



**Mangwana v Republic (Criminal Appeal 109 of 2018)
[2024] KECA 454 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KECA 454 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 109 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
APRIL 12, 2024**

BETWEEN

EZEKIEL OBIERO MANGWANA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kisumu (Hon. Justice D.S Majanja) delivered on 20th November, 2017. in HCCR Case No. 46 of 2009)

JUDGMENT

1. The appellant, Ezekiel Obiero Mangwana, was charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code. He was alleged to have murdered Jackline Auma Arunga, on 30th November 2009, at Uhui Sub- location, South Ugenya Location in Ugenya District within the then Nyanza Province.
2. Hearing of the case commenced before Karanja, J. who heard the evidence of three witnesses. Subsequently, the matter was taken over by Chemitei, J. who heard the evidence of five witnesses after which Majanja, J. took over. Upon Section 200 of the Criminal Procedure Code being explained to him, the appellant sought to have the case heard afresh, but the learned Judge declined ruling that it would not be possible to trace the witnesses. The learned Judge, then, heard the evidence of the two remaining prosecution witnesses and the unsworn evidence of the appellant.
3. Briefly, the evidence before the trial court was as follows: on 30th November, 2009 at about 6.00 pm, the deceased, who was a 6 year- old girl, her brother Andrew Keah Joseph (Andrew), and sisters, Mercy Atieno (Mercy), and Loise were at home, when their mother sent the girls to the posho mill. Mercy, who testified, told the court that while on the way to the posho mill, the deceased told them that she wanted to go back home. When the siblings later returned back home without the deceased, their parents Joshua Arunga Keya (Keya) and his wife started frantically looking for her but were not successful.



4. The matter was reported to the village elder, one, Peter Omuhunjai (Omuhunjai), who, in turn, reported the matter to Wycliffe Ochieng Thomas, the Assistant Chief of the area. Upon enquiries, Luta Wycliffe Muyekho (Muyekho), recalled that while on his way to Musanda market he had seen the appellant, whom he knew, with a little girl. Alice Caroline Adhiambo (Adhiambo), also, recalled having met the appellant walking with the little girl whom she knew.
5. Upon the appellant being questioned, he explained that the deceased was following him. Subsequently, the deceased's underpants, which she was wearing when she disappeared, were recovered near the river. There was also a cap and an under pant which was recovered near the cap which was identified by Andrew and William Ochango Keya (William), (an uncle to the deceased) as belonging to the appellant. Both Andrew and William testified that they knew the appellant before. The appellant was escorted to the police station where he was rearrested.
6. On 10th December, 2009, the deceased body was found floating on the river about 20 meters from where the clothing had earlier been recovered. A post mortem examination on the body of the deceased was done by Dr. Esiaba at Siaya District Hospital Mortuary. The report was produced by Dr. Collins Oginga, a medical officer who was familiar with the handwriting of Dr. Esiaba. The report revealed that the body of the child was in a decomposing state. The Doctor noted that there was a fracture of the right parietal bone of the skull which led to the conclusion that the cause of death was a head injury inflicted by a blunt object.
7. In his defence, the appellant denied having murdered the deceased. He claimed that on the material day he went home in the morning after working in a jaggery the whole night. He was on his way back to work when he met a village elder and some youth who confronted him and took him to the Assistant Chief, who in turn took him to Sigomere police post. He claimed that he was beaten by police officers, and told to confess to a murder that he had not committed.
8. Consequently, the learned Judge found the appellant guilty as charged, convicted him of murder and sentenced him to death as provided by law.
9. The appellant is now before us challenging the judgment of the trial court on two grounds contained in a memorandum of appeal filed by his advocate Nixon Abira. The grounds are:
 - i. The Learned trial judge erred in law and fact in finding that the case against the appellant was proved beyond reasonable doubt.
 - ii. That the appellant is fully seeking refuge in the provisions of Articles 165(3)(a)(b), 159(2)(b) and 22(4) of *the Constitution* of Kenya 2010 bearing in mind the Supreme Court decision in *Francis Karioko Muruatetu & Another -vs- Republic* [2017] eKLR
10. We have considered the grounds of appeal, submissions in support of the appeal and against the appeal, and the law. We note that this is a first appeal and it is our duty to subject the evidence that was tendered in the trial court to a fresh analysis before reaching our own conclusions. In so doing, we give due regard to the fact that, unlike the trial judge who had the advantage of hearing and seeing the demeanour of the witnesses, as they testified during trial, we have not had that advantage and must, therefore, defer to the findings of the trial court on facts and the demeanour or credibility of the witnesses. (See *Okeno v. Republic* (1972) EA 32).
11. The learned Judge properly directed himself on the necessary ingredients for proof of the offence of murder. That is: that the death and cause of death of the deceased was proved, secondly, that the act or omission that led to the death of the deceased was caused by the appellant and that the appellant had malice aforethought. The evidence is clear that the deceased's body was recovered from a river with a



fractured skull. The report of Dr. Esiaba, who performed the post mortem examination, left no doubt that the deceased died from a head injury caused by a blunt object. As to who caused the deceased the injuries, there was no direct evidence linking the appellant to any act or omission that resulted in the deceased's injury.

12. In convicting the appellant, the learned Judge weighed the evidence before him and rejected the appellant's defence stating in part as follows:

“The sum of all this evidence is that on the evening of the 30th November 2009, the accused lured the deceased to follow him and while he was with her, he was seen by PW 4 and PW 5. He took her to the banks of River Firatsi where he removed her clothes, proceeded to assault her. He hit her on the head thus fracturing her skull and dumped her body in the river. In the course of his dastardly act, he also left his cap behind. Thereafter and in order to cover his tracks, he appeared at the deceased's parents' homestead pretending he was concerned for the deceased but he was arrested due to very strong suspicion against him. All this evidence taken together points to one person and one person only as the perpetrator of the felonious act and that person is the accused. The act of luring a young innocent girl to the river bank and assaulting her on the head and thereafter throwing her into the river is neither an accidental nor innocent act. It is a deliberate act intended to cause grievous harm if not death. There is no doubt that the accused's actions were clothed with malice aforethought within the meaning of section 209(a) of the *Penal Code*.”

13. It is evident that the appellant was convicted on circumstantial evidence. The main incriminating evidence was the appellant being the last person seen with the deceased, the recovery of the deceased's underpants next to a cap identified as belonging to the appellant near the riverbank and the recovery of the deceased's body with injuries days later from the same river.
14. What commends itself to us for determination is whether the circumstantial evidence adduced against the appellant was sufficient to sustain his conviction, and if so, whether the sentence meted out against the appellant was lawful.
15. The principles applicable on the law of circumstantial evidence has been developed and distilled by this Court and its predecessor over the years. In *PON v Republic* [2019] eKLR, this Court referred to some of the crucial cases as follows:

“To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that the guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are *Rex -vs- Kipkering Arap Kosgei & another*, 1949 EACA, 135 and *Simon Musoke -vs- R.* [1958] EA 71. In *Rex -vs- Kipkering* (Supra), the court explained that:

“In order to justify a conviction 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 and the burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”



16. In the same case the Court noted further developments as follows:

Simon Musoke -vs- R (supra) introduced an additional factor to the foregoing to the effect that before drawing the inference of the accused's guilt from circumstantial evidence, the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. Over the years these strictures have been developed further by way of explanation. For example, in the case of *Omar Mzungu Chimera -vs- R*, Criminal Appeal No. 56 of 1998, the Court stated that:

'It is settled law that when a case rests entirely on circumstantial evidence such tests must satisfy three tests.

- i. The circumstances from which an inference of guilt is 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.'

17. From the authorities referred to above, the guiding principles in the application of circumstantial evidence are that to justify the inference of guilt, first, the evidence must irresistibly point to the accused as the perpetrator of the crime; secondly, 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; and thirdly, the chain of events must be so complete that it establishes the culpability of the accused and no one else.

18. The learned Judge properly directed himself on the principles applicable to circumstantial evidence being guided by *Abanga alias Onyango -vs- Republic*, CA Criminal Appeal No. 32 of 1990 (UR).

19. In addressing the circumstantial evidence implicating the appellant, the learned Judge applied Section 111(1) of the *Evidence Act* directing himself as follows:

"Since the evidence exclusively points to the accused as the last person to be seen with the deceased, he shoulders the evidential burden to provide a reasonable explanation on what happened to the 6-year-old child he was seen with before she disappeared.

20. The learned Judge found that the appellant failed to offer any reasonable explanation and that his unsworn statement was nothing more than an account of his arrest and did not mention anything of the two prosecution witnesses having seen him with the deceased. In accordance with the extract of the judgment that we have adverted to at paragraph 12 of this judgment. The learned Judge concluded that the inculpatory facts against the appellant led to the inescapable conclusion that it was the appellant who lured the child to the river bank and assaulted her, before throwing her body into the river.

21. We have reconsidered and reexamined the evidence that was before the trial court. There was no eye witness to the heinous crime, hence the prosecution relied entirely on circumstantial evidence to connect the appellant to the murder. In this regard, the material evidence was that of Omuhunjai, Muyekho and Adhiambo. Both Muyekho and Adhiambo saw the deceased in the company of the appellant on the evening she disappeared, and the appellant admitted this though he claimed that it was the deceased who was following him. There is also the evidence of Andrew and Keya that a



cap recovered together with the deceased's under-pants near the river belonged to the appellant. The appellant did not deny the ownership of the cap.

22. We find that the appellant having been seen with the deceased shortly before she disappeared, and the recovery of the appellant's cap and the deceased's underpants near the riverbank, pointed to the fact that the appellant and the deceased were together at the riverbank.
23. The recovery of the deceased's body from the river with injuries indicating that her death was caused by an assault using a blunt object, makes the evidence of the appellant having been seen with the deceased shortly before the deceased disappeared crucial as he was the last person who was apparently seen with the deceased alive.
24. In *Daniel Munyui Chiragu & another vs- Republic*, (Criminal Appeal No. 104 of 2018) [2021] KECA 342, KLR, this Court addressing the 'doctrine of last seen' stated as follows:

“Regarding the doctrine of “last seen with” we will revert to Nigerian case of *Moses Jua V. The State* (2007) LPELR- CA/IL/42/2006. The court, while considering the ‘last seen alive with’ doctrine held:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

In yet another Nigerian case considering the same doctrine, in *Stephen Haruna V. The Attorney-General Of The Federation* (2010) 1 iLAW/CA/A/86/C/2009 the court opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

Quoting from another jurisdiction, to be specific India, the courts there have developed the doctrine further. In the case of *Ramreddy Rajeshkhanna Reddy & Another V. State of Andhra Pradesh*, JT 2006(4) SC 16 for instance 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. In the case at hand the appellant who was the last person seen with the deceased before she died, offered no explanation as to what happened to her. Section 111(1) of the *Evidence Act* which states:

“(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 defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

26. The appellant, being the only person with the information of what happened to the deceased at the riverbank, had the burden of explaining what happened to her and extricating himself from any blame. Having failed to do so, an adverse inference must be drawn. The incriminating evidence arising from the doctrine of last seen is further strengthened by the finding of the appellant’s cap near the riverbank next to the deceased’s underpants. These inculpatory facts point unerringly to the appellant as the person who caused the death of the deceased and there is no other reasonable hypothesis that can be drawn. In the circumstances, we are satisfied that his conviction was safe.
27. As to the appeal against sentence, the appellant was sentenced to death and the record shows that in sentencing the appellant, the learned Judge noted that there was only one sentence available, and that was the death sentence. Indeed, the position taken by the learned Judge is in accordance with Section 204 of the *Criminal Procedure Code*. This was the position before the ground-breaking Supreme Court decision in *Francis Karioko Muruatetu & another -vs- Republic* [2017] eKLR, wherein the Supreme Court ruled that the mandatory nature of the death sentence in Section 204 is unconstitutional as it deprives the trial court the opportunity to exercise its judicial discretion in sentencing.
28. In the circumstances, we dismiss the appeal against conviction but allow the appeal against sentence to the extent of setting aside the sentence of death, and remitting the case back to the trial court for resentencing. Taking judicial notice of the fact that Majanja, J. is no-longer based at Kisumu High Court, the resentencing may be done by any Judge of competent jurisdiction.

Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF APRIL, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

