



**Lubutse v Republic (Criminal Appeal 231 of 2018)
[2024] KECA 384 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KECA 384 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 231 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
APRIL 12, 2024**

BETWEEN

JOSEPH KENNEDY LUBUTSE APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Kisumu,
(Majanja, J.) dated 30th April, 2017 in Criminal Case No. 8 of 2017)*

JUDGMENT

1. The appellant, Joseph Kennedy Lubutse, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on 5th April, 2017, at Ukweli Village, Konya Sub-location within Kisumu County, he murdered Helida Adhiambo Gumbe.
2. During the trial, a total of nine witnesses testified for the prosecution while the appellant gave sworn evidence and called no witnesses. In brief, the prosecution evidence was that the appellant was employed by Thomas Rabuor Otieno (Thomas) as a caretaker at his home. The appellant had a house where he used to sleep within the compound.
3. On 5th April, 2017, Nicky Dominic Odhiambo (Nicky), was on his way home when he came across a human body which was lying on the foot path. He went home and informed his grandmother who encouraged him to go and confirm. He went back and confirmed that the person looked dead. He alerted Aloice Amoth Omenyo (Aloice), a member of the Community Policing Unit who, upon running to the scene, observed that the body had cuts on the neck and shoulders. He contacted police officers from Riat Police Station, and Sgt. Kandawala Mukanda and other officers proceeded to the scene and confirmed that the body was that of a female and had deep cut wounds. Scene of crime personnel were called to the scene and photographs were taken before the body was moved to the mortuary.



4. In the meantime, the body had been identified as that of Helida Adhiambo Gumbe and the deceased's father, Tobias Amolo Ohama (Ohama), alerted. He accompanied the Assistant Chief and Aloice to the house of Thomas in an effort to get more information. Thomas called the appellant, who was in the compound, and together they proceeded to the house of the appellant which was within the compound. As they entered the house, they found blood stains on the floor and a blood-stained sheet that was dividing the room into two, blood-stained handkerchief and a blood-stained panga. In the meantime, a large crowd which had gathered outside the house became unruly, threatening to lynch the appellant. Police were called but by the time they arrived, the steel door to the appellant's house had been broken. The police also saw the blood-stained bedsheet and a lot of blood on the floor. They collected the blood-stained handkerchief and blood-stained panga and escorted the items together with the appellant to Kondele Police Station.
5. Subsequently, Sgt. Kandawala Mukanda, who had been tasked to handle the case, handed over the blood-stained items to his in charge. Detective Corporal Walubengo was later assigned to investigate the case, proceeded to the scene but found the appellant's house had already been burnt down by a mob. He noticed that there were some drops of blood leading to the house of PW1, and there was a pit about 20 meters from PW1's house which was used for disposal of house and animal waste. A green T-shirt with fresh blood and a blood-stained sack and pair of white blood-stained shoes were all recovered from the pit. The exhibits were forwarded to the Government Analyst who conducted a DNA analysis and compared it with DNA from the deceased. The analyst prepared a report in which he found that the DNA profile found on all the items recovered matched that of the deceased.
6. The appellant, who gave sworn evidence in his defence denied having killed the deceased, and denied even knowing her. He maintained that on the material night he was alone at home with PW1 and nothing remarkable took place.
7. In his judgment, the learned Judge found that there was sufficient evidence which showed that the blood-stained items, specifically bedsheet, handkerchief and a panga which were recovered from the house of the appellant, matched the DNA profile of the deceased. This confirmed that the deceased was in the house of the appellant on the material night.
8. The recovery of the items from the house of the appellant also placed the burden on the appellant to explain how the items ended up in the house. The learned Judge found that the appellant failed to provide any reasonable explanation for the presence of the items in his house, and, therefore, there was circumstantial evidence, which when taken together pointed to the appellant as the person who was with the deceased on the night she died. The learned Judge concluded that the evidence led irresistibly to the appellant as the person who inflicted the injuries on the deceased, that resulted in her death. In addition, malice aforethought within the meaning of Section 206(a) of the *Penal Code* could be inferred from the injuries. Consequently, the learned Judge convicted the appellant and sentenced him to serve 35 years imprisonment.
9. The appellant is now before us in this first appeal in which he has raised five grounds. He challenges the learned Judge for relying on circumstantial evidence to convict him with the offence of murder when the threshold had not been met; in failing to acknowledge and appreciate the glaring contradictions in the prosecution case; in failing to appreciate that the prosecution had failed to establish their case beyond reasonable doubt; in advancing theory and speculation to fill the glaring loopholes in the prosecution case to justify the conviction of the appellant on insufficient evidence; and in failing to consider the appellant's mitigation that was on record, and passing a sentence which was manifestly harsh as it did not take into account the circumstances and the appellant's previous record.



10. In the written submissions filed in support of the appeal by the appellant's advocate, *Wilberforce Wangonda, Omar Chimera -vs- Republic*, Criminal Appeal No. 56 of 1998 (unreported), quoted in *Emily Chepkirui -vs- Republic* [2009] eKLR, was relied on for the proposition that circumstantial evidence must satisfy three tests:
 - i. The circumstances from which the 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 the 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.
11. It was argued for the appellant that although the DNA analysis of the recovered items marched the DNA profile of the deceased, they had no DNA relationship with the profile of the appellant. This raised a doubt in the prosecution case regarding the guilt of the appellant. The learned Judge was faulted for failing to note that the prosecution did not establish the ingredients of the offence of murder, as the death of the deceased was not connected to an unlawful act or omission on the part of the appellant. That some of the items were recovered in the compound next to the appellant's house and outside the home at the scene where the body was recovered. In addition, it was argued that no malice aforethought was established. On the issue of sentence, it was submitted that the learned Judge failed to consider the mitigation of the appellant.
12. The respondent was represented by Mr. Okango, Senior Principal Prosecution Counsel from the Office of the Director of Prosecutions (ODPP). Mr. Okango filed written submissions in which he opposed the appeal, maintaining that the circumstantial evidence against the appellant was very strong, and the chain of evidence as given by the prosecution witnesses left no other conclusion, other than the appellant being the person who killed the deceased. He argued that the prosecution case would only have been negated if the blood stained marched the DNA of the appellant, but it was the DNA of the deceased that was found on the blood-stained items and this confirmed the prosecution case that the deceased was in the appellant's house where the blood-stained panga and the handkerchief were recovered; It was asserted that the deceased's DNA profile was found in blood-stained items recovered from the appellant's house because that is the place that she was fatally assaulted.
13. As regards proof of the elements of murder, it was submitted that the fact of death was not in dispute as witnesses found the body of the deceased lying by the pathway and the post mortem report revealed that her death was caused by external hemorrhage due to severe external jugular vein stab wound on the neck; and that injury together with the fact that blood-stained items were recovered from the house of the appellant, led to the inescapable conclusion that the appellant was the perpetrator of the offence. In addition, malice aforethought could be inferred from the injuries inflicted on the deceased.
14. It was submitted that the appellant having failed to offer any explanation, the learned Judge was right in invoking Section 111(1) of the *Evidence Act* to draw an adverse conclusion from the unbroken chain of events that was revealed from the evidence that was adduced before him. Regarding the sentence, it was submitted that the learned Judge properly exercised his discretion in sentencing the appellant to 35 years' imprisonment.
15. This being a first appeal, our mandate is to exhaustively reconsider and re-evaluate the evidence that was adduced before the trial court bearing in mind that we have not had the advantage of seeing the witnesses testify and must therefore defer to the findings of the trial Judge in that regard unless it is



established that the learned Judge misdirected himself on a particular matter or took into account irrelevant matters or failed to take into account relevant matters. (see *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR; and *Alexander Ongasia & 8 others v Republic* [1993] eKLR).

16. For an offence of murder to be proved, the prosecution must establish three main things. First, that the death of the deceased occurred, secondly, that the death was caused by unlawful act or omission on the part of the accused person and thirdly, that the accused person had malice aforethought in causing the act or omission.
17. From the evidence of Nicky, Aloice, Sgt Mukanda of Riat Police post and Crispinus Abala, the scenes of crime officer who took photographs, it was clear that the body of the deceased was recovered from a pathway, with several cut wounds. The post mortem examination report revealed that the body had several cut wounds, and the cause of death was external hemorrhage due to severe external jugular vein stab wound on the right neck. Therefore, the fact of death was clearly established.
18. The issue before us is whether the evidence which was adduced before the trial court was sufficient to establish that the appellant is the one who caused the deceased the injuries that led to her death, and if so, whether he did so with malice aforethought.
19. There was no direct evidence linking the appellant to the death of the deceased as there was no evidence of any eye witness who saw the appellant commit any act or omission that could have caused the death of the deceased. The prosecution case against the appellant was anchored on circumstantial evidence. This was the recovery of a blood-stained panga, and a blood-stained handkerchief from the house of the appellant, and a blood-stained T-shirt, pair of shoes and pair of slippers from a pit near the house of the appellant. The DNA profile of the all these items was established to be the DNA profile of the deceased. The question is whether this evidence provided sufficient circumstantial evidence upon which the appellant's conviction could be anchored.
20. In *Republic vs Ahmad Abdolfadhi Mohammed & Anor* 2019 eKLR, the Supreme Court restated the principles applicable on the law on circumstantial evidence as follows:

“[55] The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is “indirect [or] oblique evidence ... that is not given by eyewitness testimony.” It is “[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact.” It is also said to be “[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence....”

56. On its application, circumstantial evidence is like any other evidence. Though, it finds its probative value in reasonable, and not speculative, inferences to be drawn from the facts of a case, and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding disputed questions of fact, circumstantial evidence should never be given a derogatory tag. *Jowitt's Dictionary of English Law*, 4th Edition, states thus of circumstantial evidence:

“... with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, ... a fingerprint recovered from the window forced open by the burglar matches the accused's fingerprints, ... [or where there is] a ... DNA match between the accused's control sample and genetic material recovered from the scene of the crime ...”



56. This is why, way back in 1928, the English Court of Appeal asserted 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.”
56. However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court “should proceed with circumspection when drawing firm inferences from circumstantial evidence.” The court should also consider circumstantial evidence in its totality and not in piece-meal. As the Privy Council stated in *Teper v. R* [1952] AC at p. 489 “Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.”
56. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative, but also, in the words of the Indian Supreme Court, “the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established....” As was stated in the case of *Kipkering Arap Koskei & Another v. R* (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the “...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, ...”
56. As was further stated in the case of *Musili v. Republic* CR A No.30 of 2013 (UR) “to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt.” The chain must never be broken at any stage. In other words, there “must be no other co-existing circumstances weakening the chain of circumstances relied on” and the circumstances from which the guilt inference is drawn must be of
- definite tendency and unerringly pointing towards the guilt of the accused. “Suspicion however strong, cannot provide a basis for inferring guilt.”
21. From the above, in a nutshell, for circumstantial evidence to justify the inference of guilt, the evidence must irresistibly point to the accused as the person who committed the crime, the incriminating factors must be inconsistent with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the chain of events must be so complete that it establishes the guilt of the accused and no one else.
22. The fact that a blood stained panga and a blood-stained handkerchief were recovered from the house of the appellant, naturally raise suspicion. This became more than mere suspicion when the DNA profile of the blood stains on the panga and handkerchief turned out to be that of the deceased. That left no doubt that the deceased had been in the appellant’s house and that she was bleeding when she was in the house. Indeed, Aloice, Thomas and Chief Omollo all stated that apart from the blood stained items, there was a lot of blood on the floor of the Accused’s house. The recovery of the blood-stained panga in particular, viewed in the light of the injuries that were found on the body of the deceased, left no doubt that the panga was the weapon used in inflicting the injuries upon the deceased.
23. It was submitted by the defence that the appellant’s DNA profile was not found in any of these blood-stained items and this absolved him. In our view, that is a conclusion that is not supported by any



evidence. The deceased was fatally injured and the evidence points irresistibly to the deceased having suffered the injuries in the appellant's house. The appellant has not offered any explanation and the incriminating facts are not capable of any explanation other than the fact that he is the one who inflicted the injuries on the deceased.

24. We note that there were some other blood-stained items which were recovered from a pit near the appellant's house. Although the appellant implied that someone else could have had access to the pit, the fact that the blood-stained items from the pit were similarly of the deceased's DNA profile linked the items to the other blood-stained items that were found in the appellant's house. Moreover, the appellant was the caretaker in that home and he could have known if there was any intruder.
25. In our view, the circumstantial evidence that was adduced against the appellant, was cogent, credible, and formed a complete chain leading irresistibly to the appellant having been the one who inflicted the injuries on the deceased. We agree with the trial Judge that the gruesome manner in which the injuries were inflicted upon the deceased, left no doubt that the intention was to cause the death of the deceased or grievous harm and therefore malice aforethought can be inferred under Section 206(a) of the Penal Code. Accordingly, we uphold the appellant's conviction.
26. As concerns the sentence of 35 years that was imposed upon the appellant, as was stated by this Court in Bernard Kimani Gacheru vs. Republic [2002] eKLR :

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”

27. The learned Judge considered the appellant's mitigation and the circumstances of the offence and properly exercised his discretion in sentencing the appellant. We therefore have no reason to interfere with the sentence.

The upshot of the above is that the appeal is dismissed in its entirety.

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



Signed

DEPUTY REGISTRAR

