



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyaga v Republic (Criminal Appeal 18 of 2020)  
[2025] KECA 1280 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1280 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 18 OF 2020  
JM MATIVO, PM GACHOKA & WK KORIR, JJA  
JULY 11, 2025**

**BETWEEN**

**DAVID NYAGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nyahururu  
(RPV. Wendob, J.) dated 25th November 2020 in HCCRC No. 14 of 2017)*

**JUDGMENT**

1. This is a first appeal against the appellant's conviction and sentence for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. As such, it is the duty of this Court to reconsider and re-evaluate the evidence adduced before the trial court with a view to reaching its own independent determination on whether or not to uphold the conviction and sentence of the trial court. See *Okeno v Republic* [1972] EA 32.
2. The appellant, David Nyaga, 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 the night of 11<sup>th</sup> and 12<sup>th</sup> June 2015 at Kwa-Kahii Trading centre within Nyandarua County, the appellant murdered Samuel Githinji Wambugu. When the appellant was arraigned before the trial court, he entered a plea of 'not guilty'. After full trial, the appellant was convicted of the offence and sentenced to 25 years imprisonment.
3. The appellant is aggrieved by those findings. He filed his notice of appeal dated 21<sup>st</sup> December 2020. He also filed his memorandum of appeal similarly dated that raised eight grounds disputing the findings of the learned judge. In precis, the appellant complained that the prosecution evidence was marred with contradictions and insufficiencies; his defence was cogent; the trial court erroneously shifted the burden of proof to the appellant; the sentence meted out against the appellant was harsh and excessive;



and the circumstantial evidence was not watertight. In view of the foregoing, the appellant prayed that the appeal be allowed, the conviction be quashed and the sentence be set aside.

4. The appeal was heard virtually on 28<sup>th</sup> April 2025 where parties elected to rely on their corresponding written submissions that were orally highlighted. The appellant was present and represented by learned counsel Mr. Mongeri. Appearing for the state was Senior Assistant Director of Public Prosecutions Mr. Omutelema.
5. The appellant's written submissions, together with a list and bundle of authorities both dated 4<sup>th</sup> April 2025, argued that since no witness testified that he was seen injuring the deceased and throwing him in the dam, the circumstantial evidence laid out against him could not justify an inference of guilt. Furthermore, Mbai and George were not called as witnesses having been mentioned as crucial witnesses by PW4.
6. Observing that the trial court heavily relied on PW4's evidence to convict him, the appellant submitted that PW4's evidence was unreliable because he was drunk, did not see the appellant in possession of any weapon and gave contradicting evidence. He urged this court to consider his defence that shook the evidence of the prosecution.
7. Citing several decisions, the appellant submitted that the prosecution failed to discharge its burden of proof being beyond reasonable doubt. He pointed out that he was only arrested by PW5 on account of public uproar arising from the dangerous assumption of PW4's evidence that he was the perpetrator.
8. He further challenged that the investigations were shoddy since no toxicological tests and blood samples were taken as to tie the appellant to the offence. He additionally stated that since no photographs were taken, it was impossible to establish the state of the deceased who was allegedly found three days after drowning in the dam. Lastly on the sentence, the appellant proposed that the same be reduced to 8 years imprisonment should this Court find his conviction safe. He prayed that his appeal be allowed.
9. The respondent filed written submissions, a case digest and a list and bundle of authorities all dated 2<sup>nd</sup> April 2024. It submitted that all the ingredients of the offence of murder were proved beyond reasonable doubt. It stated that the appellant was properly convicted on the basis of circumstantial evidence having satisfied the three-pronged test. In this case, it submitted that the evidence of PW4 irresistibly pointed out that the appellant murdered the deceased person.
10. Citing section 111 of the *Evidence Act*, the respondent pointed out that it was incumbent on the appellant to explain how the deceased's body had inflicted head injuries and was found floating in a dam. Though the burden of proof was never shifted to him, it conceded, he was duty bound to explain matters within his special knowledge. That when placed on his defence, the appellant gave unsworn evidence that was not only contradictory but also failed to dislodge the prosecution's watertight evidence.
11. Further submitting on the ingredients to the offence of murder, the respondent continued that the appellant had every intention of murdering the deceased on account of the injuries inflicted to his body. Finally, the respondent submitted that the sentence meted out took into account the appellant's mitigation while observing a balancing act against the aggravating circumstances leading to the deceased's death. It urged this Court to dismiss the appeal.
12. We have considered the memorandum of appeal and the parties' written submissions, examined the record of appeal and analyzed the law. The prosecution called six witnesses in a bid to prove that the appellant committed the offence that he was charged with. The record before us captures the evidence



- as follows: PW1 Ayub Gitonga Wambugu, the deceased's brother, received a call on 15<sup>th</sup> June 2015 at 11:30 a.m., informing him that the deceased had passed on. He identified the body of the deceased at Ol Kalou mortuary. At the post mortem, he observed that the deceased suffered injuries on the back of his head.
13. PW2 Joseph Maina Kiriko testified that on 12<sup>th</sup> June 2015 at 8:30 a.m., he noticed a lifeless body floating on the dam when he was herding his cattle. He was with one of the neighbours PW3 Jane Muthoni Mbutu. Thereafter, they informed the chief. Shortly, the police were called and removed the body. That was when he recognized the body as that belonging to the deceased who was his neighbour. He recalled that the deceased lived in harmony with other neighbours.
  14. PW3 testified that PW2 informed her that he had seen a body floating on the dam. Immediately thereafter, they informed their neighbours who reported the incident to the relevant authorities.
  15. PW4 Josphat Mbugua Kiri testified that on 11<sup>th</sup> June 2015 at 2:00 p.m., the deceased, who was his friend, called him requesting him to buy meat so that they would cook it together with ugali. Unable to find meat, PW4 instead purchased beans, oil and tomatoes at Kwa-Kahii hotel. He would then retreat back to the deceased's home where they shared a meal. Later, they went to Museveni Centre before embarking on an alcohol bender.
  16. PW4 testified that they hopped in different bar joints before arriving at Kahuruko Bar. They were also accompanied by George. Having found the door closed, PW4 knocked on it while the deceased knocked on the window causing it to crack. This caught the attention of the bar owner who is the appellant. On finding out that the deceased was the culprit, the appellant grabbed him. PW4 got hold of the appellant giving the deceased an opportunity to escape in the darkness.
  17. PW4 then saw Mbai running in the direction that the deceased fled to together with the appellant who managed to release himself from the clasp of PW4's hands. Mbai had a beer bottle in his hand. The appellant neither had a weapon nor was he seen inflicting injuries on the deceased.
  18. PW4 tied his hand since it was bleeding. He then heard the noise of barbed wire but could not see what was happening. PW4 then walked home since efforts to trace the deceased became futile when he began to look for him. He was then joined by George but they both could not find him. The next day, PW4 found a blood clot at the direction that the deceased ran to. Later that morning, PW4 was informed that the deceased was found in a nearby dam where he witnessed his body being retrieved. He was emphatic that the deceased was murdered by the appellant and Mbai because they chased him and he was never seen again.
  19. PW5 IP Maure Birindu testified that on 12<sup>th</sup> June 2016, he received a report at 10:00 a.m. that a body was found floating at Kwa-Kahii dam. The body, identified as that of the deceased, was retrieved from the said dam. He did not see any visible injuries on the body. It was then taken to Olkalou mortuary. PW5 relied on the evidence of PW4 to arrest the appellant two days later. He recalled that area residents wanted to lynch the appellant and burnt down his bar in retaliation for the deceased's death.
  20. PW6 Dr. Patrick Kiruki Kang'ethe conducted the autopsy on the deceased's body. On observation, PW6 noted that the deceased was bleeding from the nostrils and ears. He had a large hematoma measuring 10mm by 10mm on the head. His fingers had developed peripheral sinuous of extremities. His chest and lungs were full of water. He formed the opinion that the deceased died as a result of severe head injury resulting in bleeding in the brain and also succumbed to drowning due to spongy lungs. Furthermore, he was asphyxiated. He signed the post mortem reported dated 15<sup>th</sup> June 2015 that was produced in evidence.



21. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was placed on his defence. The appellant gave unsworn evidence and stated that he had closed the bar when he heard a knock on the window. Soon after he heard the sound of a broken window. On opening the door, he saw a friend of the deceased. That person was arrested. However, on noticing that he was drunk, they released him. The appellant denied ever seeing the deceased on that night but the next day, he learnt that the body of a man who later came to be known as the deceased, had been found in the dam. He was later arrested and charged.
22. The trial court, having considered the evidence presented by both the prosecution and the defence, held that the appellant committed the offence and convicted him. After considering the mitigation, the appellant was sentenced to 25 years imprisonment.
23. The grounds of appeal can be collapsed into three thematic areas: whether the prosecution proved the ingredients of the offence of murder beyond reasonable doubt against the appellant; whether the circumstantial evidence adduced was sufficient to sustain the conviction against the appellant; and whether the sentence was lawful. We will consider the first two issues together.
24. It is old hat that the prosecution, in a charge of murder, has the singular task of proving the following three ingredients in order to secure a conviction: that the death occurred; that the death was caused by the unlawful act of commission or omission by the appellant; and that the appellant had malice aforethought as he committed the said act. See *Nyambura & Others v Republic* [2001] KLR 355.
25. As to the death of the deceased, we agree with the trial court's finding and the submission by the respondent that there is no dispute that the deceased had passed on. There was sufficient evidence to that effect. Save for who caused the death, all the witnesses agree that the deceased's body was recovered from a dam after the events of the previous night. The death of the deceased was corroborated by the production of PW6's post mortem report. The report confirmed that the deceased died as a result of severe head injury resulting in the bleeding in the brain and also succumbed to drowning because of spongy lungs.
26. The elephant in the room is whether it was the appellant who was responsible for the death of the deceased. Alternatively, did the prosecution prove beyond reasonable doubt that it was the appellant, and nobody else, who committed the unlawful act that led to the death of the deceased? From the evidence tendered before the trial court, it is common ground that none of the prosecution witnesses actually saw or witnessed the appellant or indeed any other person kill the deceased. Thus, there was no direct evidence linking the appellant to the death of the deceased. The prosecution's case on this aspect is hinged on circumstantial evidence. In the case of *Abmad Abolfathi Mohammed & another v Republic* [2018] eKLR, this Court had this to say on circumstantial evidence:

“However, it is altruism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence. Way back in 1928 Lord Heward, CJ, stated as follows on circumstantial evidence in *R v. Taylor, Weaver & Donovan* [1928] Cr. App. R. 21:

“It has been said that the evidence against (*sic*) applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that is circumstantial.”



27. Further, the principles for reliance on circumstantial evidence to sustain a conviction in any criminal trial have been laid down in several authorities of this Court. In *Abanga Alias Onyango v Republic*, Cr. Appeal No. 32 of 1990 (UR), this Court held 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 circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”

28. This Court amplified the above position in the case of *Sawe v Republic* [2003] KLR 364 thus:

“In order to justify, on circumstantial evidence, the inference of guilt, 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 circumstances 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 party accused.”

29. Bearing the said principles in mind, the question that begs for an answer is whether the circumstantial evidence relied on by the prosecution irresistibly linked the appellant to the offence? The star witness for the prosecution is Josphat Mbugua Kiri (PW4). His evidence revealed that they had been on a drinking spree the whole evening with the deceased. In his evidence he says: “.....went to Super keg bar. We drunk (*sic*) half Napoleon-Napoleon is alcohol in a bottle. It’s a small bottle. We took half and left it at the counter.....went entered another bar and George came...we stayed there and entered another bar called Small joint.....we entered Kahuroko bar. We found it closed and I knocked, and Githinji knocked on the glass and it creaked (*sic*).”

30. In his own admission, this witness was drunk. He had been moving from one bar to another that night together with the deceased. In this adventure, they went to the bar that is owned by the appellant.

31. The events that occurred soon after PW4 and the deceased went to Karuroko bar call for scrutiny on the continuation of the chain of events. PW4 stated that the deceased hit the glass window of the appellant’s bar causing a break in the process. It is this action that prompted the owner of the bar, who is the appellant, to open and establish from his own investigations what had transpired. In his evidence, PW4 stated: “... Nyaga (read appellant) came out. He asked who broke the glass and Samuel said it was him. Nyaga got hold of Samuel but I got hold of Nyaga. Samuel disappeared into the darkness. I was left with Nyaga and someone by the name Mbai came from behind Nyaga and followed Samuel where he has gone. I released Nyaga because my hand had been injured before and when it started bleeding I released Nyaga and he followed Samuel Githinji.”

32. One does not need rocket science to establish that this was where the chain started to break. PW4 stated that he held the appellant while the deceased disappeared into the darkness followed by another man



called Mbai. Another question that arises is how long did PW4 hold the appellant. Who is this Mbai that was never arrested or summoned as a witness?

33. PW4 continued to narrate the events of the evening as follows: “behind the bar is a barbed wire. I called people that Nyaga and Mbai chased Samuel and I could not trace him. I heard people say that a body had been seen in the dam. I went to Museveni and the dam. I went to one near our home but there was nobody. I went to Museveni and Samuel was removed from the dam at about 10-11am.”
34. In cross examination he says... “Nyaga did not manage to beat him then as I got hold of him...I did not see Nyaga with any weapon....when Mbai chased Samuel , I was still holding Nyaga and I released him soon thereafter...”
35. For the prosecution to continue with the chain of events, it was necessary to explain who this character called Mbai was and why he was not an accused or a witness in the case. The other glaring gap is that the distance of the dam from the scene of crime was not established, bearing in mind that it was in the direction that PW4 testified that the deceased and Mbai ran to.
36. When the court raised this issue with the respondent, no plausible answer was given. With this kind of evidence, can one say that an inference of guilt can be cogently and firmly established? Do all the circumstances point to the guilt of the appellant? Can the circumstances taken cumulatively show a chain so complete that there is no escape from the conclusion that within all human possibilities, the crime was committed by the accused and no one else? Certainly not. The ball was dropped at the point that the investigating officer failed to pick up on the events that happened soon after the deceased and Mbai disappeared into the darkness in a chase.
37. The chain between what happened after that and the retrieval of the body in the dam the following day was broken. It is possible that the appellant may or may not have caught up with the deceased and Mbai but a conviction cannot be based on a remote possibility. The prosecution had duty to tie up all loose ends as the burden to prove the offences lies on it throughout and never shifted to the appellant.
38. An attempt to hold on to section 111 (1) of the *Evidence Act* is a desperate attempt to clutch at straw. The said section provides as follows:

“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.”
39. From the totality of the evidence in this case, it is a limp argument for the prosecution to say that the burden of proof shifted to the appellant to explain how the deceased’s body was found in the dam.
40. The evidence of the only police officer who testified is pathetic, to say the least. It is the epitome of shoddy investigations and a classic example of how the guilty escape the dragnet of justice. In his



evidence, he only narrates how he got the report of a body floating in a dam was retrieved and proceeded to trace the relatives of the deceased. In his own words, he stated:

“somebody identified the body as that of the deceased. I do not know who identified the body. That’s all.”

41. This is the only evidence that the prosecution relied on from the investigation officer. There was no attempt to find out who Mbai was, what role he played and evidence to show that after PW4 raised an alarm, as he alleged, there was an attempt to look for the deceased that night.
42. Having analyzed the evidence above, we come to the inescapable conclusion that it is not safe to conclude that ‘the doctrine of ‘last seen’ was properly applicable on the facts and circumstances of this case. The doctrine of ‘last seen alive’ is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before their death was responsible for his or her death and the accused is expected to provide an explanation as to what happened. In the instant case, last person to be seen with the deceased was Mbai. The prosecution failed to tie the appellant to the events that unfolded thereafter.
43. In view of finding that the prosecution failed to establish beyond a reasonable doubt that the appellant unlawfully caused the death of the deceased, we will stop here as there is no need to address the other ingredients of the offence.
44. In conclusion, we find that this appeal has merit and we allow it.

We quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT NAKURU THIS 11<sup>TH</sup> DAY OF JULY 2025.**

**J. MATIVO**

**JUDGE OF APPEAL**

.....

**M. GACHOKA C.Arb, FCI Arb.**

**JUDGE OF APPEAL**

.....

**W. KORIR**

**JUDGE OF APPEAL**

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

Signed

Deputy Registrar

