**REPUBLIC OF KENYA IN THE COURT OF APPEAL**

**AT MALINDI**

**[CORAM: MURGOR, NYAMWEYA & OCHIENG' JJ.A]**

**CRIMINAL APPEAL NO E090 OF 2023 BETWEEN**

**JOHN KADENGE KOMBE**

**.....**

**APPELLANT**

**AND**

**REPUBLIC…**

**.....**

**RESPONDENT**

***(An appeal from the Judgment of the High Court of Kenya at Malindi (R. Nyakundi J.) delivered on 16th December 2020 in Criminal Case No. 22 of 2018)***

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*** JUDGMENT OF THE COURT**

1. John Kadenge Kombe, the appellant herein, was convicted of murder and sentenced to 35 years imprisonment by the High Court of Kenya at Malindi (***R. Nyakundi J.***), in a judgment delivered on 16th December 2020 in Criminal Case No. 22 of 2018 . The appellant, who was the 1st accused person, had been accused of the murder together with two other co- accused persons who were subsequently acquitted of the offence. The particulars of the offence were that on 16th November 2018 at Wesa Sub- Location the appellant together with the

other two co-accused persons murdered Johnson Kivuno alias Sammy (hereinafter “the deceased”). The evidence relied upon by the trial Judge was the testimony of five witnesses called by the prosecution witnesses. In summary, Charo Chome (PW1),

who lived with the deceased, saw the deceased leave with the appellant on 16th November 2018, and that was the last time the deceased was seen alive.

2. The gist of PW1's evidence was that when the deceased did not return home, the deceased's relatives started making inquiries as regards the deceased's whereabouts on 17th November 2018, and they confronted the appellant who informed them that the deceased had given him a plastic container, a knife and a radio to hand over to one Kajembe when they parted ways on 16th November 2018. The deceased's relatives began to search for the deceased and reported the matter at the police station, whereupon the appellant was arrested and held in custody. PW1 stated that on 18th November 2018 they received information that a body had been found at sea and confirmed that it was the deceased. These facts were reiterated by the deceased's brother, Macdonald Kithi who testified as PW3, and who in addition testified that he attended the post mortem examination conducted on the deceased.

3. Other evidence linking the appellant to the deceased was adduced by Issa Mwanongo Mwajima alias Kajiwe (PW4), who testified that on 16th November 2018 the appellant came to his house at 10.00 am and left a plastic container, radio and knife in his custody, and came for them the next day at 8.00 am. George Gambo (PW2), who stated that on the next day, being 17th November 2018, he met the appellant at 2.00pm,

who gave him a mobile phone and memory card as security for a friendly loan of

Kshs.600/=, which PW2 gave him. PW2 was later informed that the phone

the appellant had given to him belonged to someone else, and he reported to the village elder and called the deceased's brother, one Wazi. PW2 went to the police station and handed over the mobile phone that had been given to him by the appellant.

4. PC. Dominic Omondi (PW5), the investigating officer, testified that he recorded statements from the deceased's brothers and the witnesses, and arrested 3 suspects, including the appellant who was last seen together with the deceased. He testified that he also received a white plastic container, wine tapping knife, and a techno phone of IME 356480, 95155160, 356498095155178, which one of the witnesses said he had bought from the appellant. PW 5 then wrote a letter to Safaricom to confirm whether the same was at one time being used by the deceased, who confirmed that the phone was registered to the deceased. He produced the plastic container, knife, mobile phone, radio that were recovered as exhibits, as well as the post-mortem report. He stated that the deceased died of asphyxia, having been strangled.

5. The three accused persons gave unsworn statements when put on their defence. The appellant testified as DW1 and stated that he knew the deceased and narrated that on 16th November 2018 he went to the home of the deceased and after staying with him, the deceased told him he was going to tap wine. He stated the deceased had a knife, radio, container for wine and mobile phone, and asked him to sell

his mobile phone and to take

the container for wine, knife and radio to one Kajiwe which he did. He

went to Kajiwe's house the next morning to inquire whether the deceased went for his properties, and when Kajiwe told him that the deceased was yet to come he took the items, and together with Kazungu Charo and Onesmus Mzungu, proceeded with them to the deceased's home. When he arrived, the people who were there inquired about the whereabouts of the deceased, and he explained to them how he came to possess the deceased items and left the items at his home and went back to the ocean. That when he finished his work at 8.00pm.he came home and found a crowd of people wanting to know the whereabouts of the deceased, and he was then taken to Kilifi Police station. On 18/11/2018, a report came in that the deceased body was recovered from the ocean. He denied knowing who killed the deceased.

6. Onesmus Peter Musuko the 2nd accused person testified as DW2 and Kazungu John Charo the 3rd accused person as DW3, and they both denied being involved in the death of the deceased or having met the deceased with the appellant. They stated that they were with the appellant when he collected the knife, wine container and radio belonging to the deceased from Kajiwe. They denied seeing the mobile phone belonging to the deceased.

*7.* The trial Judge, after analysing the evidence, observed in his judgment that prosecution case was wholly dependent on circumstantial evidence that the accused persons on 16th November 2018 jointly murdered the deceased,

and that the unexplained recent possession of stolen goods belonging to

the deceased warranted an inference of guilt of committing a felony of robbery and at the time fatally injured the deceased. The trial Judge was therefore satisfied beyond reasonable doubt on all the evidence taken together, that the appellant, who was the 1st accused person, had been placed at the scene of the crime which occurred on 16th November 2018, and proved the elements of murder beyond reasonable doubt. However, that the identification evidence never went far enough in establishing a link, a connecting factor between the 2nd and 3rd accused persons and the offence and there was lack of sufficient evidence for the state to have charged and prosecuted the 2nd and 3rd accused persons jointly with the 1st accused. The trial Judge accordingly convicted the appellant for the offence whilst acquitting the 2nd and 3rd accused persons.

8. The appellant is aggrieved by the findings by the trial Court, and has proffered this appeal based on four (4) grounds of appeal which are set out in his Memorandum of Appeal as follows:

1) *The Learned Trial Judge erred grossly in law and facts by failing to appreciate the contradictions indiscrepancies (sic) and inconsistencies in prosecution case.*

2) *The Learned Trial Judge erred in law and fact by failing to consider that the burden of proof had not been proven beyond any reasonable doubt (sic).*

3) *The Learned Trial Judge erred in law and fact by failing*

*to consider*
*that Men's Rea and Actus Reus were never established.*

4) *The Learned Trial Judge erred in both law and fact by failing to appreciate that the defences of the Appellants were not conclusively considered.*

9. We heard the appeal on this Court's virtual platform on 10th March 2025 and the appellant ***John Kadenge Kombe*** was present appearing virtually from Malindi Prison, learned counsel ***Ms. Sharon Maiga,*** appeared for the appellant, while the learned Assistant Director of Public Prosecutions, ***Ms. Mutua,*** appeared for the respondent. The two learned counsel relied on their respective submissions dated 28th February 2025 and 4th March 2025.

10. As this is a first appeal, the duties of this Court are set out in the case of **Okeno vs. Republic [1972] EA 32** as follows:

***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."***

11. The appellant's counsel faulted the learned trial Judge for making a finding based on circumstantial evidence without

the prosecution meeting the test of beyond reasonable doubt that the appellant committed the offence. Additionally, the element of *mens rea* and malice aforethought had not

been demonstrated against the appellant, and the only reason he was suspected was because he had four items belonging to the deceased in his possession. However, that the evidence did corroborate that the appellant did not deny that the items in his possession belonged to the deceased however, his actions were in accordance to the deceased's instructions given to him on Friday 16th November 2018 and there was no evidence that the appellant committed the unlawful act leading to the death of the deceased; that the prosecution's case had a vacuum since the medical examiner who conducted the post mortem was not called to explain the condition of the deceased body and the time of death.

12. The appellant submitted that it was clear that the element of recent possession automatically failed after demonstrating that the referenced items were not stolen and the appellant did not have exclusive possession of them. Additionally, the prosecution did not prove the test set out in the case of **Isaac Nganga Kahiga *alias* Peter Nganga Kahiga vs Republic CR. Appeal no 272 of 2005** thus the trial Judge erred in in law and fact by basing the appellant's convictions on the principle of recent possession of the deceased's items despite the Appellant giving a reasonable explanation. Further, in examining the concept of circumstantial evidence, it was trite law that before a court can rely on circumstantial evidence of the inference that the accused

was guilty, it must also satisfy itself that there was no other coexisting circumstances which could weaken or destroy the inference of guilt. The appellant cited various decisions in support of this submissions

including **Sawe vs Republic (2003) KLR 364** ,**Teper vs Republic (1952) All ER 480, Musoke vs Republic (1958) EA 715**)and **Emily Chepkirui vs Republic [2009] KECA 372 (KLR)** .

13. The appellant submitted that the chain of evidence when taken together, was inconsistent with his guilt, and made reference to sections 203 and 206 of the Penal Code, to submit that that for the offence of murder to be proved, malice aforethought must exist as one of the ingredients . However that the prosecution failed to call the medical examiner to testify on the time of death and the condition of the deceased body to give insight as to what caused the death of the deceased, and failed to prove malice aforethought and/ or establish a link of the death to the appellant.

14. Counsel for the respondent on her part, while citing the decisions in **Anthony Ndegwa Ngari vs Republic [2014] eKLR** and **Barisa vs Republic ( [2024] KECA 219 (KLR)** on the elements required to be proved in the offence of murder, submitted that the respondent presented cogent, consistent and corroborated evidence to support the charge against the appellant and that the appellant's defence, did not dislodge the watertight evidence by the prosecution so as to create reasonable doubt.

15. We have considered the submissions made by the appellant

and respondent, and it is evident that the main issue is whether the circumstantial evidence adduced by the prosecution met the necessary threshold to sustain the conviction of the appellant for the offence of

murder. The elements of the offence of murder were set out in **Anthony Ndegwa Ngari vs Republic (supra)** as the death of the deceased and its cause; the accused committed the unlawful act which caused the death of the deceased and the accused had malice aforethought. In addition, the threshold for sustaining a conviction in a criminal trial on the basis of circumstantial evidence has been laid down in several authorities of this court. In **Abanga alias Onyango vs Republic, CR. App No. 32 of 1990 (UR)** it was held 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."***

16. Likewise, this Court held as follows in **Sawe vs. Republic [2003] KLR 364**:

> ***"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of***

***circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."***

17. The fact of the deceased's death is not contested. The evidence established that the deceased was found dead in the ocean on 18th November 2018 and PW3 attended his post-mortem examination and identified him. What is in issue in this appeal is whether the prosecution proved the cause of death, and whether the appellant caused the death with malice aforethought. On the cause of death, the appellant contests the production of the post-mortem report by PW5 and states that the medical officer who conducted the post-mortem examination of the deceased ought to have produced the post-mortem report to explain the time and cause of death. Section 77 of the Evidence Act permits the production of documents in the nature of by persons other than their maker where the circumstances set out therein are fulfilled as follows:

> "***77. Reports by Government analysts and geologists***
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> ***1. In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
>
> ***2. The Court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***
>
> ***3. When any report is so used the Court may,***

***if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof***.

18. The appellant did not object to production of the post-mortem report or seek to have the medical officer who prepared the report summoned to explain any details as regards the cause of death. In addition, the said post-mortem report clearly indicated the cause of death to be asphyxia.

**19.** The prosecution's evidence pointed to two circumstances that linked the appellant to the deceased's death. The first was that the appellant was the last person to be seen with the deceased on 16th November 2018, therefore inviting the application of "*the last seen with*" doctrine. This Court (*Makhandia, Mbogholi-Msagha & Omondi, JJA*) explained the application of the doctrine of "last seen with" as follows in **Chiragu & Another vs Republic (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR):**

> ***"24…..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."***

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

***"The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the 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."***

***Quoting from another jurisdiction, to be specific India, the courts there have developed the doctrine further. In the case of Ramreddy Rajeshkhanna Reddy & another V. State of Andhra Pradesh, JT 2006***
***(4) SC 16 for instance the court held:***

***"That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration."***

20. The appellant admits to have been with the deceased on 16th December 2018, and his defence and his explanation is that when they parted ways, the deceased was alive and well. The appellant also states that the prosecution did not establish the time the deceased died to cogently link him with the death. The relevant timelines and events established by the prosecution in its evidence in this respect

are that the deceased was last seen with the appellant by PW1 on 16th December 2018 and he did not return home. On 16th December 2018, PW4 on his part also testified as regards the appellant's activities as follows:

***"On 16th November, 2018, I was at my house, the 1st accused came to my house at 10.00am. He left some items in my custody. He was leaving for the sea. I directed him where to store the items".***

21. PW4 also stated that he did not see the deceased with the appellant, and that the appellant again went to his house the following day, 17th December 2018 at 8.00 am, and collected the deceased's items which were a radio, container for palm wine and knife, and which the appellant explained he then took to the deceased's home. However, the appellant did not surrender the deceased's mobile phone which was also established to have been in his possession by PW2 and PW5, and which he sold to PW2 on the same day at 2.00pm.

22. Therefore, a second set of circumstances were established by the prosecution linking the appellant to the deceased, these being possession of items belonging to the deceased on 16th and 17th December 2018. It is on the basis of this evidence that the learned trial Judge invoked the doctrine of recent possession. We however need to clarify that the doctrine of recent possession only applies to the offence of robbery, and in the present appeal, the evidence of possession of the deceased items served the purpose of corroborating "*the last seen with*" doctrine, and in particular the time gap between the disappearance of the deceased on 16th December 2018 and the recovery of his body on 18th December 2018.

23. In effect, as at 16th December 2018, the deceased was last seen with the appellant and then disappeared, the appellant was found with the

deceased's items and tools of his trade on the same day being his knife, palm wine container and radio; he collected the said items from PW4 and returned them to the deceased's family on the morning of 17th December 2018 but without the deceased's mobile phone; and he then sold the phone to PW2 on the afternoon of 17th December 2018. The deceased was subsequently found dead floating in the ocean on the morning of 18th December 2018. It is notable in this respect that the appellant had indicated to PW4 that he was going to the sea on 16th December 2018 after giving him the deceased's items.

24. The appellant explained that he left the items with PW4 on the deceased's instructions, and that the deceased also told him to sell his mobile phone and requested for money to meet funeral costs. The deceased's relatives who testified did not indicate that there was any such funeral, and on the contrary expressed concern at the deceased's disappearance. There are therefore a number of circumstances surrounding the disappearance of the deceased which the appellant does not explain satisfactorily, the first being where and how they parted ways with the deceased; secondly why he was inquiring if the deceased had collected his items the next morning and why he then took away the said items; and why when he went to the deceased's home he did not surrender the deceased's mobile phone, especially since he knew that the deceased's

family was inquiring about his whereabouts; and instead why he proceeded to sell the mobile phone to

PW2. In our view, these actions pointed to and infer knowledge on the part of the appellant that the deceased would not be returning.

25. As regards time of death, it was established by the prosecution that the time of death was between 16th December and 18th December 2018, and having been last seen with the deceased, the appellant has not discounted his involvement in the deceased's disappearance during this period, or of his death. In our view, the circumstantial evidence adduced sufficiently pointed to the appellant's culpability in the death of the deceased beyond reasonable doubt, and the appellant's defence did not raise any doubts regarding his involvement or culpability. On the contrary his actions completed the chain of evidence that pointed to the murder of the deceased by the appellant. We also agree with the learned Judge of the High Court that the act of strangulation, which is the main cause of asphyxia, and of throwing a body to the ocean in itself point to an intention to cause death or grievous harm to a person with malice aforethought.

26. On the sentence of 35 years' imprisonment, the offence of murder attracts the death penalty under section 204 of the Penal Code, and we note that the learned trial Judge considered the principles of **Francis Muruatetu vs Republic (2017) eKLR** which require Courts to also consider the mitigation of an accused person when imposing

the said sentence. Given the circumstances of the deceased's death, we find the sentence of 35 years imprisonment to be both lawful and reasonable.

27. Consequently, we find that the appellant's appeal against the both the conviction for murder and sentence of 35 years imprisonment not to be merited and it is hereby dismissed in its entirety. Lastly, this judgment is delivered and signed under Rule 34(3) of the Court of Appeal Rules (2022), following the untimely death of the ***Hon. Mr. Justice Fred Ochieng JA*** prior to its delivery.

28. Orders accordingly.

**Dated and Delivered at Mombasa this 5th day of December, 2025**

**A.K. MURGOR**

**.....**

**JUDGE OF APPEAL**

**P. NYAMWEYA**

**.....**

**JUDGE OF APPEAL**

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

*signed*

***DEPUTY REGISTRAR***