Nyaga v Republic (Criminal Appeal 141 of 2019)
[2025] KECA 1073 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KECA 1073 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 141 OF 2019

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

JUNE 5, 2025

BETWEEN

BETH NYAGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the Judgment of the High Court at Kerugoya (L. W. Gitari, J.) delivered on 12th April, 2018 in H.C. CR. Case No. 9 of 2013)

JUDGMENT

1. The appellant Beth Muthoni Nyaga was tried and convicted of the offence of murder by the High Court of Kenya at Kerugoya. She was sentenced to suffer death, it had been alleged that on 25th October, 2013 at Riagicheru village in Kirinyaga County she had murdered BKG. Being a first appeal it is our duty to reappraise the evidence and come to our own conclusions of facts but always remembering that we do not have the advantage of the trial Judge of seeing and hearing the witnesses - we must give due allowance for that. That duty of a first appellate court was discussed in the oft-cited case of *Okeno v Republic* 1972 EA 32 where it was stated:

> " "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] EA. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the

trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] EA. 424."

2. The prosecution case was through the evidence of several witnesses. LWM (W –PW1), a 15 year old pupil at a local school was a relative of Beth (the appellant) and the deceased. On 25th October, 2013 she travelled to Kathiriku to visit her mother who had separated from her father. At about 9 a.m. the appellant arrived and W noted that she had a bloodied bandage on her right hand. The appellant explained that she had nosebled in the night. She asked W to wash off the blood which she did. The appellant had arrived accompanied by her friend Phylis Michere Nyaga (Michere-PW6) who undertook washing of utensils after which the two ladies left. When her mother came back she informed her that the appellant had blood on her hand. She was later informed by her father James Gaturi Muthee (Muthee- PW4) that the deceased's body had been recovered at Nyamindi river and when she went to the scene she noted that the body had several cuts on the head.

3. Grace Karioki Mutei (Karioki- PW2) was an auntie to the deceased. She testified that on 24th September, 2013 the appellant came to her house accompanied by the deceased and a child, MW (MW-PW 11) and they had dinner together. They resided in different houses in the same compound. After dinner the appellant called the deceased and MW to go to bed in her house but Karioki told the deceased to come back to the house early the next morning as she wanted him to take care of her infant child as she (K) went to work. The deceased did not show up the next morning and upon enquiring from MW she was informed that neither the deceased nor the appellant were in the house. W arrived and related to her how the appellant had asked her to wash off blood which was on her plastered hand. When she (K) went to the appellant's house to enquire where the deceased was and why the appellant was not in the house early that morning the appellant told her that she had gone to visit her friend Michere to request her to help her plant beans. She noted blood on the appellant's hands. On the whereabouts of the deceased the appellant informed her that she had left him in the house when she went to visit Michere but did not find him upon her return. She related to her brother Samuel Njagi and Anthony Munyui about seeing blood on the appellant's hand and the disappearance of the deceased. They called the father of the deceased Muthee who worked in a different town, told him of the developments and he came home two days later. She later learnt of the discovery of the body of the deceased and when she visited a dry part of Nyamindi river she noted stab wounds on the body of the deceased.

4. Samuel Nyaga Mbutii (Nyaga-PW3) is a brother in law of the appellant. The whole family lived in different houses in the same compound. He testified that the appellant did not have a good relationship with her step-son (the deceased) as she denied him food and tea forcing him (Nyaga) to provide for the deceased. On 25th September, 2013 he did not see the deceased forcing him to call his brother (Muthee) to inform him of the disappearance of the deceased. He was later informed of the discovery of a body and when he visited Nyamindi river he saw the body of the deceased which had serious injuries on it. According to him the deceased was under the care of the appellant and she should answer for his disappearance and death.

5. Muthee was informed of disappearance his son and he arrived home two days later when they reported the disappearance of the deceased to Wanguru Police Station. He later identified the body of the deceased at Nyamindi river and noted several cuts on the body. The deceased was a step-son to the appellant.

6. Elizabeth Wamburu (Wamburu-PW5) is a co-wife to the appellant and mother of the deceased. She took her son (the deceased) to his father (Muthee) on 7th September, 2013 as she and Muthee did not live together as they had separated. She was informed on 28th September, 2013 that her son was missing

and his body was found the next day at Nyamindi river. She visited the scene and noted that the body had several cuts with a panga. Prior to his death the deceased stayed with his step-mother, the appellant.

7. On 25th October, 2013 Michere (PW6) was home early in the morning preparing breakfast when the appellant visited her. Upon enquiry why she was up and about so early the appellant informed her that she had visited her farm with a farmhand to show him where to plant beans because she had a fractured hand. She noted that the hand had blood stains and when she asked the source of blood the appellant informed her that it was from a nose bleed incident suffered the previous night. She later learnt that the deceased's body had been found at a river.

8. Hellen Wangige Ndambiri, (Wangige -PW 7) was the grandmother of the deceased grandmother who lived in the same compound with the appellant. She confirmed that the deceased had come visiting and resided in the appellant's house.

9. There was then the formal evidence of other witnesses like Dr. Joseph Thuo (PW 8), a psychiatrist at Embu Level 5 Hospital who examined the appellant and found that she was fit to stand trial. Dr. Godfrey Njiru (PW9) of Embu Level 5 Hospital who performed post-mortem on the body of the deceased. The deceased was approximately 10 years old. The doctor noted stab wounds on the back of the head and 2 stab wounds on the right side of the head with the longest wound being 4 cm long. The side wounds were exposed, one could see the skull. There was a compound fracture on the side of the head where it was exposed on the right side and the deceased had bled inside the brain region. The doctor concluded that the cause of death was due to head injury caused by bleeding into the brain.

10. Sergeant Loise W Mwangi (PW10) who was at the material time stationed at Wanguru Police Station received report of a missing child and carried out investigations leading to the arrest and charging of the appellant for the offence of murder. She was recalled before the trial court to produce a statement she had recorded from MW.

11. MW was called as the last prosecution witness. She was 12 years old, a daughter of the appellant and step-sister to the deceased. She did not know whether her brother was alive or dead but knew that her mother was in prison for reasons unknown to her.

12. At the close of the prosecution case and it being found by the trial court that a prima facie case had been made out the appellant gave a sworn statement where she testified that she was married to Muthee; the deceased was Muthee's son with a previous wife. The deceased was brought to her by his mother on 9th October, 2013 and she took him in as her own son, took care of him and took him to school. She did not know what happened to him. She had broken her hand in a bicycle ride and on 25th October, 2013 she had requested her friend (Michere) to plant beans for her but had not seen the deceased that morning. She was later beaten and almost lynched as she was asked where the deceased was. She was arrested and informed that the deceased's body had been found at Nyamindi river. She denied committing the offence.

13. As we have seen the appellant was convicted and sentenced to death in a judgment delivered by Gitari, J. on 12th April, 2018 which has provoked this appeal premised on a home–grown "memeorandum of Appeal" where 4 grounds of appeal are set out. The appellant states that the trial court disregarded the findings in a *Petition No. 618 of 2016* and the decision of the Supreme Court of Kenya in *Francis Karioko Muruatetu & Another v Republic* [2015] which declared mandatory death sentence

to be unconstitutional. The appellant states at ground 2 that the trial Judge failed to appreciate a constitutional principle of fair administrative action.

> "... to hear the views of those likely to be directly affected by the administrative decisions as it is within the petitioner's decision right under Article 47, 48, 49, 50(2) chapter four of the *constitution* 2010, fair administrative action access to justice..."

14. The appellant states in other grounds that the Judge erred in law for upholding conviction based on circumstantial evidence that did not meet the required standards and, finally, that the Judge erred by not finding that the prosecution did not prove the case. We are asked to allow the appeal, quash the conviction and set aside the sentence.

15. When the appeal came up for hearing before us on 12th February, 2015 the appellant appeared virtually from Langata Women's Prison and was represented by learned counsel Miss Grace Maina. The respondent was represented by learned counsel Mr. Solomon Naulikha. Both sides had filed written submissions which they entirely relied on.

16. We will go with the submissions drawn by the appellant's lawyer where, after a history of the case is given counsel submits that the whole case was decided based on circumstantial evidence as none of the prosecution witnesses saw the appellant murder the deceased. It is submitted further that no blood sample was submitted for forensic analysis to establish whether it was the blood of the deceased or that of the appellant; that the weapon used to inflict the injuries was not produced into the case by the prosecution. It is therefore submitted that the conviction was unsafe and should be quashed.

17. The respondent in written submissions identified three issues for determination -whether the elements of murder were established to the required standard; whether the appellant was the perpetrator of the offence and whether the sentence meted was lawful. The case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR is cited where the ingredients to prove murder were identified to be:

    i. the death of the deceased;

    ii. that the accused committed the unlawful act which caused the death of the deceased; and

    iii. that the accused had malice aforethought.

18. It is submitted that the death of the deceased was proved through the evidence of PW1, PW2, PW3, PW4, PW5 and PW9 – that the deceased died of head injury caused by bleeding in the brain.

19. On whether the appellant committed the unlawful act which caused the death of the deceased it is submitted that PW2 was with the appellant and the deceased on the night preceding the deceased's disappearance; that PW2 noted blood on the appellant's hand early the following morning; that the appellant had spent the night with the deceased in the same room which was unusual as he usually spent the night in a separate bedroom with his step sister MW; that there was evidence that the appellant used to deny the deceased food; that the evidence of PW1, PW2 and PW6 that they saw blood on the appellant's hand had not been disputed.

20. The respondent submits on malice aforethought that the actions of the appellant were those of a person who hated the deceased and wished to eliminate him. Several cases are cited on what amounts to malice forethoughts including *Roba Galma Wario v Republic* [2015] eKLR.

21. It is further submitted for the respondent that there was evidence by the prosecution witnesses to show that the appellant was the perpetrator of the offence.

22. It is submitted on sentence that the appellant was the step mother of the deceased who had a duty to take care of him but instead decided to murder him; that the deceased was merely 10 years old with a bright future and that in those circumstances the death sentence was deserved.

23. We have considered the whole record, submissions made and the law.

24. The offence of murder is provided under section 203 of the *Penal Code*. Section 206 of that Code provides as follows on malice aforethought

> 206. Malice aforethought
>
> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
>
> a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. an intent to commit a felony;
>
> d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

25. This Court stated in *John Mutuma Gatobu v Republic* [2015] eKLR:-

> "...malice aforethought in our law is used in a technical sense properly defined under Section 206 of the *Penal Code* ...
>
> There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought."

26. It was proved by the prosecution through the evidence of witnesses that the appellant was seen (by Karioki) the night before his disappearance with the deceased. They all had dinner together. The following morning the deceased was supposed to go to Karioki's house to take care of an infant child but he did not appear. Karioki enquired of the appellant where the deceased was but there was no explanation of his whereabouts. Karioki and W saw blood on the appellant's hand, the appellant infact asked W to wash off the blood which she did. The blood was also seen by the appellant's friend Michere. The appellant's explanation to these witnesses that the blood was a result of a nose bleed was not believed by them and was dismissed by the trial court.

27. The appellant submits that the trial court was wrong to base its findings on circumstantial evidence. This position is wrong and not supported by law. It has been held that circumstantial evidence is often

the best evidence. This Court in *Macharia v Republic* (Criminal Appeal No. 69 of 2017) [2024] KECA 933 (KLR) held:

> "In *Neema Mwandoro Ndurya v R* [2008] eKLR, this Court quoted with approval the decision in the case of *R v Taylor Weaver and Donovan* [1928] 21 Cr. App. R 20 for the position that:
>
> > "Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

28. The Court in *Macharia vs. Republic* (*supra*) went on to say:

> "Ultimately, circumstantial evidence provides a basis from which the facts in dispute can be inferred. The salient question to be answered is whether the prosecution can prove beyond reasonable doubt that the appellant was guilty of the crime allegedly committed. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence."

29. The circumstances, as we have seen, were that the appellant asked her step-son the deceased to share her bedroom the night in question after which he disappeared and his body found four days later dumped at dry part of Ndambiri river. The appellant did not explain when asked where the deceased was. She was seen early in the morning with a bloody hand and she asked W to wash off the blood. There was evidence that the appellant disliked the deceased where she would even deny him food. There is undisputed evidence of the deceased death; that the appellant was the last person to be seen with the deceased after which he disappeared and his badly wounded body found and that the appellant disliked the deceased and wanted him dead. We are satisfied that the conviction of the appellant was based on solid ground and evidence and the appeal on conviction fails and is dismissed.

30. The appellant complains that the death sentence imposed on her was harsh in the circumstances.

31. Section 204 of the *Penal Code* provides for a death sentence on a person convicted for murder.

32. The Supreme Court of Kenya was asked in *Francis Karioko Muruatetu & Another v Republic* [2015] to answer the question whether it was constitutional for Parliament to impose a mandatory sentence. It returned that it was unconstitutional for Parliament to impose a mandatory death sentence on a conviction for murder. The Courts have since then felt free to impose sentences in murder convictions based on circumstances of the case.

33. Mr. Naulikha, learned State Counsel, in a brief highlight on written submissions asked us to consider the age of the deceased, the relationship between the appellant and the deceased and the appellant's conduct preceding the murder of the deceased.

34. Upon conviction the appellant stated in mitigation that she was a first offender; that she was remorseful; that she was a mother of two children; she was 31 years old and sole breadwinner of her children; she prayed for leniency.

35. We have noted that mitigation and what learned State Counsel has said on that issue. The deceased was 10 years old, a stepson of the appellant who society would have expected to take good care of but she instead turned against him, a 10 years old defenceless boy and killed him in a violent vicious manner as described by the doctor who performed post-mortem. The injuries were so serious including a fracture to the skull which exposed the brain. Society would have no mercy upon this kind of person.

36. Guided by current jurisprudence on the issue of sentencing and looking at the surrounding circumstances to the said murder we set aside the death sentence and substitute thereof a sentence of 40 years imprisonment from the date when the appellant was charged (2nd December, 2013). In the end, therefore, the appeal on conviction fails and is dismissed. The appeal on sentence succeeds to the extent that we sentence the appellant to 40 years imprisonment from 2nd December, 2013.

DATED AND DELIVERED AT NYERI THIS 5TH DAY OF JUNE, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR