



REPUBLIC OF KENYA



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**Kwemboi v Republic (Criminal Appeal E072 of 2021)
[2026] KECA 792 (KLR) (24 April 2026) (Judgment)**

Neutral citation: [2026] KECA 792 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E072 OF 2021
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA
APRIL 24, 2026**

BETWEEN

ANDREW JUMA KWEMBOI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Bungoma
(Riechi, J.) dated 29th October, 2020 in Criminal Case No.27 of 2017)*

JUDGMENT

1. Andrew Juma Kwemboi ('the appellant') was tried before the High Court of Kenya at Bungoma for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on a date between 28th August, 2017, and 3rd September, 2017, at Cheptais Market, Cheptais Location, in Cheptais Sub-county, within Bungoma County, the appellant, jointly with another not before court, murdered Jadel Kipnusu Juma.
2. The appellant pleaded not guilty to the information. The prosecution called eleven (11) witnesses in a bid to establish its case against the appellant. A brief summary of the facts according to the prosecution was that the appellant lived in the same homestead as his mother, Joina Wakhungu Ngeiywa (PW2). The appellant was married to PW6, Lydia Chebet. They sired one child Jadel Kipnusu (the deceased). The appellant and PW6 then separated. PW6 moved back to her parents' house (PW7 and PW8), leaving the deceased child in the appellant's care and PW2. The deceased was approximately one and half years old.
3. PW2 testified that on 28th August, 2017, she left for the farm at 10.00 a.m., leaving behind the appellant with the deceased.

When she came back to the house at 9.00 p.m., she did not find the appellant and the deceased. The appellant later showed up and informed her that he had left the deceased with a lady friend known



as Cherop, but that he was going to pick him. The appellant left, and did not come back home. PW2 testified that the appellant came back home after two days. The deceased was not with him. He promised PW2 that he would bring the deceased home that evening. He however did not come back home. PW2 reported the matter to PW1, Morris Osikata, of Nyumba Kumi initiative.

4. It was PW2's testimony that on 2nd September, 2017, at about 00 a.m., she noticed that the appellant was at his house. She immediately called PW1, PW3, Patrick Mulongo, who was the appellant's uncle, and PW4, Benson Khamala. They came and confronted the appellant. They demanded he tell them where he had taken the deceased. The appellant told them that the deceased was at the home of one Kiptir. They apprehended him and took him to Cheptais Police Station where he was re-arrested by PW5, PC David Amomor. At the police station, the appellant told them that he had left the deceased with a lady who stays at Chwele. He was willing to give them her number, but that he had left his phone at his house. PW2 went to the appellant's house to look for his phone. She discovered bags of sand and informed the police. The police rushed to the appellant's house and upon conducting a search, they discovered a shallow grave dug inside the bedroom. They managed to exhume the deceased's body.
5. PW9, Sergeant Philip Ripis, the investigating officer, accompanied by his colleagues, went to the scene of crime on 3rd September, 2017. They found the appellant's house had been cordoned off. PW9 interviewed witnesses at the scene. They then entered the appellant's house where they saw a heap of sand in his bedroom. Under the appellant's bed, they found a gunny bag with sand, and a jembe next to it. After seeking a court order for exhumation, he went back to the scene of crime, accompanied by PW11, Dickson Mochana, a pathologist. They exhumed the deceased's body from the shallow grave that had been dug inside the appellant's house. The body had been wrapped in a lessa and placed inside a polythene bag.
6. PW11 conducted a post mortem on the body of the deceased on 5th September, 2017. He testified that the deceased had bruises on the front side of his neck; injury of the front bone of his neck; and his airway was filled with foam. He formed the opinion that the deceased died due to strangulation. He estimated that the deceased had died approximately ten (10) days prior thereto.
7. The appellant, in his defence admitted that his mother (PW2) left the deceased in his care on the material date. It was the appellant's testimony that he left the deceased with one Cherop, as he had to go to work. On 1st September, 2017, he called home and PW2 informed him that Cherop had left with the deceased, and that she had not come back. He went to Cherop's house but did not find her. He went again on 3rd September, 2017. He still could still not locate her. He went back home and informed his uncle of the deceased's disappearance. They decided to report the matter to the police. While at the police station, he was informed that the deceased was found buried in his house.

The appellant denied having anything to do with the death of the deceased.

8. At the end of the trial, the learned Judge found that the prosecution had sufficiently established its case against the appellant. Upon conviction, the appellant was sentenced to serve twenty-five (25) years imprisonment.
9. The appellant, dissatisfied with the decision of the trial Court, filed the appeal before us. In his memorandum of appeal dated 7th February, 2023, the appellant contended that: the prosecution failed to discharge its burden of proof; there was no direct evidence linking him to the offence; and that the prosecution failed to avail key witnesses. In further grounds of appeal dated 1st October, 2025, the appellant averred that: the trial court erred in relying on the doctrine of last seen which was not corroborated by material facts; his defence provided a co-existing circumstance, consistent with his innocence; that the trial court failed to comply with the provisions of Section 214 of the Criminal



Procedure Code; and, that Section 333(2) of the Criminal Procedure Code was not adhered to in respect of his sentence.

10. The appeal was heard by way of written submissions. The appellant was represented by learned counsel Mr. Menezes. It was his submission that the circumstantial evidence relied upon by the prosecution was insufficient to sustain a conviction. He faulted the prosecution for failing to subject the recovered exhibits to forensic analysis to conclusively tie the appellant to the offence. He urged that the mere allegation that the appellant was the last person seen with the deceased was not enough to prove that he murdered the deceased. The appellant submitted that the doctrine of last seen was not applicable in this case, as the appellant told the court that he left the deceased under the care of his second wife, Cherop, who had since gone into hiding. He also contended that Cherop had access to his house, and this created reasonable doubt, which should be resolved in the appellant's favour. He faulted the prosecution for failing to call Cherop, who in his view, was a crucial witness. The appellant further urged that when the charge sheet was amended on 27th November, 2019, the trial court failed to call the appellant to plead afresh, and that it also failed to inform him of his right to recall witnesses, as directed under Section 214 of the Criminal Procedure Code. The appellant stated that he was in remand custody during the pendency of his trial, and that this period ought to be computed in his sentence.
11. The appeal was opposed. Learned Prosecution Counsel, Mr. Mogoia, submitted that the circumstantial evidence relied on by the prosecution pointed to no one else, but the appellant, as the person who murdered the deceased. He maintained that the appellant was the last person seen with the deceased, and that the deceased's body was recovered a few days later from his house. On sentence, Mr. Mogoia submitted that the sentence imposed upon the appellant was commensurate with the offence committed. He maintained that the appeal lacked merit.
12. This is a first appeal. The duty of the first appellate court was stated by this Court in *Gabriel Kamau Njoroge v Republic* [1987] KECA 4 (KLR) as follows:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect. (see *Pandya v R* [1957] EA 336, *Ruwalla v R* [1957] EA 570)”.
13. We have considered the material placed before us, and we find that the issues that emerged for determination by this Court are:
 - i. Whether the prosecution sufficiently established that the appellant killed the deceased with malice aforethought;
 - ii. Whether the provisions of Section 214 of the Criminal Procedure Code were complied with;
 - iii. Whether the period spent by the appellant in remand custody was computed in his sentence.
14. On whether the prosecution proved the charge of murder against the appellant, the case rested entirely on circumstantial evidence, as no one saw the appellant strangle the deceased. The applicable principles



are well settled. They were aptly stated by this Court in *Abanga alias Onyango v. Republic* Cr. Appeal No. 32 of 1990 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.”

15. Further, this Court in the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] KECA 743 (KLR) pronounced itself as follows on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”

16. In the present case, it is not disputed that the deceased, a child of approximately one and a half years, was left in the sole care and custody of the appellant on 28th August, 2017. PW2’s evidence firmly placed the appellant as the last person seen with the deceased. The appellant himself admitted as much in his defence.

17. This Court in *Ngala & 2 others v Republic* [2025] KECA 660 (KLR) observed as follows regarding the ‘Last seen’ doctrine:

“In addition to the foregoing, we need to point out the fact that, even though the onus of proof in criminal cases always rests squarely on the prosecution, 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 death.

Explaining the application of the “last seen with” doctrine in *Kamau v Republic* [2024] KECA 1193 (KLR), this Court cited with approval the decision of the Supreme Court of Nigeria in the case of *Haruna v AG of Federation* (2012) LPELR- SC.72/2010, (Pp.30-31, paras. F-B) where the Court explained that:

“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 the 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 his or her death in such circumstances. In the absence of a satisfactory explanation, a trial court as well as an appellate court will be justified in drawing the inference that the accused person killed the deceased.””

18. From the foregoing, once it was established that the appellant was the last person seen in the company of the deceased, he bore a duty to offer a plausible and consistent explanation as to the whereabouts of the child. The record shows that he was not forthcoming when he was first questioned regarding the whereabouts of the deceased. He initially misled PW1, PW2 and PW3 that the child was at the home of one Kiptir. He later changed his story and stated that he had left the child with a lady in Chwele. Notably, at no point during these initial inquiries did he mention that he had left the deceased with Cherop, as alleged in his defence at trial. These material inconsistencies and belated introduction of Cherop significantly undermined the credibility of his explanation, rendering it an afterthought.
19. Further, the appellant’s explanation was decisively displaced by the discovery of the deceased’s body buried in his own house. The shallow grave where the deceased was discovered was located in the appellant’s bedroom, concealed under sand, with a jembe and a gunny bag nearby. These were not circumstances that could reasonably be attributed to any other person without the appellant’s knowledge or involvement.
20. The medical evidence adduced by PW11 established that the deceased’s cause of death was strangulation, as evidenced by bruising on the neck, injury to the neck structures, and the presence of foam in the airway. Strangulation is, by its very nature, a deliberate act requiring the application of force, and it irresistibly points to the existence of malice aforethought. The nature of the injuries inflicted on a defenseless infant demonstrates a clear intention to cause death or grievous harm. The estimated time of death, being approximately ten days prior to the date the post mortem was conducted, coincided with the period during which the deceased had gone missing while in the appellant’s custody, thereby further strengthening the prosecution’s case.
21. The appellant’s contention that the prosecution failed to call Cherop as a witness is not fatal to the prosecution’s case. The law does not require the prosecution to call a superfluity of witnesses, but only those necessary to establish its case. In the circumstances of this case, the evidence on record was sufficient to establish a complete chain of events, that pointed to the appellant, and no one else, as the person who killed the deceased.
22. We also find no merit in the complaint regarding lack of forensic analysis. While forensic evidence may strengthen a case, its absence is not necessarily fatal where, as in the present appeal, the circumstantial evidence is cogent, consistent, and points irresistibly to the guilt of the appellant.
23. On whether Section 214 of the Criminal Procedure Code was complied with, it was the appellant’s submission that when the charge sheet was amended, by deletion of the word ‘diverse dates’ and replacing it with a ‘a date’, he was not called upon to plead afresh. Further, he was not informed of his right to call to recall witnesses. Section 214 of the Criminal Procedure Code provides that:
 1. “Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:



Provided that-

- i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;
- ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.”

24. The record shows that on 27th November, 2019, the prosecution made an application to amend the information by deleting the words ‘diverse dates’ and replacing it with ‘a date’. We are satisfied that the amendment made to the information did not introduce any new matter or alter the substance of the offence that the appellant faced. This Court in *Josphat Karanja Muna v Republic* [2009] KECA 26 (KLR) observed as follows:

“That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word.”

25. In the absence of demonstrable prejudice to the appellant, this ground of appeal must fail.

26. On sentence, the appellant urged this court to relook his mitigating circumstances, and review the sentence. He further contended that the period he spent in remand custody was not considered by the trial court. This Court’s predecessor in the case of *Ogolla s/o Owuor vs. Republic*, [1954] EACA 270, pronounced itself on this issue as follows:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

27. We note that the trial court imposed a custodial sentence of twenty-five (25) years imprisonment. The sentence imposed, in our view, was lawful and proportionate to the gravity of the offence, which involved the unlawful killing of a defenseless infant. The appellant has not demonstrated that the learned Judge acted on wrong principles or overlooked any material facts. His mitigating circumstances were properly considered by the trial court.

28. We however note that the appellant was in remand custody during the pendency of the suit before the trial court. The trial court failed to take this period into account as directed by Section 333(2) of the Criminal Procedure Code.

29. In the end, having carefully considered the record, the submissions of both parties, and the applicable law, we find that the conviction of the appellant was safe. His appeal against conviction is dismissed. The appeal against sentence succeeds only to the limited extent that the period the appellant spent in remand custody shall be taken into account. Accordingly, the sentence of twenty-five (25) years imprisonment is affirmed, but shall run from the date of the appellant’s arrest, that is, 3rd September, 2017.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL, 2026.

ASIKE-MAKHANDIA



JUDGE OF APPEAL

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H.A. OMONDI

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

I certify that this is a true copy of original.

DEPUTY REGISTRAR.

