Limakori v Republic (Criminal Appeal 53 of 2019)
[2025] KECA 1348 (KLR) (25 July 2025) (Judgment)

Neutral citation: [2025] KECA 1348 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 53 OF 2019

JM MATIVO, PM GACHOKA & WK KORIR, JJA

JULY 25, 2025

BETWEEN

SAMSON LIMAKORI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kapenguria (R.N. Sitati, J.) dated 28th November 2018 in HCCRC No. 19 of 2015)

JUDGMENT

1. The appellant, Samson Limakori, 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 June 2015 at Natelem Village Ywalateke Location within West Pokot County, the appellant murdered Chemekal Samson.

2. When the appellant was arraigned before the trial court, he entered a plea of 'not guilty'. After a full trial, the appellant was convicted of the offence and sentenced to 25 years imprisonment. The appellant is aggrieved by those findings. He filed his notice of appeal lodged on 11th March 2019.

3. The appellant also filed his memorandum of appeal titled "appellant's supplementary memorandum of appeal" dated 16th April 2025. The appellant raised sixteen grounds of appeal disputing the findings of the learned judge. Those grounds are summarized as follows: that the evidence of the prosecution was inconclusive and weak since the cause of death was not established beyond reasonable doubt; the learned judge erred in calling the doctor when both parties had closed their cases and as a consequence, his right to a fair hearing was jeopardized; and that the trial court failed to weigh the applicability of section 150 of the *Criminal Procedure Code* against the appellant's constitutional rights to a fair hearing.

4. He complained that the learned judge erroneously admitted the evidence of a defective post mortem report; the learned judge failed to consider that by calling the doctor's evidence, the appellant could not call an expert witness to controvert his testimony; no witness was present during the post mortem exercise; the element of harm or violence was not established absent proper medical evidence; and the sentence meted out was harsh. For those reasons, he prayed that his appeal be allowed by quashing the conviction and setting aside the sentence.

5. The appeal was heard virtually on 5th May 2025. The appellant was present and represented by learned counsel Mr. Oyaro while Senior Assistant Director of Public Prosecutions Mr. Tanui was present on behalf of the respondent. The appeal was canvassed by way of written submissions that were orally highlighted.

6. The appellant filed his written submissions dated 16th April 2025. He submitted that his right to a fair trial was infringed when the learned judge elected to call for the evidence of the doctor after both parties had closed their cases. At that juncture, none of the parties testified that a post mortem had taken place. In effect, the appellant submitted that the learned judge assumed the role of a litigator.

7. Furthermore, the appellant was only supplied with this evidence after the trial court formed the opinion that he had a case to answer. In his view, thus, the learned judge ought to have treated that evidence with great circumspection especially taking into account the fact that it was that evidence that convicted the appellant.

8. Looking at the evidence in totality, the appellant submitted that the ingredients of the offence of murder were not established beyond any shadow of a doubt. Having relied on circumstantial evidence, the appellant submitted that the prosecution failed to create a chain so complete that an inescapable conclusion and inference would be drawn to irresistibly point him as the perpetrator of the offence. For those reasons, he prayed that his appeal be allowed.

9. Opposing the appeal, the respondent filed its written submissions, a case digest and a bundle of authorities all dated 28th Apil 2025 to submit that the learned judge afforded the appellant a fair trial. Its basis of that argument stemmed from the fact that the learned judge invoked section 150 of the *Criminal Procedure Code* and directed the prosecution to furnish the autopsy report to the appellant. The appellant was accordingly not prejudiced by that decision since he had ample time to challenge the evidence adduced.

10. Learned counsel submitted that the prosecution had established beyond reasonable doubt that the deceased died as a result of an unlawful act. That the said unlawful act was committed by the appellant who was possessed with the mens rea. While acknowledging that the evidence was circumstantial, the respondent pointed out that the trial court properly applied the doctrine of last seen to establish that the appellant was last seen with the deceased when she was alive. He was thus the perpetrator of the offence. The respondent opined that the witnesses corroborated that the appellant strangled the deceased. Contrary to the appellant's assertions, it submitted, the deceased did not succumb to fracture injuries. For those reasons, it prayed that the appellant's appeal be dismissed.

