



REPUBLIC OF KENYA



**Kungu v Republic (Criminal Appeal 18 of 2013)
[2024] KECA 957 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 957 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 18 OF 2013
FA OCHIENG, GWN MACHARIA & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

STEPEN NG'ANG'A KUNGU APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (W. Ouko, J. (as he then was)) dated 25th March 2013 in HCCRC No. 21 of 2011)

JUDGMENT

1. Stephen Ng'ang'a Kungu, the appellant, was charged, convicted and sentenced to suffer death for murder contrary to section 203 as read with section 204 of the [Penal Code](#). The information stated that on 17th February 2011 at Kahiga Village in Kipipiri District within the then Central Province, the appellant murdered Evelyne Wamaitha Kiragu.
2. The appellant is dissatisfied with the judgment of the High Court and is before us faulting the trial court on the grounds that:
 - i. The learned trial judge erred both in law and in fact in convicting the appellant on highly contradictory evidence by the prosecution witnesses.
 - ii. The learned judge erred by failing to critically analyse the prosecution evidence and that of the defence thus relying on evidence fraught with contradictions.
 - iii. The learned trial judge erred in not analyzing evidence as a whole and finally arriving at a wrong conclusion that the charge of murder had been proved beyond reasonable doubt.



- iv. The learned trial judge erred in imposing a sentence that was harsh and excessive.”
3. At the trial, six witnesses took to the stand in support of the prosecution’s case. This being a first appeal and alive to our mandate to consider the evidence afresh and arrive at our independent decision, we shall rehash the evidence of the witnesses. Gladys Mumbi (PW1) testified that she lived with Evelyne Wamaitha Kiragu (the deceased) and that on 17th February 2011, she realized that the deceased had not returned from school. She quickly informed the appellant and PW2 and they started looking for the deceased. Their search was not successful. When they resumed the search the next day, they stumbled upon the body of the deceased in the bush. The witness testified that the deceased’s geometrical set was a few meters from the body. Later on, the police also recovered the deceased’s books and food container.
 4. Peter Mukanya Kungu (PW2) testified that he was a brother to the father of the deceased and a son to PW1. On the material day, he was informed that the deceased had not returned home from school. In the process of searching for the deceased, he learnt that she did not go to school on the date of her disappearance. As he was heading to the deceased’s school for a second time, he spotted the deceased’s body lying next to a river. He alerted members of the search party who included his father and the appellant. They then proceeded to the police station to report the incident. When police officers arrived, they questioned the appellant and escorted him to his house which was about 300 meters away. When asked to open the house, the appellant stated that he did not have the key. He left claiming that he was going to collect the key from PW1 but never returned. The police then broke into the house from where they recovered the deceased’s books and food container.
 5. Joel Mburu Kungu (PW3) testified that the appellant was his step-brother and that on 17th February 2011, he received information that the deceased did not return from school. He stated that the next morning as they were preparing to continue with the search for the deceased, the appellant went and informed them that the deceased’s body had been found. The witness also stated that while at the scene, the appellant brought the deceased’s geometrical set. It was his testimony that the police officers who visited the scene decided to search the nearby houses. The officers decided to start the search from the house of the appellant as it was the house nearest to where the body was. The appellant declined to open the door and he disappeared.
 6. William Kiragu (PW4) testified that the deceased was his daughter who lived with her grandmother (PW1). His testimony was that upon being notified of the deceased’s disappearance on 17th February 2011, he proceeded to Wanjohi where he found PW1 and the appellant. The following day, he proceeded to the deceased’s school with the appellant where they were informed that the deceased did not turn up at school the previous day. On their way back home, they noticed a crowd gathered on the other side of the river and upon proceeding to the scene, he saw the deceased’s body. He noticed the body had scratch marks on the neck, and the pants had been removed up to the knees. When police officers arrived and started to search the houses, the appellant disappeared forcing the police to break into his house. Inside the appellant’s house, they recovered some of the deceased’s books under the mattress and others under the bed. The deceased’s intact lunchbox was found under the bed.
 7. Dr. Patrick Kimili Kangethe (PW5) conducted postmortem on the body of the deceased 8 days after the death. He observed blood clots on the nostril and mouth, and cyanosis of lips and tongue. He also saw visible markings and skin tissue bruising on the neck. On the vaginal area, he observed bruising on the genital vaginal wall and a ruptured hymen. There was also a fracture of the cartilage on the neck at C1 and C2. In the postmortem report, which he produced as an exhibit, the witness concluded that the deceased died as a result of severe asphyxia due to strangulation.



8. Inspector of Police Philemon Kiprono (PW6) testified that on 18th February 2011 while serving as the Deputy OCS of Kipipiri Police Station, he received a murder report made by the appellant and his brothers. He proceeded to the scene and was informed that the deceased had left for school the previous day at 6.00 am and never returned. After interrogating those present, he decided to search the houses of the appellant and his brothers. He decided to start the search with the appellant's house because it was the one nearest to the scene but the appellant declined to open the door saying that the keys were at the house of PW1.

The appellant claimed he was going to collect the key but never returned. Upon realizing that the appellant had disappeared and could not be traced, they broke into the house. Therein, and under the mattress, they recovered the deceased's books and food container which he produced as exhibits. The appellant was later arrested by administration police officers at Sofia area.

9. In his defence, the appellant denied committing the offence. He stated that on the material day, he left for work and when he returned in the evening, they realized that the deceased had not returned. They searched for her without success. The following day he accompanied PW3 to the deceased's school where they were informed that the deceased did not attend school the previous day although her classmates knew where her books were. On their way home, they saw a geometrical set which PW1 identified as belonging to the deceased. After the body was found he was asked by the OCS to open the door to his house but he escaped because he was scared as he had never been arrested before.

10. When this appeal came up for hearing on the Court's virtual platform on 11th March 2024, learned counsel Ms. Daye appeared for the appellant while learned counsel Mr. Omutelema was present for the respondent. They had both filed written submissions which they sought to wholly rely upon.

11. In her submissions dated 27th April 2023, Ms. Daye referred to *Okeno v. Republic* [1972] EA 32 to highlight the all-encompassing jurisdiction of this Court on a first appeal. Counsel highlighted the evidence of the prosecution witnesses and asserted that the evidence was contradictory and uncorroborated in respect to the recovery of the body of the deceased. Counsel submitted that the fact that the appellant's key was with PW1 meant that anyone else could have planted the deceased's books and food container in the appellant's house. According to counsel, the investigating officer failed to do due diligence by only going to the appellant's house and acting as prodded by the members of the public.

12. Counsel urged us to find that the circumstantial evidence, in this case, was not conclusively knitted. She referred to *PON v. R* [2019] eKLR and *Chiragu & Another v. Republic* [2021] KECA 342 (KLR) and beseeched us to find, as was found in those decisions, that the circumstantial evidence adduced was inadequate. Still pursuing her submission on the inadequacy of the evidence tendered, counsel took issue with the failure to conduct a DNA analysis on the deceased's body. According to counsel, this omission left a loophole in the chain of events hence the prosecution's case did not meet the threshold set in *Sawe v. Republic* [2003] KLR 364 and *Simoni Musoke v. Republic* [1958] EA 71 for returning a conviction on circumstantial evidence. It was counsel's ultimate contention that the glaring loopholes in the evidence exonerated the appellant. Counsel consequently urged that we allow the appeal.

13. Opposing the appeal, Mr. Omutelema through the submissions dated 5th March 2024 restated the evidence on record and submitted that the evidence adduced by the prosecution, though circumstantial, was enough to lead to the conviction of the appellant. Counsel asserted that the trial court properly applied the provisions of section 111 of the *Evidence Act* by finding that the appellant failed to tender an explanation as to how he came into possession of the deceased's items. Mr. Omutelema further submitted that the trial court considered the appellant's conduct in concluding



that he had malice aforethought. Finally, counsel argued that the circumstances of this case called for a severe sentence and asked us to impose such a sentence.

14. We have reviewed the record and memorandum of appeal, and the submissions and authorities relied on by counsel for the parties. In our view, what arises for determination is whether the offence of murder was proved against the appellant, and if so, whether the death sentence was appropriate in the circumstances of this case.
15. As was stated in *Roba Galma Wario v. Republic* [2015] eKLR), for a trial court to return a conviction on a charge of murder, the prosecution must prove the fact and cause of the death of the deceased person, that it is the accused person whose actions or omissions led to the deceased's death, and, that the accused person had malice aforethought. Failure by the prosecution to establish any of these ingredients should result in a conviction of the lesser charge of manslaughter or depending on the defence put up by the accused person, an acquittal altogether.
16. In this case, the fact and cause of the death of the deceased was never in dispute. PW1, PW2, PW3, PW4 and PW6 all saw the deceased's lifeless body by the riverside. The appellant was a witness and confirmed this fact in his defence. PW4 recalled observing injuries on the neck of the deceased with her pants pulled down to her knees. PW5 conducted postmortem on the body of the deceased and confirmed that she died as a result of severe asphyxia due to strangulation. He also observed that she had injuries and bruises on her private parts. There was no contention by the appellant that the deceased's death was unlawful.
17. The point of departure between the prosecution and the defence was in respect to the prosecution's claim that the deceased died in the hands of the appellant. Counsel for the parties correctly appreciated that the case against the appellant was anchored on circumstantial evidence. They have referred to authorities outlining the principles undergirding consideration of circumstantial evidence. Those principles were expressed in *Abanga v. Republic* LLR NO. 3975 (CAK) thus:

“It is settled law that when a case rests on entirely 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.”

18. Similarly, in *Joan Chebichii Sawe v. Republic* [2003] eKLR, the Court held that:

“As we have already pointed out, the evidence in this case was entirely circumstantial. 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 on. 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 is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”



19. The cited authorities succinctly capture the threshold that must be met by the prosecution in order for the trial court to use circumstantial evidence to convict an accused person. That is the standard we shall apply to the evidence that was adduced at the trial in order to determine if the trial court was correct in finding the appellant guilty for the murder of the deceased.
20. In this case, the deceased is said to have left home for school on 17th February 2011 at about 6.00 am. She carried her school bag which had her books as well as her lunchbox. The deceased stayed with her grandmother (PW1) who happened to be the mother of PW2, PW3 and PW4. From the evidence of PW6, all the sons of PW1 and the appellant were living within her vicinity. The appellant's house was about 40 meters from that of PW1. From the evidence of PW1, PW2, PW3, PW4 and the appellant, everyone seemed concerned about the disappearance of the deceased and they were all in the search party. On the morning of 18th February 2011, PW2 discovered the deceased's body lying in a thicket. PW6 testified that when they went to the scene, he questioned PW2, PW3 and the appellant and decided to search their houses. PW1, PW2, PW3, PW4 and even the appellant himself confirmed that the appellant refused to open the door to his house and disappeared from the scene. When the appellant took long in coming back with the key to the house, PW6 broke into the house. He entered the house in the presence of PW4 and others, and that is when they recovered the deceased's books and lunchbox. Even though the appellant alleged that PW2 could have framed him, his evidence cannot be believed as there was no way PW2 could have entered a house which was locked and was broken into a few minutes after the appellant fled the scene.
21. The foregoing evidence leaves no doubt that the appellant's house played storage to the items lastly owned and possessed by the deceased. There was also no doubt that the deceased was with these items when she left home for school. The Court in *Sakwa v. Republic* [2023] KECA 732 (KLR) explained the application of the doctrine of recent possession thus:
- “To aid in determining this aspect, it was necessary for the prosecution to establish that, first, the appellant was in possession of stolen items; second that upon considering all the relevant factors, the court was satisfied that the items belonged to PW1; third, that the items were stolen from PW1 during the robbery; and fourth, that the items were recently stolen. Next, the trial court was required to consider whether the appellant put forth a plausible explanation as to how he came into possession of the items. We must however appreciate, as was done by the courts in the authorities already cited, that such an explanation must not necessarily be satisfactory but should be reasonable. Therefore, where a reasonable explanation is put forth, then the doctrine of recent possession should not be invoked.”
22. From the evidence that we have rehashed hereinbefore, we are satisfied that the trial court properly called upon the appellant to tender an explanation on how the deceased's items found their way under the mattress and bed inside his house. The question then is whether the appellant gave a reasonable explanation in response to this evidence. We note that the appellant, when asked to open his house for inspection took off from the scene. The appellant's explanation for taking off from the scene was that he had never been arrested before and he feared the police. If he was innocent, why would he fear the police when PW6 had indicated that they would be searching every house nearby? In our view, the appellant's flight from the scene was driven by a guilty mind. In his attempt to explain the presence of the deceased's items in his house, the appellant put forth two conflicting stories. The first is a denial that the books were found in his house. But how can we believe him when he was not present during the recovery because he had already fled the scene? The second explanation fronted by the appellant was that PW2 placed the books in his house. We likewise find this explanation unreasonable. It was the appellant's evidence that while at the school, the deceased's classmates told them that they knew where the books



- were. At that point, the appellant was at the school with PW4 and not PW2. Therefore, if anyone knew where the books were, it was not PW2. We also note that PW4, the deceased's father, did not corroborate the appellant's version of the deceased's classmates talking of knowing the whereabouts of the books and neither was PW4 cross-examined on this aspect.
23. From the foregoing, the only plausible conclusion is that the recovered items were found in the appellant's house and he failed to reasonably explain how they got there. The doctrine of recent possession therefore connected the appellant to the disappearance of the deceased and her brutal murder. In our view, the evidence on record conclusively and neatly linked the appellant to the murder of the deceased. Even without DNA evidence, the appellant's conviction is watertight. PW5 explained that despite suspecting that the deceased was defiled, they did not collect any spermatozoa due to the state in which the body was at the time of the postmortem.
 24. Although the appellant did not claim that malice aforethought was not established, his assertion that he did not commit the offence implies that he is denying every ingredient of the charge of murder. On the question as to whether malice aforethought was established, we have reviewed the trial court's conclusion and faced with the circumstances as presented to the trial court, we would not have reached any other conclusion. Among the ingredients of malice aforethought found in section 206 of the *Penal Code* are an intention to cause the death of, or to do grievous harm to, any person; knowledge that the act or omission causing death will probably cause the death of, or grievous harm to, some person; and an intent to commit a felony. In this case, the deceased had various injuries as explained by PW5. The evidence of PW4 and PW5 alluded to sexual assault accompanied by strangulation and fracturing of the cartilage on the neck at C1 and C2. From the foregoing, there is no doubt that the appellant's intention was to cause death or commit a felony. Applying the facts to the law, it is clear that malice aforethought was proved.
 25. In light of our foregoing findings, we find that the appeal against conviction lacks merit and we affirm the conviction by the trial court.
 26. The remaining issue is whether the appellant has made out a case for interference with the death sentence imposed by the trial court. We observe that even though the sentence was passed in 2013 prior to the declaration by the Supreme Court in *Francis Karioko Muruatetu & Another v. Republic* [2017] eKLR that the mandatory nature of the death sentence for murder convicts is unconstitutional, the sentencing Judge, H. Omondi, J. (as she then was), considered the appellant's mitigation before passing sentence. Be that as it may, this appeal coming after the stated decision of the Supreme Court, it is necessary to ask ourselves whether the death sentence being the ultimate sentence was appropriate in the circumstances of the case.
 27. What then should be the appropriate sentence? In sentencing, we must consider both the aggravating and mitigating factors. In mitigation, the appellant expressed remorse and indicated that he had reached out and made amends with the deceased's mother. The appellant was also considered as a first-time offender. On the other hand, a life was lost. It was not just a life, but that of a young and school-going niece of the appellant. From the evidence, it is clear that the deceased was strangled to death during or after sexual assault. This in itself is an aggravating factor. The offence was committed in the most heinous manner and a long custodial sentence is recommended. Considering that there was sexual assault in the course of the murder, it is our view that a sentence of 35 years is appropriate.
 28. The upshot of the foregoing is that the appeal against conviction lacks merit and is hereby dismissed. The appeal against sentence partially succeeds so that the death sentence imposed by the trial court is set aside and substituted therefor with a sentence of 35 years in prison. There being no evidence on record that the appellant was admitted to bond during the trial, the sentence shall, in accordance with



the proviso to section 333(2) of the *Criminal Procedure Code*, run from 21st February 2011 when the appellant was arraigned before the High Court.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY 2024

F. OCHIENG

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

