



REPUBLIC OF KENYA



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**Muriungi v Republic (Criminal Appeal 112 of 2018)
[2025] KECA 1433 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1433 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 112 OF 2018
W KARANJA, J MOHAMMED & LK KIMARU, JJA
JULY 31, 2025**

BETWEEN

PAUL MWENDA MURIUNGI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence of the High Court of Kenya at Meru (A. Ong'injo J.) dated 27th June 2018 in Criminal Case No. 64 of 2022)

JUDGMENT

Background

1. Paul Mwenda Muriungi (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 between 18th and 19th September 2012 at Nkanda Sub-location, Igembe North District, Meru County, the appellant murdered Lucy Karimi (the deceased). He pleaded not guilty and the case proceeded to hearing with eight (8) prosecution witnesses.
2. Isaiah Lenguthia (PW1) the deceased's father, testified that on 18th September 2012 at about 5:00p.m., he saw the appellant at the gate calling the deceased. The deceased handed over her one-month-old child to her mother (PW3) and went to meet the appellant but did not return. It was PW1's testimony that the next morning, a neighbour informed him that the deceased had been killed. He found her body about sixty (60) steps from his home with injuries on the neck. He reported the matter to the Chief and the appellant was arrested.
3. Jacob Gituma (PW2) testified that on 19th September 2012 at about 1:00 a.m., while returning home, he found the appellant beating the deceased at a farm. He testified that he asked the appellant to stop beating the deceased but the appellant ordered him to go to his house. PW2 testified that he had a torch



and that he saw the appellant and the deceased proceed toward their home. It was his further evidence that he subsequently learned that the deceased had died.

4. Beatrice Karanyuni (PW3), the deceased's mother, testified that on the material day at about 4.00pm the appellant went to their home and called the deceased. It was PW3's testimony that the appellant and the deceased were married but that the deceased had returned home when she was expecting the appellant's child. That the deceased left their home on the material day with the appellant, leaving behind her infant child and never returned. It was her evidence that she stayed with the infant until 6.00am the next morning when she was informed that the deceased had died.
5. Ruth Mugambi (PW4), a fourteen (14) year-old girl, testified that she last saw the deceased and the appellant walking together from a cinema. It was her evidence that the deceased told her to go ahead of them and that the deceased never returned home.
6. Joseph Muthuri Muriungi (PW5) testified that at about 1:00 a.m. on 19th September 2012, he heard screams. He went out with his torch and found the appellant beating the deceased. When he intervened, the appellant threatened to kill him. He left and the next morning at about 6.00am he found people gathered at the scene where the deceased lay dead.
7. Joseph Muriungi Kanake alias Baariu (PW6) who is the appellant's father, testified that the body of the deceased was found on his farm where the appellant lived as a watchman. It was his evidence that he had previously expelled the appellant from his home as he (the appellant) had assaulted another woman.
8. Dr. Charles Njeru (PW7) a doctor at Meru Teaching and Referral Hospital performed a post-mortem examination on the body of the deceased. It was his conclusion that the cause of death was cardio pulmonary arrest due to asphyxiation due to strangulation and that head injury also contributed to the death.
9. No. 235493 IP Abel Okadapali (PW8) the Investigating Officer, testified that he visited the scene of crime after receiving the report and found the body of the deceased.
10. The appellant gave a sworn defence and did not call any witness. He admitted that he met with the deceased on the material day to give her money for upkeep but claimed that he later went to work as a night guard. He denied being with the deceased at the cinema or assaulting her.
11. The High Court (A. Onginjo) found that the cause of death was strangulation and relied on the testimony of PW2, PW5 and PW4. The appellant was convicted and sentenced to death on 27th June 2018.
12. Aggrieved by this decision, the appellant appealed to this Court on the grounds that the prosecution evidence was contradictory; identification was unsafe; the death penalty was unconstitutional; key witnesses were not called; the defence was wrongly rejected; and that the circumstantial evidence relied on to convict him was insufficient.
13. The appellant appealed against both conviction and sentence by the High Court. The grounds of appeal were that the learned Judge erred in law and fact by:
 - a. failing to note contradictions in the evidence of PW2, PW4 and PW5 which rendered it unreliable;
 - b. failing to observe that the offence occurred at night under unclarified torch light, making identification unsafe;



- c. imposing a death sentence despite section 204 of the *Penal Code* having been declared unconstitutional;
- d. failing to note that crucial witnesses were not called;
- e. holding that the prosecution proved its case beyond reasonable doubt;
- f. rejecting the appellant’s defence without cogent reasons; and
- g. failing to find that the circumstantial evidence was insufficient.