11. We have anxiously considered the memorandum of appeal and the opposing submissions, examined the record of appeal and analyzed the law. As a first appellate court, the appellant is entitled to expect the evidence tendered in the superior court to be submitted to a fresh and exhaustive examination and to have this Court's own decision on that evidence. In doing so, the Court is alive to the fact that we did not have the advantage of seeing the witnesses. [See Henry Katap Kipkeu vs. Republic [2009] KECA 294 (KLR)].

12. The facts as captured in the record before us are as follows: PW1 Irene Chelimo testified that on 5th June 2015 at 11:00 a.m., she was sleeping at her neighbour's home. Her father, the appellant herein, woke her up that night and asked her to check on her mother, the deceased. He informed her that her mother had passed on. The appellant told her that the deceased had been drinking beer and had died in the forest. He was crying. Instead of going to see the deceased, PW1 went to sleep at Kapelisha's house.

13. The following day, PW1 gathered the strength to see her mother. She was found lifeless on a farm by the footpath. She observed that though the deceased's hair had been previously plaited, she had been shaved. There was a beaded belt that had been removed from her body and placed next to her. She observed that she had no visible injuries to her body. There was also a lesso placed next to her. She was lying on her left hand. Later, the deceased's body was collected by the police. She recalled that when the deceased was alive, her parents hardly fought, having witnessed them fighting only once.

14. PW2 Hosea Pkiech, PW1's younger brother, testified that when he was asleep at home on the night of 5th June 2015 at about 11:00 p.m., the appellant awoke him and informed him that his deceased mother had passed on. He did not disclose what caused her death. He accompanied his father to the maize farm. On seeing the deceased, PW2 screamed. She was lying on the footpath. He recalled that she had no visible injuries. The following day, police officers collected the body. He testified that his parents were never at loggerheads. He added that they never drank beer.

15. PW3 Kochesum Bumoreng testified that on 5th June 2015 at around 4:00 p.m., the deceased borrowed some maize from her. PW3 gave her maize and the deceased joined her husband (the appellant) to return home together. Later on, PW3 learned that the appellant had murdered the deceased.

16. PW4 Thomas Limakou a village elder testified that on 5th June 2015 at 11:00 p.m., he was at home sleeping when he heard screams. He woke up to investigate what led to that. He found the appellant holding PW1's hand. He was also in the company of PW2. While crying, the appellant informed him that his wife had passed on. PW1 then left them while PW4 and the appellant located the body.

17. According to PW4, they crossed the river two times before getting to the maize farm where the deceased body lay. He used the torchlight from his phone to observe that there were no visible injuries to the deceased, who lay on her back on a footpath. Next to the deceased was a lesso, a belt and a piece of hair. A large crowd had gathered by that time. He also observed that the area had a lot of footsteps. There were also marks of a dragged body. PW4 stayed there till morning and called the assistant chief. The body was then collected by the police.

18. PW4 testified that later he was informed that the appellant surrendered himself to the police station. He recalled that on that night, the appellant appeared drunk. He stated that the appellant used to beat his deceased wife and that he had intervened on four occasions to separate the two. He further testified that the appellant did not tell him how the deceased had died.

19. PW5 PC Boniface Wayongo attached to Kapenguria Police Station stated that he took over the case from his predecessor who had passed away on 30th August 2016. That on receiving reports that the deceased had passed on, his predecessor and other officers retreated to the scene and retrieved the deceased's body, whom he referred to as Monicah Jackson. The suspect was arrested and charged with the present offence.

20. At the close of the prosecution's case, the trial court found that the prosecution had established a prima facie case against the appellant. He was placed on his defence. His sworn testimony was that on 5th June 2015, after finishing his house chores, he prepared, together with his wife, to go for a meeting

at Natelem Primary School. After attending the meeting, the appellant and his wife returned home. Thereafter, the appellant went to Beatrice's busaa den at around 3:00 p.m.

