Kamau v Republic (Criminal Appeal E131 of 2022)
[2024] KECA 1193 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1193 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E131 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

SEPTEMBER 20, 2024

BETWEEN

SAMUEL GITAU KAMAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Garsen (R. L. Korir, J.) delivered on 30th October 2019 in Garsen HCCR No 7 of 2016)

JUDGMENT

1. The appellant, Samuel Gitau Kamau, 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 10th June 2016 at Githurai Village in Mkunumbi Sub-location, Lamu West Sub-county within Lamu County, the appellant murdered Lucy Wachu Njuguna (the deceased).

2. Joseph Kamau (PW1), the appellant's and the deceased's son, testified that, on the night of 10th June 2016, he was at home asleep when he heard the sound of his father's motorcycle. His father, the appellant, came and asked him where his mother was. He stated that he told him that she had gone to see mama Maureen, and that he then went back to sleep.

3. Jane Wandia Njuguna (PW2), the appellant's mother, testified that on the same night, while sleeping in her house within the same compound as that of the deceased and her son, the appellant, she heard the appellant asking for a torch; that the appellant told her that his motor cycle had gone off, and that there were no light. She stated that she woke up and gave him a torch and went back to sleep.

4. She went on to state that the appellant then walked to his house while calling his wife (the deceased) and that, when he entered his house, he started screaming. When she went to the house, she found him crying and, on entering, she saw that his wife was dead; that the deceased had a red laceration round

her neck. They called members of Nyumba Kumi, and the body was taken to the mortuary. She stated that the deceased and the appellant had been living together peacefully in the same compound.

5. Jerusha Muthoni (PW3), a friend of the deceased, stated that the deceased and Zipporah Wangechi Njoroge (PW4) were in her house on the material evening cooking chapati for guests she was to have the next day; that they finished cooking at about 9 p.m; that, while they were eating, the appellant knocked on the door and demanded that his wife return home; that, after she had gone to sleep, she heard people screaming only to be told that the deceased had died, and that the police came and took her body away.

6. PW4 was also at the home of PW 3 and the deceased cooking chapatis when at about 10pm the appellant came and took the deceased. She later learnt that the deceased had died.

7. Edith Wanjiku (PW5) was with PW4 and the deceased in PW3's house cooking till 10 pm when the appellant came for deceased and took her home. Her evidence was similar to that of Eda Anjoke PW6. They stated that they were at PW3's house cooking mandazi and chapati for a function scheduled for the following day. At around 10:00 pm, the appellant arrived at PW3's house and asked for his wife, the deceased. They left together and in the company of PW4 who was also going to her home.

8. Elijah Njuguna Wakara (PW7) is the father to the deceased. He was informed by one Dr. John Warigi from Mpeketoni Sub-County Hospital that the deceased's body was at the hospital mortuary. He proceeded there and observed that the deceased appeared to have been strangled.

9. David Njuguna Kagangi (PW8) attended the post mortem examination on 15th June 2016. He knew the deceased and the appellant as a couple and was not aware of any grudge that existed between them.

10. Dr. Jillo Amana (PW9), a doctor from Mpeketoni Sub-County hospital conducted the post mortem on the body of the deceased and observed a sharp injury round the neck and a bruise on the face. The cause of death, according to him, was hypoxia (low oxygen) due to strangulation.

11. Festo Njoroge, PW10, the Investigating Officer, stated that, upon receiving a report of the deceased's death, accompanied by other police officers, he visited the scene of crime. The scene of crime was cordoned and 4 photographs taken. The body of the deceased was lying on a children's bed which was broken. He collected a mosquito net from the scene and two phones, one belonging to the deceased and the other to the appellant. He also collected a rope with human hair from the scene and the appellant's pair of trousers and a jacket for forensic examination, that is, DNA testing. After handing over the exhibits to the Government Chemist, the DNA result including blood samples taken from the appellant were negative; that there was no grudge that existed between the appellant and the deceased, and he could not establish the motive behind the murder. The Investigating Officer concluded that the evidence at hand was circumstantial and left it to the court to analyze and make its own finding. The appellant was subsequently arrested and charged with murder.

12. When put on his defence, the appellant testified that, on the night of the alleged incident, he went to get his wife from PW3's house after which he left her in their house and went to get his motorcycle. On his return, he found the house in darkness and went to get a torch from his mother. Upon entering the house, he found that his wife was dead.

13. The trial Judge having been satisfied that the offence of murder was proved to the required standard convicted the appellant and sentenced him to 20 years imprisonment.

14. The appellant was aggrieved by the trial court's decision and has appealed to this Court on the grounds that; the learned judge was in error in law and facts by failing to consider that the prosecution evidence was incredible and amounted to mere assertions that did not prove the offence of murder against the

appellant; in relying on circumstantial evidence without considering that PW1, PW2, PW3 and PW4's evidence failed to prove the offence of murder; and that this Court should interfere with the sentence imposed upon the appellant, for reasons that it is unjust, excessive and harsh.

15. Both the appellant and the respondent filed written submissions and, when the appeal came up for hearing on a virtual platform, learned counsel Mr. Randiek holding brief for Ms. Nzamba appeared for the appellant while, learned prosecution counsel Mr. Mwangi Kamau appeared for the State. Both counsel did not highlight their submissions, but instead sought to rely on them in their entirety.

16. In his written submissions, the appellant submitted that the prosecution did not establish the ingredients of the offence of murder to the required standards; that the cause of the death was not proved, and that there was no evidence that pointed to him as the person responsible for the deceased's death; that, further, malice aforethought was not proved, and that there was no direct evidence that pointed to him as the person who murdered the deceased, particularly as there was no evidence of a dispute between them, and nor was there any sign of a quarrel on the night of the alleged incident.

17. It was also submitted that there were inconsistencies in the prosecution's case, and that the prosecution evidence that was principally circumstantial evidence, remained uncorroborated.

18. For its part, the prosecution submitted that the ingredients of the offence of murder of the deceased were established; and that the death of the deceased was proved by the postmortem report. It was further submitted that, when the last seen with doctrine was applied to the circumstances of the case, the trial court could come to no other conclusion than, that the appellant was involved in the death of the deceased; that the evidence of PW1, PW2, PW3 and PW4 that the last time they saw her alive was when the appellant took the deceased home meant that the appellant and no one else was responsible for her death.

19. It was also submitted that the trial court rightly applied the provisions of section 206(a) and (b) and found that, by strangling the deceased, the appellant clearly intended to cause harm, with the result that malice aforethought was properly established.

20. This is a first appeal where the duty of a first appellate court is to subject the evidence as a whole to a fresh and exhaustive examination.

21. The duty of a first appellate court was aptly explained in the case of *Okeno v Republic* [1972] EA 32, thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA (336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

22. In view of the above, the issues for determination are: i) Whether the offence of murder was proved. ii) whether the sentence was harsh and excessive.

23. The appellant in this appeal was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, which provides:

203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Any person convicted of murder shall be sentenced to death.

24. In order to reach the conclusion that the offence of murder was established, the prosecution must prove the following elements, namely: the fact and cause of death; the unlawful act or omission causing death; the existence of malice aforethought, and that it is accused who caused the unlawful act or omission that caused the death. See *Nyambura & Others v. Republic* [2001] KLR 355.

25. On the death of the deceased, it is not disputed that the deceased died on the evening in question. The prosecution evidence, as well as the post mortem report, showed that the deceased died, and that the cause of death was hypoxia (low oxygen) due to strangulation.

26. As to whether the appellant was responsible for her death, it was the trial court's finding that the appellant caused the death of the deceased. In so finding, the trial Judge observed that none of the prosecution witnesses testified that he or she saw the appellant attacking the deceased. But, according to the prosecution, the deceased was found dead in their home which they shared with the appellant, and that the deceased was last seen with the appellant. In convicting the appellant, the trial Judge relied on the provisions of sections 110 and 111 of the *Evidence Act* and held that:

> In the converse, I find the accused's assertion that he left the wife in the house and only came back to find her dead incredible. There was no evidence that anyone else had intruded into the home and killed his wife while he was away. The accused's explanation to my mind was a poor attempt at creating an alibi. It did not dislodge the prosecution's evidence that he was alone with his wife in their house at the material time when the wife was strangled to death.

20. Looking at the above cited sections of the law and the evidence that the accused and the deceased were together in their house; and, that her body was found inside the said house on their matrimonial bed leads me to the firm conclusion that it is the accused and no one else that killed the deceased. He must have known what happened to the deceased. He was the last person with her and these being facts within his special knowledge; he bore a statutory burden to discharge a rebuttable presumption as envisaged in the *Evidence Act* and he failed to do so in his defence. I find the accused's explanation and conduct inculpatory."

27. When the evidence is considered, as rightly observed by the trial Judge, the prosecution's case was hinged on circumstantial evidence based on the doctrine of last seen with since none of the witnesses actually saw the appellant murder the deceased.

28. In the case of *Ahmad 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."

29. Section 111 (1) of the *Evidence Act* 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."

30. In explaining the last seen with doctrine, the Supreme Court of Nigeria in the case of *Haruna v AG of Federation* (2012) LPELR-SC.72/2010, (Pp. 30-31, paras. F-B) it was held that:

> 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.

31. This Court in the case of *Kimani v Republic* (Criminal Appeal 41 of 2022) [2023] KECA 1390 (KLR) held that:

> "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."

32. In the case of *Dida Ali Mohammed v R* Nakuru Court of Appeal Criminal Appeal No. 178 of 2000 (UR) it was held that:

> Then there is the circumstantial evidence which shows that it was the appellant who was the last person seen with the deceased before her death...As to when the deceased left the appellant's home and upto where the latter escorted her are maters which were peculiarly within the appellant's knowledge which we think, under section 111(1) of the *Evidence Act*, he was the only person who could but did not explain. And the evidence of recovery of the deceased's body consequent upon information the appellant gave are all circumstances which when taken cumulatively lead to irresistible conclusion that the appellant and no other person killed the deceased, and which exclude any other reasonable hypothesis than that the appellant killed the deceased."

And in the case of *Moingo & Another v. Republic* [2022] KECA 6 (KLR) this Court reiterated that:

> The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine 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 an inference that the accused killed the deceased)."

See also *Ngeno v Republic* (Criminal Appeal 24 of 2016) [2024] KECA 757 (KLR).

33. The record is unequivocal that the appellant was the last person to have been seen with the deceased a few hours before her death. In particular, after they left PW3's house they were accompanied by PW4, who saw the two turn into their gate, and then continue onwards to her home. Being the last person to have been seen with her, the circumstantial evidence pointed inextricably to him to extricate himself from blame. Given the circumstances, under section 111 of the *Evidence Act*, the burden now rested upon him to explain what happened to her or how she met her death. In his defence, he stated that, after he left her in the house, he went to get his motorcycle; that when he returned, he found his wife was dead. He did not proffer any explanation as to how the deceased met her death, and nothing in the evidence pointed to any other person as having been responsible, since PW1 and PW2 were asleep in nearby rooms, but did not hear any screams coming from the deceased.

34. When the totality of the evidence is considered, it becomes apparent that the appellant failed to prove his innocence and, having failed to do so, an adverse inference must be drawn that he and no one else was the person who caused the death of the deceased as no other reasonable hypothesis can be drawn.

35. Concerning malice aforethought, section 206 of the *Penal Code* specifies that:

> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
>
> a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."

36. In the locus classicus case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 it was held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

37. This position was reiterated by the Supreme Court of Uganda in *Rwabugande v Uganda* [2017] UGSC where it laid down the circumstances from which an inference of malicious intent can be deduced as follows:

> The weapon used, (b) the part of the body targeted i.e. whether it is a vulnerable part or not, (c) the manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted and (d) the conduct of the accused before, during and after the incident i.e. whether there was impunity."

38. In the instant case, the evidence adduced was that the deceased was strangled, and that she had a cut wound to the head. It was obvious that the act of strangulation by exertion pressure on the neck was an act that was deliberately intended to kill her, so that there can be no question that malice aforethought was established.

39. Consequently, given that the deceased died from strangulation, and that the appellant, who was the last person to have been seen with her did not provide any explanation on how she was strangled, or absolve himself from her death, and considering that malice aforethought was established by the manner of

strangulation, we are satisfied, that the learned judge rightly concluded that the prosecution proved its case to the required standard that the appellant murdered the deceased.

40. On sentence, as stated in *Bernard Kimani Gacheru v Republic* [2002] eKLR, ordinarily, sentencing is at the discretion of the trial court and an appellate court ought not to interfere with the 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."

41. In this case, the appellant has not faulted the learned Judge for failing to consider some material factors, or taking into account irrelevant factors, or acting on wrong principles. The appellant was convicted for the offence of murder for which the death sentence is by law prescribed. Based on the guidance of the Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, he was instead sentenced to serve 20 years' imprisonment.

42. We find that the appellant has not demonstrated that the sentence imposed was harsh and excessive, particularly since he was responsible for the callous and wanton death of the deceased. For this reason, we have no basis on which to interfere with the sentence.

43. As such, the appeal against conviction and sentence is without merit and is accordingly dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C. Arb, FCIArb

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JUDGE OF APPEAL

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

Signed

G. V. ODUNGA

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JUDGE OF APPEAL

DEPUTY REGISTRAR