Submissions by Counsel

14. At the hearing of the appeal, the appellant was represented by learned counsel Mrs. Mutegi while the respondent was represented by Ms. B. Nandwa, the learned Prosecution counsel. Mrs. Mutegi submitted that the prosecution’s evidence was contradictory, specifically regarding whether the deceased’s body was clothed, the weapon used, and the nature of injuries sustained. Further, that the torch light used for identification of the appellant as the perpetrator was not clarified. Counsel relied on the case of *Wamunga v Republic* (1989) KLR 424, emphasizing the need for caution where the only evidence is that of identification.
15. Counsel further submitted that the death penalty had been outlawed; that Kobia who is said to have informed PW1 that the deceased had been killed by the appellant and the area Chief were not called as witnesses; and that the appellant’s defence that he was on duty guarding the premises where he worked was wrongly rejected.
16. Ms. Nandwa opposed the appeal and submitted that the prosecution proved its case against the appellant beyond reasonable doubt by proving all the ingredients of the offence of murder. Counsel relied on the case of *Anthony Ndegwa Ngari v Republic* [2024] eKLR in support of this proposition. Counsel further submitted that the appellant was positively identified by PW2 and PW5 while assaulting the deceased on the material night. Further, that PW4 testified that the appellant was last seen walking home with the deceased. The State invoked the doctrine of “last seen,” citing the case of *Republic v EKK* (2018) eKLR and the Nigerian case of *Moses Jua v State* [2007] LPELR-CA/IL/42/2006, arguing that in the absence of an explanation, the court could infer guilt.
17. Counsel further submitted that identification of the appellant as the perpetrator was reliable as PW2 and PW5 who testified that they saw the appellant beating the deceased on the material night knew the appellant. Counsel further submitted that malice aforethought was proved by evidence of strangulation and head injuries. Counsel asserted that minor contradictions, did not go to the root of the prosecution’s case. Counsel relied on the case of *Richard Munene v Republic* [2018] eKLR where the court found as follows:

“it is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies and contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”
18. On sentence, counsel submitted that the death penalty remains lawful under *the Constitution* and applicable sentencing guidelines. Counsel urged us to uphold both the conviction and sentence imposed by the High Court.



Determination

19. We have considered the record of appeal, the submissions by counsel for the parties, the authorities cited and the law. As this is a first appeal, the duty of this Court was set out in the case of *Okeno v. R* [1972] EA 32 as follows:

“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 vs. Republic* [1957] E.A. 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala vs. R* [1957] EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there is some evidence to support the lower court’s findings and conclusion; 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 vs. Sunday Post* [1958] EA 424.”

20. In a murder case, the prosecution has the burden of proving the death of the deceased; that the death resulted from the unlawful act or omission of the appellant; and demonstrate that the appellant had malice aforethought to cause the deceased’s death.
21. It is not in doubt that the deceased who was the appellant’s wife, lost her life between the night of 18th and 19th January 2012. The key issue is whether the evidence of the prosecution linked the appellant to the murder of the deceased. The appellant submitted that he was not the perpetrator; that the evidence of the prosecution linking him to the heinous act was contradictory; and that there was no proper identification noting that the death occurred at night.
22. There was no direct evidence as to death of the deceased, the prosecution relied upon circumstantial evidence and in particular the doctrine of ‘last seen with the deceased’. The standard for circumstantial evidence is laid out in numerous decided cases, among them *Simon Musoke vs. R* (1958) EA 71 that:

“The circumstances must be such as to produce moral certainty to the exclusion for any other reasonable doubt

.... It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference.”

23. As regards the doctrine of last seen with the deceased, this Court in the case of *Kaburu v Republic (Criminal Appeal 103 of 2023)* [2024] KECA 536 (KLR) stated as follows:

“38) According to the doctrine, if an individual is the last person seen with a deceased individual, he/she is required by law to provide an explanation regarding the circumstances surrounding the death. The burden of proof lies on the person last seen with the deceased to provide an explanation regarding the circumstances surrounding the death. The burden of proof lies on the person last seen with the deceased to provide at least a minimum explanation regarding their knowledge of the events leading to the death.

39. Generally, the doctrine of last seen places a legal obligation on the person last seen with a deceased individual to provide an explanation regarding the events leading to their death. Failure to provide a satisfactory explanation can lead to the inference that the accused person



is responsible for the death. Therefore, the appellant had obligation to provide a plausible explanation how the children lost their lives.