21. Later on, the appellant joined his wife in Rose's den and drank chang'aa together until 10:00 p.m. They were drunk. They embarked on their journey home on foot. He recalled that it was raining. They took a rocky path. The appellant walked ahead of his wife. Suddenly, his wife screamed. He noted that she had slipped and fallen. The appellant rushed back to help her get on her feet but she was too heavy for him. He tried to lift her by the hand and waist. They rolled several times because he was unable to lift her up.

22. The appellant then screamed for help. His wife was still alive at this juncture. Unable to find assistance, the appellant left his wife at the scene to physically look for help. He was, however, unable to find any assistance. On return to where he had let his wife, the appellant testified that he found her dead. He then made a report and was placed in police custody at Kapenguria Police Station. He denied that he killed his wife.

23. The court then reserved the matter for judgment. However, in the course of writing its decision, the trial court gave the following directions on 25th October 2018:

> " After reading through the evidence on record, including the defence given by the accused person herein, and in which he alleges that the deceased died as a result of a fall, this court finds it necessary to hear the medical evidence in the matter so that in making its decision it can be properly guided.
>
> In the circumstances, and pursuant to the provision of section 150 of the CPC, this court requires prosecution to avail the doctor who carried out the post mortem examination on the body of the deceased and give evidence of his findings."

24. We shall deal with the validity or otherwise of this procedure later in the judgment as this was one of the hotly contested arguments raised in this appeal.

25. PW6 Dr. Jotham Mukhola testified on 31st October 2018. He produced and relied on the post mortem report filled by Dr. Rono. He explained that he testified on his behalf because the author of the report was away for his studies. According to PW6, the body of the deceased was found in a maize plantation with visible signs of a struggle. The post mortem was conducted at Kapenguria General Hospital on 8th June 2015 at 10:30 a.m.

26. It was observed that the deceased had swelling and discoloration on the skull and in the area around it. The body had bruises on the front part of the neck. There was bleeding on the frontal side of her eyes, while her lips and tongue were blue in color due to lack of oxygen before her death. Internally, there was generalized bleeding and excess carbonation of the lungs. The cause of death was deprivation of oxygen supply due to strangulation. The post mortem report was then adduced in evidence.

27. PW6 conceded that though the post mortem report did not evince the name of the doctor, he was emphatic that the signature embedded therein belonged to Dr. Rono. He also observed that the form had not been stamped. He added that if a person fell down headlong, depending on the nature of force, that person would suffer a fracture of the neck bone. That was not the case herein. There was visible evidence that the deceased had been strangled. It was not indicated whether the deceased had hair. Finally, it was not indicative that there was twisting of the neck but strangulation can be caused by constricting the neck.

28. Before turning to the ingredients of the offence of murder, the appellant raised a critical issue with the learned judge's directions dated 25th October 2018. The appellant lamented that the decision violated his right to a fair trial since the doctor's evidence was called after all parties had closed their cases. Resultantly, he was unable to challenge the evidence by calling a witness to rebut that evidence.

29. Section 150 of the *Criminal Procedure Code* provides as follows:

> " A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:
>
> Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

30. The wordings of the provision captured above herein reveal that a trial court is placed with wide discretionary powers to meet the ends of justice in the determination of the case. Given the wide discretionary powers set out, it is no gainsaid that the powers donated should not be premised on caprice or whims. It is also important to add that a trial court must always bear in mind that in invoking this provision, it must be guided by the dictates of a right to a fair trial as couched in Articles 25

    (c) and 50 (2) of *the Constitution*. In so doing, the trial court is duty bound to balance the pendulum so that the accused person is not prejudiced.

31. The East African Court of Appeal in Njaggi and Another vs. Regina (Criminal Appeal No. 42 of 1952; Criminal Appeal No. 43 of 1952) [1953] EACA 37 (1 January 1953) weighed in on this issue as follows:

> "As we pointed out in the last appeal (Mr. Wilkinson was also the magistrate) in order that injustice should not be done to an accused, the calling of a witness by the court after the case for the defence has been closed should be limited to the case where something has arisen ex improviso on the part of the accused which human ingenuity could not foresee. We think that in this case an injustice was clearly done to the appellants by calling the witness Kasinga when the defence case had closed. It was certainly not justified by the considerations we have mentioned. Appeals allowed. Convictions and sentences set aside."

32. The above position was echoed in the case of Omari s/o Ramadhani vs. R [1962] EA 486. Similarly, De Hestang in Fitalis Ogure s/o Ollan vs. Republic (1950) 24 KLR had this to say:

> "Although at first sight this section appears not only to give a wide discretion to a magistrate in calling any witness but also to make it mandatory on him to call or recall any person whose evidence appears to be essential to the just decision of the case, the Supreme Court has repeatedly held that a judge should not call a witness in a criminal trial after the case of the defence is closed. The present case goes, however much further .....the witness was called after the case had been adjourned for judgment. At the close of the case for prosecution, the learned magistrate was in doubt and instead of resolving this doubt, there and then in favour of the accused, he decided on this course of calling fresh witness. In my view, in doing so, the learned magistrate unwillingly committed an irregularity which is fatal to the conviction

because if the evidence of that witness is rejected, then it is clear that the appellant should be given the benefit of the doubt and acquitted."

33. The above decisions posit that while section 150 of the *Criminal Procedure Code* is discretionary, a trial court is discouraged from calling for the evidence of the prosecution after the close of the defence. In this case, the trial court found that it was necessary to call for the evidence of the post mortem, which was absent as at the time of writing the judgment. It is trite that one of the ingredients for the offence of murder is the proof beyond reasonable doubt that death occurred and that the unlawful act was caused by the deceased. So from the outset, it was the duty of the prosecution to establish that fact. How would the prosecution have established the fact of the death without calling the doctor who conducted the postmortem? If the prosecution failed to do so, why would a judge intervene to fill in that gap? We do agree with the appellant that the learned judge entered into a dangerous arena by placing herself in the position of a litigator. That decision was made per incuriam since it was clear that the respondent did not intend to rely on the evidence of the post mortem.

34. In our view, the evidence that was on record as at the time the trial court was writing its decision was not sufficient to sustain a conviction. It was therefore incumbent, and might we add, her only option, to acquit the appellant since there was no nexus between the deceased's death and the appellant's alleged commission of the crime. This was a grave misdirection and a flagrant breach of the appellant's right to a fair trial. This also flouted the rules of procedure. Since the trial court opened the case for the prosecution, the Judge needed to accommodate the defence to open their case in a similar fashion. That however, was not the direction taken. As rightly stated by the appellant, he was seriously prejudiced because of the inability to challenge the evidence on account of the fact that both parties had closed their cases.

35. Be that as it may, a cursory perusal of the post mortem revealed serious abnormalities with far-reaching consequences. Firstly, it is recorded that the death of the deceased occurred on 5th June 2016 at 6:00 p.m. when the body was found on the same day at 10:00 p.m. It appears that the death of the deceased was already predetermined before her death. That evidence was not corroborated.

36. Secondly, no witnesses were present during the exercise to confirm its authenticity and that the body of the deceased indeed underwent an autopsy. Lastly and very critically, the post mortem report was not stamped and failed to have the name of the pathologist. While PW6 was emphatic that it was Dr. Rono's signature, that was his word against the evidence. The said doctor, who allegedly performed the autopsy, was absent. How then could we ascertain that the said pathologist authored it? Without this crucial information, we would be engaging in speculation.

37. The above information casts doubt on the veracity of the post mortem report. Its reliance occasioned a miscarriage of justice since it certainly proved nothing; its authenticity being very much questionable.

38. In view of the foregoing discrepancies highlighted above, the evidence did not lead to a safe conviction and it is not even necessary to reevaluate the evidence that was adduced by the prosecution, which even on a casual look is circumstantial and which does not make a chain of events that are so complete that the doctrine of last seen can be applied against the appellant.

39. We therefore come to the unwavering conclusion that the appeal must succeed. We accordingly quash the conviction and set aside the sentence meted out against the appellant. The appellant shall be immediately set free unless otherwise lawfully held.

DATED AND DELIVERED AT NAKURU THIS 25TH DAY OF JULY 2025.

J. MATIVO

……………………………….

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

……………………………….

JUDGE OF APPEAL

W. KORIR

……………………………….

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR