



**Rashid v Republic (Criminal Appeal 40 of 2018)
[2024] KECA 1515 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1515 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 40 OF 2018
P NYAMWEYA, FA OCHIENG & WK KORIR, JJA
OCTOBER 25, 2024**

BETWEEN

JULIUS KIPROP ALIAS SALIM RASHID APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Kericho
(Mumbi Ngugi, J.) dated 18th April 2018 in HC.CR.C. No. 51 of 2013)*

JUDGMENT

1. The appellant herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence as set out in the information were that on 2nd November 2013 in Majengo area in Kericho District, within Kericho County, the appellant, jointly with others not before the court, murdered Mercy Cheronu.
3. The brief facts of this case are that the appellant and the deceased were in a relationship as boyfriend and girlfriend. On the material day, the appellant is said to have been seen quarrelling with the deceased; accusing her of having an affair with another man. Later that evening at around 9:30 p.m., the deceased was found lying unconscious in an illicit brew den. The deceased was rushed to the hospital where she was pronounced dead.
4. The appellant pleaded not guilty to the charges. To advance their case against the appellant, five prosecution witnesses testified. At the end of the trial, the appellant was found guilty, convicted, and he was sentenced to 40 years' imprisonment.
5. This is a first appeal. As a Court, we are obliged to re-evaluate and re-analyze the evidence tendered before the trial Court, bearing in mind that we did not see or hear the witnesses when they gave their



testimonies, and give due allowance to the same. In the case of *Chiragu & another v Republic* [2021] KECA 342 (KLR), this Court stated that:

“However, before we grapple with grounds of appeal aforesaid, we must remind ourselves that this being a first appeal from the judgment of the High Court, by dint of section 379 of the CPC and guidance provided in the famous case of *Okeno V. R.* [1972] EA 32, we are expected to subject the entire evidence tendered in the trial court to fresh and exhaustive examination so as to reach our own independent conclusions as to the guilt or otherwise of the appellants. In doing so, we must however give due allowance to the fact that we neither saw nor observed the witnesses as they testified. Accordingly, we must give way to the findings of facts and demeanor of witnesses by the trial court. See also *Erick Otieno Arun v. Republic* [2006] eKLR. In undertaking this exercise, we must of necessity go over the evidence presented before trial court albeit in summary.”

6. PW1 was a resident of Majengo area. He told the court that he knew the appellant and the deceased, whom he referred to as Bob and Betty. They would all meet at a drinking den in the evenings after work to drink chang’aa. He also used to collect scrap metal with the appellant. According to PW1, the appellant and the deceased lived together for a long time and they were always quarrelling and fighting.
7. On the material day at around 7:30 p.m., he was with the appellant and the deceased at the drinking den when the appellant started quarrelling with the deceased, accusing her of having another lover. The appellant threatened to kill the deceased. He then heard a scream from where the deceased and the appellant were seated.
8. PW1 testified that he left for about an hour to look for the chang’aa seller and when he came back he found people gathered around the body of the deceased. However, the appellant was not there. He and eight other people went to look for him. They found him at Mulembe where they arrested him and took him to the Chief.
9. PW2 was a sister to the deceased. She told the court that she was informed of the deceased’s death at around midnight. She later identified the body of the deceased for post-mortem purposes. She testified that the appellant and the deceased had a drinking problem. They had three children, two of whom were deceased. PW2 testified that the appellant and the deceased often quarrelled and fought and that two years earlier, the deceased had been treated for broken ribs as a result of an assault by the appellant.
10. PW3 was an uncle to the deceased. He also identified the body of the deceased for post-mortem.
11. PW4 was the investigating officer. When he received the report regarding the death of the deceased, he went to the scene with another officer where they found the body of the deceased lying motionless, and foaming at the mouth. However, there were no visible injuries on the body. They took the body to Kericho District Hospital where the deceased was confirmed dead on arrival. He reiterated the testimonies of the other witnesses.
12. PW5 was a doctor at Kericho District Hospital. He produced a post-mortem report prepared by Dr. Oyoo. According to the report, the cause of the death of the deceased was strangulation, leading to asphyxia or suffocation. The doctor formed the opinion that the death was due to the fracture of the hyoid bone.
13. In a Ruling dated 6th December 2017, the learned Judge made a finding that the prosecution had established a prima facie case against the appellant and that he had a case to answer.
14. In his sworn testimony, the appellant told the court that on the material day, he left his work, as a shoe shiner, and headed home. However, on his way home he met a neighbour who told him that the



- deceased was at a chang'aa den in Majengo. He went there and asked the deceased about who would cook for their daughter and she said she would go and do so. He then left the den and went back to work until 6:30 p.m.
15. In his sworn defence, the appellant denied committing the offence.
 16. The appellant testified that one of his customers asked him to meet him at a club that was 80 meters away. When he got to the club, the owner of the club, Susan, asked him what he had done. He was then asked to wake the deceased up. He was then arrested and taken to the chief's camp and later to Kericho Police Station.
 17. The learned Judge analysed the evidence adduced and was satisfied that the prosecution evidence pointed to the appellant as the person responsible for the death of the deceased.
 18. Consequently, the learned Judge found the appellant guilty of murder. He was convicted and sentenced to 40 years' imprisonment.
 19. Being aggrieved by his conviction and sentence, the appellant in his memorandum of appeal dated 24th January 2024 raised three grounds of appeal to wit:
 - a. The learned Judge erred in failing to consider extraneous factors during sentencing, leading to a manifestly harsh sentence.
 - b. The learned Judge erred in applying the doctrine of last seen to convict the appellant whereas they were lovers and they were bound to be seen together.
 - c. The learned Judge erred in failing to offer the appellant an opportunity to mitigate before sentencing.
 20. When the appeal came up for hearing on 30th April 2024, Mr. Owuor, learned counsel appeared for the appellant whereas the respondent was represented by Mr. Omutelema, Assistant Deputy Director of Public Prosecutions. Counsel relied on their written submissions.
 21. In his written submissions, the appellant submitted that the learned Judge considered issues that were completely remote, and which issues could not have led to the death of the deceased.
 22. He faulted the learned Judge for failing to consider that he was a first offender and that he had a child who was a minor, who needed his care and attention.
 23. The appellant submitted that the murder of the deceased was not connected to him in any way. His utterances of killing the deceased were made in a state of intoxication and did not mean that he had killed the deceased. He was found more than a kilometre away from where the deceased died.
 24. While relying on the cases of Patrick Kamende Maina v Republic [2023] KECA 667 (KLR) and Edwin Otieno Odhiambo v Republic [2009] eKLR, the appellant submitted that he was not given an opportunity to mitigate.
 25. Opposing the appeal, the respondent submitted that the prosecution had proved their case against the appellant on circumstantial evidence. They relied on the case of Chiragu & Another v Republic [2021] KECA 342 (KLR) to buttress this submission.
 26. The respondent submitted that malice aforethought was established through the appellant's actions of threatening to kill the deceased.
 27. The respondent submitted further that the appellant's defence was accorded appropriate consideration before it was rejected.



28. The respondent submitted that the appellant was sentenced after being given an opportunity to mitigate, and he chose to leave the issue of sentencing to the discretion of the court. The respondent submitted that the Social Inquiry Report notwithstanding, we ought to consider the aggravating circumstances in this case and uphold the sentence.
29. We have carefully considered the record, submissions by counsel, the authorities cited, and the law. The issue for determination is whether or not the prosecution case was proved beyond reasonable doubt and whether or not this Court ought to interfere with the sentence meted against the appellant.
30. Section 203 of the Penal Code under which the appellant was charged provides that:
- “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
31. To sustain a charge under the said provision, the prosecution had to prove beyond reasonable doubt, the fact and cause of death of the deceased person; that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; and that such an unlawful act or omission was committed with malice aforethought.
32. It is common ground that the deceased died. The prosecution witnesses testified that the body of the deceased was found lying unconscious in the drinking den and that she was pronounced dead on arrival at the hospital. The post-mortem report showed that indeed the deceased had died as a result of strangulation.
33. It follows, therefore, that the questions that beg to be answered are; did the death of the deceased occur as a result of the unlawful act or omission of the appellant, and was there malice aforethought?
34. It is common ground that none of the prosecution witnesses saw the deceased being killed. They heard a scream and the next moment the deceased was lying on the floor unconscious. No direct evidence was adduced linking the appellant to the death of the deceased. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, this Court stated that:
- “However, it is a truism 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 a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -
- ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”
35. The court in *Sawe v Republic* [2003] KLR 364, stated 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 remain with the prosecution. It is a burden which never shift to the party accused.”

36. The evidence linking the appellant to the death of the deceased was that the appellant and the deceased were seen in the drinking den drinking and quarrelling. Even after everyone else had left to go find shelter because it was raining, the appellant and the deceased remained in the den. When the deceased screamed, people came and found her lying on the floor but the appellant was nowhere to be found. It follows, therefore, that the appellant was the last person to be in contact with the deceased.

37. In the Nigerian case of *Moses Jua v The State* [2007] LPELR- CA/IL/42/2006, the court held that:

“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.”

38. Similarly, in *Stephen Haruna v The Attorney-General of The Federation* [2010] 1 iLAW/CA/A/86/C/2009, the court stated 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.”

39. In his defence, the appellant stated that he was a kilometre away from where the deceased had died. However, the evidence adduced by the prosecution in this instance was such that the chain of events was never broken. From the moment the appellant started quarrelling with the deceased, no other person saw the deceased alive again other than him.

40. We find that having been the last person to have been seen with the deceased before her death, the appellant had the onus under Section 111(1) of the *Evidence Act* to explain what had happened to the deceased. Section 111(1) provides that:

“111(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.”



41. Section 119 of the *Evidence Act* provides that:

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

42. We have no doubt in our minds that these facts against the appellant were incapable of explanation upon any other reasonable hypothesis other than that of the appellant’s guilt. We have found no other co-existing circumstances that could weaken the chain of circumstances relied upon by the prosecution. In this regard, we find that the respondent proved beyond reasonable doubt that the appellant committed the unlawful act leading to the death of the deceased.

43. As regards malice aforethought, Section 206 of the Penal Code provides the following definition:

“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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

c. An intention to commit a felony.

d. An intention by an act to facilitate the flight or escape from custody of any person who attempted to commit a felony.”

44. In the case *Republic v Tubere s/o Ochen* [1945] 12 EACA 63, the court established the following elements on malice aforethought:

“The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab wound or multiple injuries; the conduct of the accused before, during, and after the incident.”

45. From the evidence on record, the appellant had always threatened to kill the deceased. The post-mortem report indicated that the deceased had been strangled. On the material day, the appellant had learned of the deceased’s alleged affair and confronted her, thus the quarrel. The appellant was evidently angry, and he was also drinking alcohol. By strangling the deceased, the appellant ought to have known that the deceased would die or that his actions would cause her grievous harm. In the circumstances, we find that malice aforethought was established.

46. We are, therefore, satisfied that all the ingredients of murder in this case met the threshold prescribed by law and the prosecution case was proved beyond any reasonable doubt. The appellant’s conviction was sound.

47. It is trite that sentencing is at the discretion of the trial Court.

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial Court were settled in the case of *Ogolla s/o Owuor v Republic* [1954] EACA 270 wherein this Court stated as follows:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the



sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

48. In the South African case of Mokela vs The State (135/11) [2011] ZASCA 166, the Supreme Court held thus:

"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

49. Similarly, in Shadrack Kipkoech Kogo vs Republic, Criminal Appeal No. 253 of 2003 the Court of Appeal stated that:

"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be inferred (see also Sayeka vs R. (1989 KLR 306)"

50. In the case of Francis Nkunja Tharamba vs Republic [2012] eKLR this Court held as follows with regard to sentencing:

"...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere."

51. In this case, the learned Judge exercised her discretion after the appellant through his counsel told the court that he did not intend to mitigate and that he left the matter to the court. The learned Judge also considered the Social Inquiry Report which indicated that he was a first offender and that he did not have any criminal tendencies. However, the learned Judge observed that the appellant was not remorseful.

52. The appellant has not shown that the trial court either took into account some extraneous factor or that it failed to take into account some relevant factor. Furthermore, the appellant has not demonstrated to us that the sentence was, of itself, so manifestly excessive as to be construed to be plainly wrong.

53. In the circumstances, we find that the trial Judge considered the correct principles in imposing the sentence of 40 years' imprisonment, and properly exercised her discretion in so doing. We uphold the sentence.



54. In the result, the appeal is dismissed in its entirety.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed DEPUTY REGISTRAR

