



**Andole v Republic (Criminal Appeal 176 of 2017)
[2025] KECA 795 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 795 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 176 OF 2017
MSA MAKHANDIA, LK KIMARU & AO MUCHELULE, JJA
MAY 9, 2025**

BETWEEN

KEVIN SHAMAN ANDOLE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from part of the judgment of the High Court at Kakamega
(Sitati, J.) dated 7th February 2017 in Criminal Case No. 4 of 2013)*

JUDGMENT

1. The appellant, Kevin Shaman Andole, was on 7th February 2017 convicted by the High Court at Kakamega (R.N. Sitati, J.) of the murder of Anne Adhiambo Nambala, the deceased, under section 203 as read with section 204 of the *Penal Code*, and sentenced to death. Being aggrieved by the conviction and sentence, he appealed to this Court. The grounds of his appeal were as follows:-
 - “1) The learned judge erred in law and fact by convicting the appellant for the offence of murder, wherein the essential ingredients of the offence were not proved by the prosecution beyond reasonable doubt.
 2. The learned judge erred in law and fact by misconstruing the evidence on the circumstances of the case and, therefore arrived at a wrong decision.
 2. The judgment of the superior court was against the weight of the evidence.
2. Our mandate as the first appellate Court is to re-appraise and re-evaluate the evidence that was tendered before the trial court and come to our own independent conclusions thereon, while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses as they testified (See Philip Nzaka Watu -vs- Republic [2016]eKLR). Trial courts are considered the finders of fact, and, therefore,



their findings are given a high degree of deference by the appellate courts. On appeal, the appellate court will only overturn a conclusion of fact if the trier of fact's decision was clearly erroneous.

3. According to the record, the deceased was the wife of Fredrick Omondi (PW 2). PW2's evidence was that he comes from Lurambi Village in Kakamega and he is a matatu conductor. On 12th January 2013 he left his home at about 6.00am to go to work after he had had tea prepared by the deceased. The deceased had left earlier to go to work. She was working in a café in Kakamega town. At about 10.00 am he was called and informed that the deceased had died. He went and found her dead body on a mattress in the appellant's home. The appellant was known to him and lived about 300 metres from his home. He found members of public with police officers who had arrested the appellant.
4. PW 4 (Sofia Bwibo Shikuku) testified that she was coming from a night prayer meeting (kesha) when at about 5.30am, she found the appellant whom she knew standing on the road ahead of her. There was a lady, the deceased, lying on the ground with foam coming from her mouth. She knew the deceased. She moved closer to check on the deceased. The appellant threatened her, asking why she was checking on the deceased. The appellant told her that the deceased was drunk. The deceased was unconscious. He lifted the deceased and carried her across the fence to his home. He took her to his house. The appellant's mother came out of her house. PW 4 narrated what she had seen. People came, including Laban Anduku Mbayachi (PW 1). PW 1 went and called the Assistant Chief Ernest Mayula Ongayo (PW 7).
5. PW 1 lives about 3 houses from the appellant. He stated that at about 5.40am he heard someone insistently crying on the road which was about 70 metres away. He went there and observed the appellant kicking the deceased on the ribs. The deceased was foaming from the mouth. He watched as the appellant carried the deceased to his house as he followed from behind. He went to inform PW 7 who called the police. PW 7 testified that when he came to the appellant's home, he found him with the deceased in his house. Both were naked and members of the public wanted to lynch the appellant. APC Kipchirchir Tum Manase (PW 8) of DO's Office Lurambi was the officer who attended to PW7's call. He testified that he found the appellant in his house with the door locked. He ordered the appellant to open the door. He had a towel around his waist and the deceased's body was on the bed, covered with a blanket. He arrested the appellant and the body was eventually taken over by the CID. PW 8 was with Senior AP Sergeant Paul Nyangisa (PW 6) whose evidence was that the deceased's body was on the bed, partly covered using a blanket. At the top of the body was white t-shirt. Like PW 8, he said the mouth of the deceased was foaming.
6. On 14th January 2013 Dr. Dickson Mchana (PW 5) of Kakamega Provincial General Hospital performed a post mortem on the body. Externally, the deceased's fingers were bluish meaning she had difficulty in breathing before she died. She had injuries on the left hand, bruises on the knees and laceration on the left side of the scalp. There was extensive blood clot under the scalp on the left side. Both lungs were solid but the airwaves had froth. The skull was not fractured. The cause of death was raised intracranial pressure in the skull secondary to blunt force trauma following assault.
7. The appellant gave a sworn statement in defence, and denied either assaulting the deceased or causing her death. He testified that at 7.00am on this day he was arrested in the video shop where he had been employed. He was alleged to have killed a person but did not know anything about the alleged killing. He stated that on the alleged night he was at his place of work. He did not call any witnesses.
8. This is the evidence that the trial learned Judge considered and came to the conclusion that the prosecution had proved beyond doubt that the appellant had murdered the deceased. On sentence, the learned Judge proceeded on the basis that the only sentence provided by the law for the offence was death.



9. When the appeal came up for hearing, Mr. Okango learned, Assistant Director of Public Prosecutions was present for the State. Learned counsel Mr. Lugano for the appellant was absent, although he had been notified by the hearing. The appellant had been produced from Naivasha Maximum Prison. He insisted on proceeding on the appeal, and relying on the submissions filed by his counsel, even after we cautioned him that he faced a serious charge and he was entitled to legal representation. Mr. Okango equally relied on his written submissions.
10. The submission on behalf of the appellant was that the prosecution's case was purely circumstantial, and that all that the witnesses did was to place him at the scene, and that only led to suspicion. Suspicion, it was submitted, could not be the basis for a conviction. The decisions in *Sawe -v- Republic* [2003]KLR 364, *Wambua & 3 Others -vs- Republic* [2008]KLR 142, and others were referred to. Secondly, that, based on the decision in *Joseph Githua Njuguna -vs- Republic* [2016] eKLR, the ingredients of murder had not been proved. Thirdly, his alibi defence had not been considered. Reference was made to the decision of *Leonard Aniseth -vs- Republic* [1963] EA 206 and *Saidi -vs- Republic* [1963] EA 6. Fourthly, that the present case was based on contradictory and inconsistent evidence thereby rendering it unworthy of belief. (See *Stanley Mathenge Karani -vs- Republic* [2015] eKLR.)
11. Lastly, the death penalty that had been imposed had not considered in line with the Supreme Court's decision in *Francis Karioko Muruatetu & Another -vs- Republic* [2017]eKLR, which held that although the death penalty was legal, it was not mandatory; that the sentencing officer had the discretion in a proper case to award a penalty lesser than the death penalty.
12. On the death penalty, Mr. Okango conceded that because the learned Judge proceeded on the basis that the death penalty was mandatory; the sentence was illegal and we should interfere with it. However, on the issue of conviction, learned counsel submitted that, given the evidence of PW 1 and PW 4, the appellant had been overwhelmingly linked to the murder of the deceased.
13. We have reconsidered the evidence against the submissions made. On the issue of conviction, it is clear to us that PW 1 and PW 4 found the appellant on the road that morning with the deceased who, according to PW 1, was being assaulted. Both witnesses found the deceased on the ground, foaming from the mouth. She was unconscious. They saw the appellant carry the deceased to his house, while they followed. PW 6, PW 7 and PW 8 all testified that they found the appellant locked in his house and on the bed was the deceased, dead. The deceased was PW 2's wife. The two had parted early that morning while the deceased was well and going to work. The learned Judge accepted this evidence to be true. We have no reason to find otherwise. It means that the alibi defence was not true, and an afterthought, and was properly discounted.
14. On the ingredients of murder, the deceased who had been well, was found with the appellant having suffered injuries that led to her death the same morning. According to PW 1, the appellant was beating and kicking the deceased. PW 4 stated that the appellant did not want to hear any inquiry about what was going on, and he threatened the witness. We accept that the trial judge was right in finding that the appellant beat the deceased to death. He was responsible for her murder. He was properly convicted, on compelling and overwhelming evidence.
15. Regarding sentence, we determine that because the trial court proceeded on the basis that death penalty was mandatory, and therefore the appellant's mitigation was not considered, the sentence was not only illegal but was also harsh and excessive. We set the sentence aside.
16. The appellant was a first offender. He was a young man and regretted the offence. He was remorseful. The circumstances of the case were, however, quite grave. The chilling murder of the deceased was



senseless and unnecessary. We substitute the death penalty with a jail term of 30 years which shall run from the date of his arrest, as the evidence shows that he was not admitted to bail.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF MAY, 2025

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

