken chain pointing

exclusively and irresistibly to the appellant as the perpetrator of the crime. She further

relied on **SUARE v Republic [2003] KLR 364** to assert that mere suspicion, however strong, cannot be a substitute for proof in criminal case of beyond reasonable doubt. Counsel concluded by urging the Court to allow the appeal, quash the conviction, and set aside the sentence or in the alternative, substitute it with a lesser custodial sentence in line with the jurisprudence emanating from **Karioko Muruatetu & Another v Republic (supra)**.

[14] Ms. Mwaniki in response submitted that the prosecution had proved all the essential elements of murder, that is, the occurrence of death and its cause; it was caused by the appellant; and that in doing so, he was actuated by malice aforethought. Counsel relied on **Anthony Ndegwa Ngari v R [2014] eKLR,** in support of the propositions. That the death of the deceased and the cause thereof was confirmed by PW5, Dr. Raymond Damba, who produced a postmortem of the deceased.

[15] On the question of culpability, counsel argued that although no witness directly saw the appellant fatally harm the deceased, the circumstantial evidence was overwhelming and met the legal threshold. She invoked the doctrine of "last seen," asserting that the appellant was the last person seen with the deceased alive and failed to offer any explanation for his disappearance and eventual death.

Counsel argued

that under **Section 111** of the Evidence Act, the appellant bore the burden of explaining what happened to the deceased, and in the absence of such explanation, **Section 119** permitted the court to draw adverse inference regarding his culpability.

[16] To establish malice aforethought, counsel referred to **Section 206** of the Penal Code which gives incidents of malice aforethought and the case of **Rex v Tabere s/o Ochen [1945] 12 EACA 63,** which emphasized that in evaluating malice aforethought, the nature of injuries, the weapon used, and the conduct of the accused before, during, and after the incident comes in handy. Counsel submitted that the deceased was found floating in the river but tied to a tree, suggesting deliberate action to drown him and eventually cause his death which is a perfect recipe for malice aforethought.

[17] In conclusion, counsel urged the court to dismiss the appeal in its entirety.

[18] This Court, sitting as the first appellate court, has the bounded duty to re-evaluate, re-analyze, and re-consider the evidence adduced before the trial court and draw its own conclusions, bearing in mind that it did not have the advantage of seeing and hearing the witnesses, as indeed

the trial court did, and as such make due allowance. See **Okeno v Republic [1972] EA 32**.

[19] In our view these are the issues for determination in this appeal, whether: the prosecution proved the information of murder against the appellant; the trial court failed to adequately consider and evaluate the appellant's defence; the circumstantial evidence relied upon met the legal threshold; the trial court shifted the burden of proof to the appellant; the trial court relied on contradictory or unreliable prosecution evidence; and finally, whether the death sentence imposed on the appellant was unconstitutional.

[20] On the first issue, **Section 203** of the Penal Code defines murder as the unlawful killing of a person by another with malice aforethought. To found a conviction therefore, the prosecution must prove the fact of death and its cause, that the death was caused by the accused's unlawful act of commission or omission, and that the accused acted with malice aforethought in that regard. The death was established through the evidence of PW1, PW2, PW3 and PW4 as they came across the body of the deceased either as it was being retrieved from the river or at the mortuary before, during and after the postmortem. In any event the death was not disputed by the

appellant. The postmortem report

produced by PW5, confirmed the cause of death which was as a result of cardio-pulmonary arrest due to drowning.

[21] The appellant was the last person seen alive with the deceased as they rode a bicycle towards river Lwakhakha, and whose body was later found floating in the same river tied to a tree. The appellant was nowhere to be found. While no direct evidence linked the appellant to the act of killing of the deceased, the trial court relied on circumstantial evidence and in particular "the last seen with doctrine" which is a piece of circumstantial evidence to convict the appellant.

[22] Regarding this doctrine, we are persuaded by the position adopted in the Nigerian case of **Moses Jua v The State [2007] LPELR-CA/IL/42/2006,** that:

> **"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."**

[23] Yet in another Nigerian Supreme case, of **Stephen Haruna**

the doctrine was expressed 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."

[24] Going to India in ***Anjan Kumar Sarma v State of Assam Criminal Appeal No. 560 of 2014*** the Supreme Court of India delivered itself on the issue thus:

"The circumstances of last seen cannot by itself form the basis of holding the accused guilty of the offence…there must be something more establishing connectivity between the accused and the crime...It is clear from the above that in a case where the other links have been satisfactorily made out and circumstances point out to the guilt of the accused, the circumstances of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstances of last seen together and absence of satisfactory explanation cannot be made the basis of conviction."

[25] Locally the doctrine has been applied in the cases of **Kimani v**

Republic (Criminal Appeal 41 of 2022) [2023] KECA 1390 (KLR) and

Moingo & Another v Republic [2022]. In the first case this Court held that;

> ***"The doctrine of 'last seen alive' is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before their death was responsible for his or her death and the accused is expected to provide an explanation as to what happened."***

And in the latter case the Court reiterated that:

> ***"The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine 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 an inference that the accused killed the deceased)."***

[26] Again this doctrine has been codified into law courtesy of **Section 111(1)** of the ***Evidence Act*** which provides that:

> ***"(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence***

with which he is charged and the burden of proving any fact, especially within the knowledge of such person is upon him: Provided that

such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

[27] Therefore in order for the "last seen with" doctrine to be invoked, the evidence relied upon must itself be cogent and credible. In this case as already stated, the appellant was last seen by PW1 and PW3 riding with the deceased towards Lwakhakha river. The appellant and deceased were never to be seen again until the deceased's body was discovered in river Lwakhakha floating whilst tied to a tree. On the night after the deceased disappeared with the appellant, the appellant came calling to the compound of PW1 shouting that he had custody of the deceased. He was arrested and handed over to PW2 and whilst in custody, escaped. He was subsequently arrested shortly thereafter by members of the public on suspicion of having killed the deceased whilst riding the very bicycle belonging to PW1.

[28] The appellant was duty-bound to offer an explanation as to how the

deceased met his death. He did not, instead he offered a spurious alibi defence and even denied knowing PW1 and or the deceased. In the

premises, we are satisfied that the trial court properly invoked the doctrine of last seen with, in convicting the appellant. In **Mutuli Tulo v Republic (supra),** this Court held that:

> ***"Circumstantial evidence is as good as any other evidence if it is properly evaluated and can prove a case with the accuracy of mathematics."***

[29] On the second issue, the appellant contended that the trial court failed to consider his alibi defence. However, the evidence of PW1 and PW3 placed him at the scene of crime. Though the appellant denied knowing the deceased or his father, one wonders then why would these witnesses of all the people place him at the scene of crime. Further why was he found in possession of PW1's bicycle shortly after the discovery of the deceased's body in the river and when he had left with the deceased with the said bicycle? In **David Mwiraria v Republic [2017] eKLR,** this Court emphasized that:

> ***"The trial court must consider the defence case and weigh it against the prosecution's evidence before arriving at a verdict."***

[30] We are satisfied that the trial court did consider the Alibi defence but found it implausible and unsupported by any evidence. The appellant's failure to explain his last known interaction with the deceased was instructive.

[31] On the third issue, the legal threshold for circumstantial evidence is well known. In **Abanga alias Onyango v Republic (supra)**, this Court held:

> ***"Circumstantial evidence must satisfy three tests: the circumstances must be firmly established, must point unerringly to the accused, and must form a complete chain excluding any other hypothesis but guilt."***

[32] The trial court found that the appellant was last seen with the deceased riding towards Lwakhakha river, disappeared thereafter, later came to PW1's home proclaiming he had custody of the deceased, escaped from lawful custody of the area Assistant Chief and the deceased's body is soon thereafter found floating in the very river whilst tied on a tree and later the appellant is arrested with the bicycle the deceased had been riding. In our view, these pieces of circumstantial evidence formed a complete and unbroken chain pointing irresistibly to the appellant's culpability.

[33] On the fourth issue, the appellant argued that the trial court improperly shifted the burden of proof to him. **Section 111** of the Evidence Act provides that when a person is accused of an offence and the facts are especially within his knowledge, the burden of explaining

those facts lies on him. In **Dorcas Jebet Keter & Another v Republic Cr. App No. 10 of 2012,** this Court held:

> ***"The burden of showing what happened to the deceased who was last seen with the accused lies on the accused, though it does not amount to proof beyond reasonable doubt."***

[34] The trial court correctly invoked this principle. The appellant's failure to explain his last interaction with the deceased justified the inference drawn under **Section 119** of the Evidence Act. This therefore does not amount to the trial court shifting the burden of proof from the prosecution to the appellant. It is a legal prerequisite.

[35] On the fifth issue, the appellant alleged improper reliance on contradictory and unreliable evidence by the trial court. The law is settled regarding how to treat inconsistent and contradictory evidence. It is only those that go to the root of the prosecution case that should count. If they are minor, they can be ignored. After all, rarely will two or more people observe and appreciate something in the same way or manner. We have reviewed the testimonies of PW1 to PW5 and find them consistent and corroborative. The so called differences, if at all, were minor and negligible. See **Nzaka Watu v Republic [2016] eKLR**.

[36] On the sixth and last issue, the appellant challenged the

constitutionality of the mandatory death sentence imposed on him. In

Francis Karioko Muruatetu & Another v Republic (supra), the Supreme Court of Kenya held:

> **"The mandatory nature of the death sentence under section 204 of the Penal Code is unconstitutional. Courts must consider mitigating circumstances before passing sentence."**

[37] The trial court acknowledged the appellant's youthfulness and remorse but concluded that the only available sentence was death. We note, however, that as at the time of sentencing the appellant which was on 2nd November 2017, the prevailing legal position then was that under **Section 204** of the Penal Code the only available sentence upon conviction was death. We are aware that the Supreme Court decision was rendered subsequently on 14th December 2017.

[38] Accordingly, we find that the trial court did not err in law in imposing the death sentence, as it acted in accordance with the law as it stood at the time. However, in light of the **Muruatetu** jurisprudence now binding on this Court, we are obligated to re-evaluate the sentence and consider mitigation afresh. We are satisfied that whereas the conviction was sound, the mandatory nature of the sentence imposed on the appellant was unconstitutional harsh, and excessive.

[39] In conclusion, whereas we uphold the conviction of the appellant

for the offence; we nonetheless set aside the sentence of death imposed

and substitute therefor with a term of imprisonment of **thirty (30) years** from the date of his arrangement in court on 7th June 2010 in line with the provisions of **Section 333(2)** of the Criminal Procedure Code. From the record, the appellant was not released on bail throughout the trial. **Dated and delivered at Kisumu this 21st day of November, 2025.**

ASIKE-MAKHANDIA
.....
..... JUDGE OF APPEAL

H.A. OMONDI
.....
..... JUDGE OF APPEAL

L. KIMARU
.....
..... JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR