

**IN THE COURT OF
APPEAL AT
KISUMU**

**(CORAM: MUSINGA (P), KIAGE, & ODUNGA,
J.J.A.)**

CRIMINAL APPEAL NO. 172 OF 2020

BETWEEN

EZEKIEL BARASA NYONGESA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal against the Judgment of the High Court of
Kenya at Bungoma (**Ali-Aroni, J.**) delivered on 10th June 2019*

in

Criminal Case No. 41 of 2014)

JUDGMENT OF THE COURT

1. The appellant was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars were that on 8th/9th December 2014 at Lukuku Village, Miendo Sub-Location in Bungoma East Sub-County in Bungoma County, he murdered **Phanice Naliaka Wafula** (“the deceased”).
2. At trial, the prosecution called nine witnesses. **PW1, Dan Wafula Mapesa**, the deceased’s father, testified that on 7th

December

2014, the appellant, accompanied by another man known as

Isaiya Simiyu Nyongesa, came to his home seeking to have his daughter (the deceased), who was his wife but they had since separated, return to him, but he refused. Subsequently a reconciliatory meeting was called by the area Assistant Chief on 8th and 9th December 2014, after which the deceased returned to the appellant's home.

3. After the meeting, PW1 returned home, and shortly thereafter he was contacted by his in-law, Moses Sichangi, who forwarded to him an alarming SMS allegedly sent from the appellant's mobile phone. The message read, in essence, that the work that the appellant wanted to be done had been completed and that the family should prepare to collect the children of the deceased. Troubled by the message, PW1 immediately instructed his son, Luka Wafula, to go to the deceased's home and ascertain what had happened. Luka later called back and informed him that he had found the door open and the deceased lying dead inside the appellant's house.

4. **PW2, Esnas Naliaka**, the deceased's sister-in-law, testified that she received a call at about 10.00 p.m. on 9th December 2014 from an unknown number. The caller simply said "he had

finished” and

that the family should go for the body of the deceased and bury

it. She did not recognize the voice and initially did not believe the call. She stated that she learnt the following day that the deceased had indeed been found dead. She went to the scene and saw the body of the deceased from a distance and later recorded a statement with the police.

5. **PW3, Moses Sichangi**, the deceased's uncle, testified that on the morning of 9th December 2014, he received an SMS from the appellant saying "what you wanted has happened, take care of my children." Concerned, he contacted PW1 and forwarded the message to him. Later he learnt that the deceased had been found dead. He confirmed that he gave the police the appellant's mobile phone number as the origin of the SMS, and stated that the appellant was later found in Mabanga area after allegedly taking poison and was admitted in hospital.
6. **PW4, Susan Wamalwa Wekesa**, a relative of the deceased, attended the post-mortem on 19th December 2014 and identified the deceased's body. She saw a deep cut on the head, consistent with a hacking injury. **PW5, Dr. Edward Vilembwa**, produced the post-mortem report. The examination revealed a large 10×10 cm cut wound at the back

of the head, severed jugular vessels, brain
tissue exposed, and a defensive wound on the left palm. He

concluded that the cause of death was cardiopulmonary arrest due to penetrating cut wounds to the head.

7. **PW6, Isaiah Nyongesa**, a village elder, testified that on 8th December 2014 the appellant approached him to assist with serving summons on PW1 for a meeting before the Assistant Chief. At the meeting on 9th December, the deceased refused to return to the appellant and stated in the presence of the elders that he had threatened to kill her. The matter was adjourned to 16th December 2014 when the appellant was required to be accompanied by his family members. He testified that he did not know if the deceased went to her father's house after the said meeting. PW7, **Luka Wafula**, the deceased's brother, testified that on 8th December 2014, he received a call from his uncle (PW3) and was informed that the appellant had finished the job. He went to the appellant's house where he heard a child crying. He entered the appellant's house and found his sister lying dead at the bedroom door with severe cut wounds. The deceased's child was also cut on the neck but she survived. He notified the Chief, who called the police and the child was taken to hospital.

8. **PW8, Corporal Vincent Mokorit**, who was stationed at Webuye

Police Station at the time of the alleged incident, testified that he

visited the scene on 10th December 2014 and found the deceased naked with deep cut wounds to the head and neck. A young child had already been taken to hospital with almost similar injuries as those of the deceased. He stated that the appellant was missing but that on 15th December 2014 he learnt that he had been found by members of the public, beaten, and admitted in hospital after allegedly taking poison. He also testified that the appellant confessed to Sgt. Simba that he used a jembe during the assault, which was later recovered from a shamba and produced in court together with Sgt. Simba's statement.

9. **PW9, Chief Inspector Samule Surgut**, the investigating officer, confirmed the circumstances of the crime scene. He stated that he found the deceased's naked body near the bedroom door with extensive injuries and learnt that a child had survived with serious neck and head cuts. He participated in the appellant's arrest and stated that the appellant was found in a rented house in Bukembe after ingesting poison and was taken to hospital. PW9 also led the search that recovered a blood-stained jembe in a sugarcane plantation. He produced a statement under inquiry in which the appellant admitted

quarrelling with his wife and cutting
her before running away.

10. In his defence, the appellant gave an unsworn statement. He denied killing his wife and said he last saw her at the Assistant Chief's office on 8th December 2014 where dowry and reconciliation discussions took place. He stated that the matter was adjourned to 16th December 2014 and that the deceased had been directed to go to her mother's home. He further testified that he was living in a rented house in Bukembe and had moved out of the matrimonial home six months earlier. He denied writing or signing the statement under inquiry, denied taking poison, and denied any involvement in the deceased's killing.
11. The learned trial judge considered the evidence and found that the appellant and the deceased were husband and wife, whose relationship had deteriorated, leading the deceased to return to her parents' home shortly before her death. After the family and local administration attempted to resolve the dispute, the deceased disappeared that same evening and her relatives later received messages from the appellant saying he had finished her. The court accepted the evidence that the deceased was found in the appellant's house with deep cut wounds while the appellant was nowhere to be seen until he

was later found in Bukembe after

ingesting poison. The post-mortem confirmed severe head and neck injuries consistent with a violent attack.

12. The court held that the appellant's alleged alibi was undermined by the fact that the deceased was discovered in his house; that he disappeared immediately after the killing; and that he later directed the police to the murder weapon. The judge also relied on the statement under inquiry in which the appellant admitted cutting his wife and fleeing. Taken together, the court concluded that the evidence firmly pointed to the appellant as the person who lured the deceased back to the matrimonial home and fatally attacked her and that his conduct demonstrated malice aforethought. The court therefore found that the prosecution had proved the charge of murder beyond reasonable doubt, convicted him and sentenced him to a jail term of 25 years.
13. The appellant was aggrieved by both the conviction and sentence and lodged this appeal. He contends in his memorandum of appeal that the trial court failed to properly evaluate the evidence on record leading to a conclusion that was not supported by the record. He also contends that his alibi defence was neither considered nor disproved, and that

the court failed to take into

account the period he had spent in custody, thereby resulting in an erroneous decision.

14. At the hearing of the appeal, learned counsel **Ms. Anyango** appeared for the appellant, while the respondent was represented by learned counsel Ms. Mwaniki. Both counsel made brief oral highlights of their client's written submissions.
15. For the appellant, it was submitted that the trial court failed to properly analyse the evidence on record, particularly the alleged text messages said to have been sent from the appellant's phone. It was contended that although PW1 claimed to have received an incriminating SMS from PW3, the prosecution never produced any service-provider data to confirm that the message emanated from the appellant's phone number. According to the appellant, this omission was significant given that there was a known disagreement over dowry between him and the deceased's family, and also given the admission by PW3 in re-examination that he could not identify the owner of the number that sent him the message. Counsel contended that this gap made the alleged SMS incredible and incapable of supporting a conviction.
16. In relation to the recovery of the jembe, the appellant

submitted

that the prosecution's evidence was riddled with contradictions

that undermined the credibility of the alleged recovery. In this regard, it was submitted that PW8 testified that it was the appellant who informed the police that a jembe had been used, whereas PW9 stated that they retrieved the jembe with the assistance of members of the public after the appellant was arrested. The appellant contended that these inconsistencies cast doubt on whether he ever gave information leading to its recovery or that he signed the statement under inquiry. In any case, it was submitted that the requirements of section 25A of the Evidence Act were not met because no person of the appellant's choice was present when the statement was allegedly recorded, thereby rendering it non-compliant and therefore inadmissible. It was also contended that the jembe was never subjected to forensic testing to establish whether the blood on it, if any, matched that of the deceased, leaving its evidentiary value unproven. According to the appellant, these gaps and contradictions weakened the prosecution's case and supported his position that the jembe could not reliably be linked to the offence.

17. On the alibi defence, it was contended that the appellant consistently stated that he had moved out of the

matrimonial

home and was living in Bukembe for six months prior to the

incident. The appellant maintained that none of the prosecution witnesses saw him with the deceased after the meeting before the Assistant Chief. Counsel further contended that PW7 only found the body of the deceased but did not see the appellant at the scene, while PW6 stated that he last saw both parties part ways after the meeting. Relying on the decision of this Court in **Victor Mwendwa Mulinge v Republic [2014] eKLR**, the appellant submitted that the burden of disproving an alibi lies entirely on the prosecution, that the prosecution must test and displace an alibi beyond reasonable doubt, and a court must also consider whether the investigation allowed for verification of the defence. The appellant therefore maintained that the prosecution did not dislodge his alibi and that the trial court wrongly shifted the burden to him by treating it as an afterthought.

18. Lastly, as regards the sentence meted on the appellant, it was submitted that the trial court did not consider the period he had spent in custody before sentencing, contrary to section 333(2) of the Criminal Procedure Code. The decision of this Court in **Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR**, was cited in support of the

argument that a sentencing

court must give real effect to time spent in pre-trial custody
and

cannot merely state that it has taken it into account while still imposing a sentence that ignores that period. The appellant also made reference to the Sentencing Guidelines (2023) which require proportionality between time already served and the overall sentence. In this regard, it was contended that the appellant was first presented in court on 22nd December 2014 and having been unable to meet bail terms, he remained in custody throughout the trial. By the time he was convicted, he had already spent about four years and six months in remand. This Court was therefore urged to factor that into the sentence.

19. In the end, counsel for the appellant prayed for the appellant's conviction to be quashed, the sentence to be set aside, and for his acquittal.
20. The respondent maintained that the conviction was sound and firmly supported by the evidence presented at the trial. Citing the decision of this Court in **Anthony Ndegwa Ngari v Republic [2014]** eKLR, it was submitted that in a charge of murder, the prosecution must establish the death of the deceased; that the death was caused by an unlawful act; and that the act was carried out with malice aforethought.

Counsel maintained that all elements of murder were fully proved.

21. To so demonstrate, counsel highlighted the post-mortem report by PW5 that confirmed deep cut wounds to the deceased's head and neck, with severed jugular vessels and brain tissue exposure, clearly demonstrating an unlawful killing. It was further submitted that the evidence presented in court consistently placed the deceased last with the appellant, who had gone to retrieve her from her parents, and who then disappeared immediately after the incident. The respondent made specific reference to the evidence of PW6, who saw the appellant leave the meeting with the deceased shortly before her disappearance and that of PW9, the investigating officer, who said the appellant confessed during a statement under inquiry and led police to the recovery of the murder weapon which was recovered in a sugarcane farm.

22. On malice aforethought, the respondent cited **section 206** of the **Penal Code** and the long-standing principles in **Rex v Tubere s/o Ochen (1945) 12 EACA 63**, stressing that courts assess malice by examining the type of weapon used, the manner of its use, the part of the body targeted, and the conduct of the accused before and after the attack. It was submitted that the nature of the

wounds on the deceased showed a clear intention to cause death

or grievous harm. The respondent also pointed to the appellant's disappearance and his subsequent attempt to take his own life as conduct that reinforced the presence of malice and guilt conscious.

23. Regarding the appellant's defence, it was submitted that the trial court properly evaluated the evidence and rightly rejected the defence. It was contended that the prosecution's case was consistent and coherent: the deceased was last seen with the appellant after the meeting before the Assistant Chief; her body was found inside the appellant's house; and the appellant disappeared immediately after the incident, only to be found later after ingesting poison. The respondent asserted that these circumstances collectively pointed to guilt and could not be explained away by the appellant's bare denial. The respondent maintained that the trial court was entitled to prefer the prosecution's account over the appellant's version because his defence did not dislodge the strong circumstantial evidence linking him to the offence. It was further contended that the appellant's attempt to distance himself from the scene was contradicted by the physical location of the body and the

sequence of events narrated by the witnesses. The respondent

further posited that nothing in the appellant's testimony created reasonable doubt, and the court was correct in finding his defence incredible when weighed against the consistent prosecution evidence.

24. On the alibi defence, the respondent submitted that the trial court correctly rejected it after weighing it against the consistent eyewitness testimony and physical evidence. It was contended that although the appellant claimed he had moved to Bukembe months before the incident, the prosecution established that the deceased was killed in the appellant's house and that he was the last person seen with her after the reconciliation meeting before the Assistant Chief. The respondent emphasized that an alibi must be assessed in the context of the entire prosecution case and cannot stand where there is credible evidence placing the accused at the scene. To support this position, the respondent relied on **Director of Public Prosecutions v Stephen Kalonzo Musyoka [2017] eKLR**, which affirmed that an alibi is properly rejected where the prosecution presents a clear chain of evidence connecting the accused to the crime. The respondent further contended that the appellant's own conduct of disappearing

immediately after the killing, being found in Bukembe after

allegedly attempting suicide, and leading police to the murder weapon provided strong corroboration that he was involved. It was therefore maintained that his alibi was not credible, was inconsistent with established facts, and was rightly dismissed.

25. In the end, the respondent urged this Court to uphold both conviction and sentence as the trial court correctly applied the law and properly evaluated the evidence.
26. It is important to point out that during the hearing, counsel for the respondent partially conceded certain grounds. She acceded that the alleged text messages in which the appellant was said to have admitted killing the deceased were never retrieved or produced in evidence. Counsel also accepted that the appellant's statement under inquiry ought not to have been relied upon as part of the prosecution's case.
27. We have considered the record, the rival submissions and the law.

This being a first appeal, the duty of this Court is to re-analyze the entire evidence and reach its own conclusions, while bearing in mind that it did not see or hear the witnesses testify. See **Okeno v Republic [1972] EA 32** and **David Njuguna Wairimu v Republic [2010] eKLR**.

28. The issues that present themselves for determination in this appeal are whether, notwithstanding the doubts raised over the text messages and the statement under inquiry, the prosecution established that it was the appellant who caused the deceased's death; whether malice aforethought was proved; and whether the appellant's alibi and general defence created any reasonable doubt.

29. **Section 203** of the **Penal Code** provides that:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

30. In **Joseph Kimani Njau v Republic [2014] KECA 229 (KLR)**, this Court while concurring with its earlier decision in **Nzuki - vs- Republic, (1993) KLR 171** held thus:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

i. The intention to cause death;

ii. The intention to cause grievous bodily harm;

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of

those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman - v- Director of Public Prosecutions, [1975] AC 55". [Emphasis added]

31. There is no dispute that the deceased died and that her death was unlawful. PW4 identified the body during the post-mortem, and PW5, Dr. Vilembwa, described severe injuries, including a 10×10 cm cut wound on the back of the head, severed jugular vessels, exposed brain tissue and a defensive wound on the palm. These injuries are consistent with a brutal attack using a heavy, sharp object and clearly amount to unlawful homicide. What remains in issue is whether the prosecution proved that it was the appellant who inflicted the injuries.
32. It is a fact that none of the witnesses saw the appellant kill the deceased. His conviction therefore rested largely on circumstantial evidence. In **Ahamad Abolfathi Mohammed & Another v Republic [2018] KECA 743 (KLR)**, this Court reaffirmed the three classic tests for circumstantial evidence

as

set out in **Abanga alias Onyango v Republic, Cr. App. No. 32 of 1990**: the circumstances must be firmly established; must point unerringly to guilt; and must form a complete chain leaving no reasonable hypothesis other than that the accused committed the offence.

33. Similarly, in **Sawe v Republic [2003] KECA 182 (KLR)**, this Court held that the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than guilt, and that there must be no co-existing circumstances weakening the inference. The burden of proof always remains on the prosecution.
34. Although no one witnessed the actual killing, the circumstantial evidence adduced before court was, in our view, compelling when evaluated against the principles in **Abanga alias Onyango v Republic** (supra) and **Sawe v Republic** (supra). The deceased had fled the matrimonial home after marital conflict and had, on the morning of 9th December 2014 expressly told the Assistant Chief and the elders that the appellant had threatened to kill her. Shortly thereafter she disappeared and soon after, PW3 received an alarming message indicating that the appellant had finished

the work and they should go for the body and the children.
Even

if those text messages were not formally retrieved or produced before the trial court, they form part of the surrounding circumstances that triggered immediate action by PW1 and PW7. What ultimately matters is that when PW7 went to check, he heard a child crying inside the appellant's house and found the deceased lying dead inside the bedroom doorway, with deep cut wounds. PW8 and PW9 later confirmed the same scene. This sequence is uncontested. The deceased's body was found inside the appellant's house and the appellant was nowhere to be found.

- 35.** It is a cardinal rule of criminal law that the burden of proving the guilt of a suspect is throughout on the prosecution. The standard of that proof is beyond any reasonable doubt, and the suspect bears no burden of establishing his own innocent. However, under section 111 of the Evidence Act, when a fact is especially within the knowledge of an accused person, the evidential burden shifts to him to offer a reasonable explanation. In his case, the appellant bore the burden of explaining how the deceased's body came to be inside his house. Failure to explain circumstances peculiarly within a person's knowledge may legitimately strengthen the

prosecution case. Indeed, this Court in **Luciana Juma Farjala**

v

Republic [2007] KECA 265 (KLR) held thus:

“While we agree with Mr. Aboubakar for the appellant that the burden lay throughout on the prosecution to prove the charge beyond any reasonable doubt, it is our view that the appellant, also, had the duty of offering a reasonable explanation as to the circumstances leading to the deceased losing his life. It is a duty placed upon him by statute to wit section 111 (1) of the Evidence Act, Cap 80 Laws of Kenya. How the deceased met his death was a fact peculiarly within the knowledge of the appellant, and he was obliged to offer a reasonable explanation.”

36. The appellant’s explanation was that he had moved out six months earlier and did not know what was happening in his old house. Beyond his bare assertion, no independent evidence was adduced to support this claim. He could, for instance, have produced tenancy documents, a landlord or neighbours from Bukembe to testify as to that fact or any rent records to support his claim but none were offered. Set against the undisputed fact that the deceased was found dead in his house, his explanation fell well short of what section 111 requires.

37. The statement under inquiry recorded by PW9 was also contested, and correctly so. Given the requirements of section 25A of the Evidence Act and the need for strict compliance with the Evidence (Out of Court Confessions) Rules, it ought

not to have been accorded significant weight. Counsel for the respondent conceded

as much and the appellant's conviction cannot rest on that statement. However, even discounting it entirely, the remaining circumstantial evidence was overwhelming: the deceased's last interaction with the appellant at the Assistant Chief's office; her refusal to return to him because he had threatened to kill her; her being found violently murdered inside his house within hours of her return; the simultaneous attempt on the child's life; the appellant's immediate disappearance; and his later discovery in a different town after ingesting poison. Viewed holistically and in accordance with the principles in **Abanga alias Onyango v Republic** (supra) and **Sawe v Republic** (supra), the inculpatory facts are incompatible with innocence and incapable of any reasonable explanation other than the appellant's guilt.

38. As for malice aforethought, section 206 of the Penal Code permits the court to infer malice from the nature of the weapon used, the part of the body targeted and the severity of the injuries. See also **Republic v Tubere s/o Ochen** (supra). In the circumstances herein, the severe targeted cuts to the head and neck and the defensive wound on the deceased's hand demonstrated a clear intention to kill or, at the very

least, knowledge that such blows

were likely to be fatal. This, taken together with the earlier threats

and the appellant's flight after the incident demonstrated malice aforethought beyond doubt.

39. On the issue of the appellant's alibi, we are not persuaded that it created any reasonable doubt. He claimed he had moved to Bukembe six months earlier, yet the deceased was killed in his house. He could not explain how the deceased came to be in his home or why he fled immediately after the killing. It is trite law that an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer. In addition, and although the prosecution must always disprove an alibi, the alibi must be tested against the totality of the evidence. In the circumstances herein, it was plainly inconsistent with established facts and was therefore properly rejected by the trial court.

40. Lastly, on the issue of sentence, the appellant was sentenced to 25 years' imprisonment. The record shows that although counsel informed the court during mitigation that the appellant had been in custody since December 2014, the trial court did not factor in that period as required by section 333(2) of the

Criminal

Procedure Code. The appellant was first presented in court on

22nd December 2014 and, being unable to meet bail terms, remained in custody throughout the trial. We are therefore inclined to interfere with the sentence only to the extent of giving credit for the time already served. In our view, the trial court misdirected itself on this issue and should have directed that the appellant's sentence runs from the date of his first arraignment, to wit, 22nd December 2014.

41. In the end, the appeal on conviction is dismissed. However, the appeal on sentence succeeds to the extent that the sentence of **25 years'** imprisonment is to run from **22nd December 2014** when the appellant was first presented in court as he has been in custody since then.

Dated and delivered at Kisumu this 30th day of January, 2026.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

P. O. KIAGE

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR