Marianga v Republic (Criminal Appeal E058 of 2021)
[2026] KECA 149 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 149 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E058 OF 2021

J MOHAMMED, HA OMONDI & LK KIMARU, JJA

JANUARY 30, 2026

BETWEEN

PETER OTIENO MARIANGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Homa Bay (J.R. Karanjah J.) dated 17th November 2020 in H. C. Cr. Case No. 3 of 2017)

JUDGMENT

Background

1. On 24th January 2017, Peter Otieno Marianga (the appellant) together with Pamela Adhiambo Onyango and Belinda Achieng Ochieng (the 2nd and 3rd accused persons in the trial court respectively) were arraigned before the High Court at Homa Bay to answer to a charge of murder contrary to Sections 203 as read with 204 of the Penal Code. The charge related to the alleged murder of David Ochieng Owino alias Atoti (hereinafter referred to as "the deceased"). All the accused persons in the trial court pleaded not guilty to the charge.

2. The prosecution case was wholly circumstantial, there being no direct evidence as to how the deceased met his death. Two competing hypotheses emerged at the trial: that the deceased was murdered and his death disguised as suicide, or that the deceased took his own life. Upon evaluation of the evidence tendered by both the prosecution and the defence, the High Court (Karanjah, J.) rejected the suicide theory and found that the only reasonable inference from the circumstantial evidence was that the deceased was unlawfully killed by the appellant and the 3rd accused person, and that the hanging of the deceased was stage-managed to conceal the murder.

3. Consequently, the appellant was convicted and sentenced to thirty (30) years' imprisonment. The 3rd accused person was sentenced to three (3) years' probation, which she has since served. The 2nd accused person was acquitted under Section 215 of the Criminal Procedure Code.

4. The particulars of the offence as contained in the information were as follows:

> " The appellant, 2nd and 3rd accused persons respectively, on the nights of 6th and 7th January 2017 at Ufira Village in Rusinga West in Mbita Sub-County within Homa Bay County in the Republic of Kenya, jointly murdered David Ochieng Owino alias Atoti contrary to Sections 203 as read with 204 of the Penal Code, Cap 63."

5. The prosecution called eight (8) witnesses in support of its case. Margaret Achieng Ochieng (PW1), the mother of the deceased, testified that on the night of 6th January 2017 between 10.00p.m. and 11.00p.m., she heard noises emanating from the deceased's homestead. Together with her son, Dan, and her daughter-in-law, Hellen Adhiambo Dan (PW2), she went to investigate. Upon arrival, they identified the appellant, whom they recognized by voice and torchlight, standing at the door of the deceased's house holding several sticks. The 3rd accused person was also present but did not actively participate.

6. PW1 testified that upon inquiry, the appellant stated that the deceased intended to marry his niece, one Sharon, an act he considered a cultural taboo. After failing to dissuade the appellant, PW1 returned home. At about 2.00 a.m., she was awakened and informed that the deceased had allegedly been found hanging. Upon arrival at his home, she observed that the body of the deceased was in an upright position, with one leg on a stool and the other on the ground.

7. PW2 corroborated PW1's testimony, stating that she was able to recognize the appellant and others present due to moonlight. She confirmed that the appellant was calling out his niece, Sharon, from inside the deceased's house. Later that night, they were informed that the deceased had allegedly committed suicide.

8. David Ochieng Okinya (PW3) and Bob Onyango Ndara (PW4), fishermen and siblings, testified that shortly after midnight on 7th January 2017, they went to the deceased's house to collect their fishing equipment. They found the front door locked and the back door damaged. Using a phone torch, they saw the deceased hanging from the roof with a nylon rope. No other person was present in the house.

9. Stephen Omondi Ayaa (PW5) testified that at about 10.45p.m. on the material night, he heard screams and went to the deceased's homestead, where he found the appellant holding a panga and calling out the deceased, alleging that his niece, Sharon, was inside the house. PW5 later learnt that the deceased had died.

10. Dr. Mary Ayuko (PW6), a medical officer based at Mbita Sub-County Hospital, produced the post-mortem report prepared by a colleague, Dr. Mark Ogundo. She testified that the deceased had injuries on the chest and neck consistent with blunt force trauma, and that the cause of death was blood loss due to a ruptured liver and asphyxia from a tight rope around the neck.

11. No. 5667 Sgt William Kibue (PW7), the Investigating Officer, testified that the scene showed signs of struggle, including a broken window. It was his testimony that before he proceeded to Nairobi on transfer he had instructed that Sharon be bonded to testify in court as a witness. That he later learned that she declined to testify and could not be traced by the officer who took over the conduct of investigations. PW7 further testified that the positioning of the ropes suggested a staged suicide. Following investigations, the appellant and his co-accused were arrested.

12. 112291 PC Raphael Baraka Naumbao (PW8) attached to the Criminal Investigations Department (DCI) in Mbita produced as exhibits the sticks and the red synthetic manila rope recovered from the scene.

13. The appellant in his sworn defence stated that on the material night, while returning from fishing, he heard the 3rd accused person crying. Upon inquiry, she informed him that the deceased had locked her out of the house. He attempted to persuade the deceased to open the door, but villagers intervened and restrained him, advising him to wait until morning. He later learnt that the deceased had allegedly committed suicide.

14. The learned trial Judge found that the deceased did not commit suicide and that the ruptured liver was inconsistent with self-hanging. The court held that the appellant had motive arising from the alleged taboo relationship between the deceased and Sharon and that the circumstantial evidence irresistibly pointed to the appellant and the 3rd accused as the perpetrators.

15. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal inter alia on the grounds that:

    a. The prosecution failed to prove its case beyond reasonable doubt;

    b. The conviction was based on insufficient circumstantial evidence; and

    c. The sentence of thirty (30) years' imprisonment was excessive.

16. At the hearing of the appeal, both parties were represented by counsel who had both filed written submissions which they highlighted. Learned counsel, Ms. Aron appeared together with Ms. Nancy Owiti. Ms. Aron submitted that the absence of an eyewitness and failure to call a crucial witness, Sharon, fatally weakened the prosecution's case. Counsel asserted that suspicion, however strong, could not found a conviction.

17. Mr. Patrick Martin Okango, the learned Assistant Director of Public Prosecution opposed the appeal. Counsel submitted that the circumstantial evidence adduced was sufficient and that the medical evidence ruled out suicide. Further, that the chain of evidence leading to the conclusion that the appellant murdered the deceased was complete.

18. As a first appellate court, we are duty-bound to re-evaluate the evidence and draw our own conclusions, bearing in mind that we did not see or hear the witnesses. See: Okeno vs Republic (1972) E.A. 32.

19. It is not disputed that the deceased died. Medical evidence established that death resulted from blunt force trauma and asphyxia. The appellant was positively placed at the scene shortly before the deceased was found dead, armed with sticks and expressing hostility towards the deceased. The injuries sustained were inconsistent with suicide.

20. Although Sharon was not called as a witness, the prosecution evidence on record was sufficient and cogent. Failure to call a witness is not per se fatal where the remaining evidence proves the charge beyond reasonable doubt.

21. This Court in the case of Kiriungi v Republic [2009] KLR 638 the Court stated as follows:

> "...the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have

been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged."

22. Further, Section 143 of the *Evidence Act* provides as follows:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

23. By parity of reasoning, we find that the failure by the prosecution to call Sharon as a witness was not prejudicial to the prosecution case.

24. Regarding the weight of the circumstantial evidence adduced by the prosecution, in Neema Mwandoro Ndurya v Republic [2008] KECA 324(KLR) this Court stated that:

> "It is true that circumstantial evidence is often said to be the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R vs. Taylor Weaver and Donovan (1928) 21 Cr App. R. 20."

25. In the circumstances of this case, we find that the circumstantial evidence formed an unbroken chain leading irresistibly to the conclusion that the appellant caused the death of the deceased with malice aforethought. The conviction was therefore safe. The appeal against conviction has no merit and is dismissed.

26. On sentence, however, we consider the principle of proportionality, the appellant's mitigation, and the sentence imposed on the co-accused. While the offence was grave, a sentence of thirty (30) years was excessive in the circumstances. Accordingly, the appeal against sentence is allowed.

27. The sentence of thirty (30) years' imprisonment is set aside and substituted with a sentence of twenty (20) years' imprisonment, to run from the date of the original sentence by the trial Court.

28. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY 2026

JAMILA MOHAMMED

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JUDGE OF APPEAL HELLEN OMONDI

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR