



**Onyiego v Republic (Criminal Appeal 241 of 2019)
[2025] KECA 337 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 337 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 241 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 21, 2025**

BETWEEN

NANCY MORAA ONYIEGO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisii, Justice D.S. Majanja, dated and delivered on 20th May 2019 in HCCA No. 41 of 2018)

JUDGMENT

1. Nancy Moraa Onyiego, the appellant herein, was charged with 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 5th November 2018 at Boitangare village, Rise sub location in Sameta sub-county within Kisii County she murdered AON, the deceased.
2. The appellant was tried and convicted of the offence and sentenced to 12 years imprisonment. Being dissatisfied and aggrieved with both the conviction and sentence, the appellant has now appealed to this court.
3. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a first appeal, this Court is mindful of its duty as 1st appellate court This duty was well articulated by this Court in Erick Otieno Arum vs. Republic [2006] eKLR as follows:

“It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e) a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its



own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same”

4. The evidence before the trial court was as follows: Bebbeca Moraa Matoke, PW1 who is the deceased’s grandmother, recalled that on the evening of 5th November 2018 at around 6 pm, Dennis Mwanga Ayuma, PW2, and his first wife, Brenda Cherotich Bett, PW6 left for Itumbe to go shopping, leaving her with the children including the deceased, a baby aged 7 months. After a while, the appellant, who was Dennis’ second wife, went to PW1’s house and told her that she was taking the deceased to stay with him.

Later PW1’s husband sent their grandson, Jared Obure, PW5 to go fetch a basin that had been left at her son Protas’ home for purposes of harvesting water. When PW5 returned, he told them that he had found the deceased drowned in a basin (actually an improvised pail, cut from a jerrycan) that had water. PW1 rushed to remove the deceased from the basin as she raised the alarm. PW1 told the court:

“...The child was bending into the basin. His legs were up and his face was in the water. I saw mucus from the nose and mouth. Neighbours came in response to the alarm. Nancy denied that she had drowned the child”.

She explained that when she asked the appellant what happened, the appellant denied having drowned the child. The police officers who responded to the alarm arrived and took away the deceased’s body.

5. After voir dire examination, PW5, Jared Obure, gave unsworn testimony. He recalled that on the material day, PW1 sent him and Morgan to fetch milk from a neighbor’s house while his cousin Ezekiel was sent to the posho mill. When he returned home, his grandfather asked him to fetch a basin from his uncle’s place and when he went there, he found the deceased in a bucket of water. He testified that he found the appellant washing clothes close to where the deceased was. He reported to PW1 what he had seen.
6. PW2 and PW6 testified that they had been with the appellant and the children on the material day, and in the evening at around 6 pm they went to shop. The appellant was heavily pregnant at the time. When they returned from shopping, and as they approached their home, they could hear people screaming. When PW2 reached home, he found the deceased lying down with foam from his nose and mouth. He did not see any injuries save for a scratch on the deceased’s chest. PW2 then sent the appellant to her home because of the hostility until the situation calmed down. When the appellant came for the funeral, she faced hostility and was rescued by the area chief PW3, who took her to Itumbe Police Station. PW6 told the court that when she saw the deceased, she fainted and did not recall what happened next.
7. PW4, Chief Inspector George Wangombe testified that at 8 pm on 5th November 2018 PW3 called him and informed him that a child had drowned in a bucket of water. PW4 proceeded to the scene where he met PW1, PW2, and PW6 who led him to the place the deceased had been placed on the floor wrapped in a blanket. The scene was photographed and the body was taken to hospital for post mortem.
8. Sgt. Humphery Osore, PW7, the Investigating Officer, told that court that after PW4 visited the scene and conducted preliminary investigations and was charged with undertaking the investigation, and on 12th November 2018 the appellant was charged with manslaughter as a post mortem had not been done. PW7 organized for a post mortem to be done and after reviewing the evidence charged the appellant with murder.



9. PW6, Dr. Benjamin Ndibile conducted the post mortem examination and observed that the deceased was in good health and that the deceased's body had a ligature mark around the neck which looked like it had been inflicted by rope. An internal examination of the neck revealed that the hyoid bone was fractured. The medic formed the opinion that the cause of death was asphyxia due to ligature strangulation. In cross examination, PW8 stated the fact that the deceased's lungs were intact and did not have any fluid excluded the possibility of drowning and that it was his view that the deceased was placed in the bucket after he was already dead.
10. The appellant, in her defence, opted to give a sworn statement.
She told the court that she was married to PW2. Initially, they resided in Kegati in Kisii County but moved to PW2's home where he found his two children living with their grandmother, PW1 but she did not find her co-wife, PW6, there. The appellant recalled that PW6 came home in August for a few days, left, and returned in November 2018 during the period the deceased died. The appellant stated that she was on good terms with her stepchildren. The appellant recalled that on the material day, PW2 & PW6 went shopping as she was pregnant. PW1 was smearing her walls when the appellant went to her place and PW1 told her to go with the deceased. The deceased refused to go with the appellant and the appellant left the child to go back to PW1 while she watched him and went to wash clothes. At around 7 pm the appellant heard PW1 screaming that the deceased had drowned and when she went to where the child was, he was unresponsive.
11. The appellant recalled that PW1 told the police that the child was playing and fell into the water and when PW2 & 6 arrived she spoke with PW6 and told her that PW1 had told her that the child had drowned. The next morning people started accusing the appellant of killing the child and that PW2 told her to go to her home as he suspected people would harm her as PW1 was accusing her of killing the child. When she came for the funeral, she was beaten by the public but was rescued by the area chief. The appellant maintained that she had a good relationship with PW6, the deceased, and the other children.
12. The trial court noted that the prosecution was required to prove, first, the fact of the death and the cause of said death, second, that the appellant committed the unlawful act or omission leading to said death, and, third, that the appellant committed the unlawful act or omission with malice aforethought. The court noted that the fact of death was not in dispute while the cause was in controversy.
13. The evidence of PW1 and PW5 who saw the child initially, stated that the child had drowned in a bucket of water and did not have apparent injuries. When PW4 went to the scene and saw the bucket of water in which the child was said to have drowned, he was suspicious as he did not think it possible for a child to drown in a quarter bucket of water. PW8 also doubted the appellant's story from his findings in his report which concluded that the cause of death was strangulation and not drowning, which conclusion the trial judge agreed with.
14. The next issue that was considered was whether the appellant was the person who strangled the deceased. The court noted that the prosecution's case was circumstantial since no one saw the deceased being strangled. The prosecution's case was that the child was left with PW1 but the appellant came and took the child and she was the last one seen with him. The appellant's counsel in rebuttal argued that there was no evidence to corroborate the allegations by PW1 and the same infact pointed to PW1's guilt, as she was the one who sent all the other children away so that she could strangle the child. Based on the evidence of PW1 and PW5, the trial court was satisfied that the appellant left with the child strangled him, and dumped him in a bucket as if he had drowned.



15. Having considered all the evidence in its totality, the trial court found that the chain of evidence was so complete that there were no other co-existing circumstances to exclude the possibility that any person other than the accused strangled the deceased. The prosecution evidence overwhelming and effectively dislodged the appellant's defence and the court found the appellant guilty of the offence as charged and sentenced her accordingly.
16. The appellant has raised 7 grounds in the memorandum of appeal as follows:
- i. The trial Judge erred in law and fact by failing to analyze and evaluate the entire evidence thus arriving at an erroneous decision.
 - ii. The trial Judge erred in law and fact by holding that it was the appellant who committed the unlawful act that led to the death of the deceased, yet there wasn't sufficient evidence to proof the same beyond reasonable doubt.
 - iii. The trial Judge erred in law and fact by convicting the appellant on the basis of circumstantial evidence when the essential and applicable principles for the same had not been satisfied.
 - iv. The trial Judge erred in law and fact by holding that the appellant who was last person seen with the deceased, based on the evidence of Pw1, and opting to discredit the evidence by the Appellant which had denied the same.
 - v. The trial Judge erred in law and fact in failing to find that the element of malice aforethought was never proved by the Prosecution.
 - vi. The sentence meted out against the appellant was excessive, taking into account her mitigation and the circumstances of the case.
 - vii. The judgement and decision of the learned trial Judge was wholly erroneous and against the law.
17. The appellant essentially argues that the prosecution did not prove the offence beyond reasonable doubt, that the court failed in convicting the appellant on circumstantial evidence and 'last seen' doctrine, and that the sentence was excessive taking into account the appellant's mitigation
18. The respondent, in opposing the appeal, points out that it is not disputed that the deceased was left in the custody of PW1 and at the time, only three people were in the compound that is the deceased, PW1, and the appellant. The only circumstantial evidence tending to link the appellant to the crime was that of PW1 who attested to the fact that it was the appellant whom she last saw leaving with the deceased. To boost their case against the appellant, the prosecution invoked the criminal law doctrine of "last seen with". That as the appellant was the last person to be seen with the deceased and the deceased was later found dead then she must have had a hand in her death. In addressing the doctrine of "last seen with" the respondent relied on the Nigerian case of *Moses Jua vs. The State* (2007) LPELR-CA/IL / 42/ 2006 where 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 vs, The Attorney General of The Federation* (2010) 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 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 vs., The Attorney General of The Federation (2010) 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..."

19. It is the respondent's contention that having been placed at the scene of the incident as the person who was last seen with the deceased before he died, the appellant had a duty to give an account of how the deceased met his death. The evidence of PW1 was that about 5 minutes after the deceased left with the appellant, his body was discovered. There is no evidence of any other person having been in the compound at the material time. The period between which the deceased was last seen with the appellant and when he was discovered was very short, and the appellant did not give a rational explanation as to what happened. We are urged to also consider the case of Republic vs. EEK [201] eKLR
20. We acknowledge that no one saw the appellant strangle the deceased, thus the prosecution's case was hinged on circumstantial evidence. What this Court must then determine is whether the trial judge made a sound and proper conviction based only on circumstantial evidence.
21. In the case of Ahamad Abolfathi Mohammed and Another vs. Republic [2018] eKLR this Court stated:

"However, it is a truism that the guilt of an accused person can be proved either by direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances of facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence.

Lord Heward CJ in R vs. Taylor, Weaver and Donovan [1928] Cr. App. R 21:-, stated:

'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 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.'

This court has set out the parameters to be met in the application of circumstantial evidence in securing a conviction in the case of Abanga Alias Onyango vs. Republic CR. App No. 32 of 1990 (UR) 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 circumstance taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human possibility the crime was committed by the accused and no one else.”

22. In *Sawe vs. Republic* [2003] KLR 364 this Court reiterated that in order to justify conviction on circumstantial evidence,

“...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 circumstance 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 remains with the prosecution. It is a burden which never shifts to the accused.”

23. Having regard to the principles, did the prosecution’s evidence meet the threshold? It is not in dispute that none of the prosecution witnesses saw the appellant strangle the deceased. It will be noted by the evidence on record that PW1 testified that the appellant came to her and took the deceased to stay with her. On the other hand, the appellant states that PW1 told her to go with the child who refused, and the appellant let him return to his grandmother. This court is of the view that no matter which angle one looks at the situation, the appellant was the one last seen with the deceased and there is no other plausible explanation of who killed the deceased. We are, therefore, satisfied that the parameter of conviction was met by the High Court and as such the conviction was sound.

24. The appellant also argues that the prosecution did not prove its case beyond reasonable doubt. From the evidence on record, it is not disputed that a death occurred. What is disputed is the cause of death, who caused it, and whether malice aforethought was proved. On the cause of death, the evidence of PW8 puts that to rest in its conclusion that the cause of death was strangulation and not drowning. On this issue who caused the death, this court agrees with the judgment of the trial court as well as the submissions of the respondent that the appellant being the last seen with the deceased, there was no other plausible explanation as to who, other than the appellant caused the death. The appellant was not able to demonstrate that anyone else could have had a hand in the death.

25. The appellant claimed that PW1 sent away all the other children so that she could kill the deceased. From the evidence on record as well as the judgment of the trial court, this suggestion is not a persuasive argument because it is on record that PW1 had been staying all along with the deceased when his mother had been away at work for prolonged periods and if she had wanted to kill him, she had every opportunity to do so.

26. On the issue of malice aforethought, the respondent submits that the learned Judge relied on the nature and cause of death to find that malice aforethought was proved; that the act of strangling a child leading to suffocation is a very personal and deliberate act which was intended to cause the death. The actions after the death of attempting to disguise the murder as an accidental drowning further showed the malice on the part of the appellant. In support of this argument, reference is made to the case of *Paul Muigai Ndungi vs. Republic* [2011] eKLR.



27. In this regard, we agree with the respondent's that the act of strangling the deceased was a deliberate act intended to cause death. The appellant went even a step further to try and disguise the murder as accidental drowning. This points to the willful intention to cause grievous harm or even death on the appellant's part.
28. On sentence, the appellant submitted that the 12-year sentence was excessive. The respondent, on the other hand, points out that the trial court in sentencing the appellant based its decision on the pre-sentencing report, current jurisprudence as laid out in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR, and given the circumstances of the case, the sentence meted upon the appellant is quite reasonable and should be upheld.
29. With regard to the severity of sentence, Section 379 (1)(a) &(b) of the *Criminal Procedure Code* provides for this court's jurisdiction to entertain an appeal against sentence from the High Court. In Francis Muruatetu & Another vs. Republic (supra), the Supreme Court of Kenya, the court gave sentencing guidelines with regard to mitigation before sentencing in murder cases at paragraph 71 as;
- a. Age of the offender,
 - b. Being a first offender,
 - c. Whether the offender pleaded guilty,
 - d. Character and record of the offender,
 - e. Commission of the offence in response to gender- based violence,
 - f. Remorsefulness of the offender,
 - g. Any other relevant factor.
30. In the same case the court in regard to the application of mitigation by the accused before sentencing held as follows:
- “it is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more that censure or in the converse impose the death penalty.”
31. This Court in Chai vs. *Republic (Criminal Appeal 30 of 2020)*[2022]KECA 495 (KLR) (1 APRIL 2022) held that the two holdings of the Supreme Court in the Muruatetu case make it very clear and underscores the importance of receiving and considering mitigating circumstances, and also of applying applicable sentencing guidelines, even though the latter is a guide. To justify a sentence the ruling should have spoken to it, showing in black and white what the court considered. In the absence of any demonstration of factors that could have led to such a sentence, the same would be excessive.
32. This Court finds that the trial court followed the guidelines set out by the Supreme Court with regard to mitigation and in doing so used its discretion in making an informed decision with regard to sentencing noting the circumstances of the case. Indeed, taking an innocent infant who trusted her, strangling him, then stage-managing a drowning accident is the height of wickedness, whatever her emotions were towards the infant's mother, and we agree that the sentence is well deserved.
33. The upshot is that we find the appeal lacking in merit, we uphold the conviction and affirm the sentence. The appeal is dismissed



It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