40. The obligation to provide an explanation in circumstances where it is shown by evidence that an accused person has knowledge of any facts or circumstances is also provided under Section 111 of the *Evidence Act* which reads:

1. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the Court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

2. Nothing in this section shall—

- a. prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or
- b. imposes on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or
- c. affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”

24. However, as a safeguard against the said doctrine, in the case of *Ramreddy Rajeshkhanna Reddy & Another v State of Andhra*

Pradesh, JT 2006 (4) SC 16 the Court held:

“That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

25. From the appellant’s own testimony, he went to the deceased’s home on the 18th January 2012 at about 5:00pm and called the deceased. That was the last time the parents of the deceased, PW1 and PW3 last saw her alive. The deceased left her one month baby to her mother (PW3) and went to meet the appellant. According to the appellant, he called the deceased for purposes of giving her money for their children’s maintenance. PW4, corroborated the evidence of PW1 and PW3 that on the fateful night, she was with the appellant and the deceased at a cinema in a church and left for home. That on the way, she left the appellant and the deceased walking together slowly while she was walked ahead of them. PW2’s testimony was that on the fateful night at about 1:00am, he was heading home from the market when he met the appellant assaulting the deceased. He flashed his torch and asked the appellant to stop the assault whereupon the appellant stopped assaulting the deceased and PW2 went away. PW5 also testified that he was in his house when he heard a lady screaming in the middle of the night on the



fateful night. He went to where the scream was coming from and found the appellant assaulting the deceased. He asked the appellant to stop but the appellant told him to go about his business or else he would kill him. PW5 then heeded the threat and left. PW5 testified that he had a torch which he used for lighting. From the record, both PW2 and PW5 knew the appellant and the deceased well as they were from the same village. From this evidence, it is not in doubt that the appellant was the person last seen with the deceased alive. The appellant merely denied the evidence of PW2, PW5 and PW4 stating that the same was fabricated. No explanation was given why all the three witnesses (PW2, PW4 and PW5) would fabricate their testimony against him. Like the trial court, we find that the evidence of PW2 and PW5 that they saw the appellant assaulting the deceased was not dislodged by the appellant. There is no other inference that can be drawn other than that the appellant strangled the deceased. We are, therefore, satisfied that the prosecution evidence proved beyond reasonable doubt that it was the appellant who caused the death of the deceased.

26. Section 206 of the *Penal Code* provides that:

“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.”

27. Did the prosecution evidence establish the requisite malice aforethought on the part of the appellant? Malice aforethought is inferred from the nature of the injuries sustained by deceased. The prosecution’s evidence as per the post mortem report produced by PW7 was that the cause of death was strangulation and head injury. The appellant’s act of strangulation and inflicting head injuries clearly established the element of malice aforethought. From the evidence of various witnesses including PW2 and PW5 it was clear that the actions of the appellant toward the deceased were calculated as he lured her from her parental home, had a history of frequent domestic quarrels and prior incidents of violence. In addition, there was evidence that the appellant beat the deceased relentlessly on the material night and threatened PW2 and PW5 when they attempted to intervene. From the record, all these were unprovoked and the appellant’s intention was to kill the deceased or cause her grievous harm. We ,therefore, find that the appellant had malice aforethought by the act of inflicting head injury and strangling the deceased. The prosecution therefore proved the two essential ingredients of the offence of murder: actus reus and mens rea.

28. Arising from our analysis of the issues discussed above and the conclusions arrived at, we find no basis to interfere with the conviction. In the circumstances, we find that the appeal against conviction has no merit and is dismissed.

29. As regards sentence, counsel for the appellant submitted that in the case of Francis Karioko Muruatetu & Another vs Republic [2017] eKLR (the



Muruatetu case) the Supreme Court declared the mandatory nature of the death sentence unconstitutional and that this Court should therefore review the sentence imposed on the appellant or substitute it with a lesser sentence.

30. The trial court was constrained to impose the death sentence prescribed by the law which was mandatory at the time. However, guided by the Supreme Court decision in the Muruatetu case, we are inclined to interfere with the sentence as the courts are now at liberty to impose any other lawful sentence apart from death.
31. Based on the current development of the law and in tandem with the Muruatetu case, we are persuaded to interfere with the sentence. Accordingly, we allow the appeal against sentence and set it aside, and substitute therefore with a sentence of forty (40) years' imprisonment to run from the date of the sentence by the High Court.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY, 2025

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true Copy of the original

Signed

DEPUTY REGISTRAR

