Makokha v Republic (Criminal Appeal 16 of 2019)
[2024] KECA 1582 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1582 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 16 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 8, 2024

BETWEEN

EMMANUEL WEKESA MAKOKHA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J) delivered on 2nd March, 2017 in HCCRA No. 20 of 2012)

JUDGMENT

1. The appellant, Emmanuel Wekesa Makokha, was arraigned before the High Court, for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The High Court, upon hearing the evidence of seven prosecution witnesses, and the appellant's unsworn statement in his defence, found the appellant guilty of the charge, convicted him, and sentenced him to death as provided under Section 204 of the Penal Code. The appellant is aggrieved by his conviction and sentence, hence this appeal.

2. The particulars of the offence against the appellant were that: on the 29th May, 2012 at Ndalu Village, Ndalu Location in Bungoma, he murdered BJS (deceased), a child then aged five years. Joan Cherono (Cherono) is the mother of the deceased. At the material time, Cherono was in a relationship with the appellant, and they were living together with the deceased, whom she conceived a child from another relationship. Cherono and her friend and next- door neighbor, Linet Mukhungu (Linet) worked in a bar owned by Lilian Wafula Mani (Lilian).

3. L's thirteen-year-old daughter EM (E), testified that on 29th May 2012, they were together with the deceased at the veranda of their house. She left the deceased on the veranda, when she went into the house to keep some money which she had. On coming back, E did not find the deceased where she had

left her. E looked for the deceased, but could not find her. She informed Linet who made a missing person report to PC George Otieno (PC Otieno), then stationed at Kiminini Police Station.

4. On the same day, 29th May, 2012, at about 6pm, Erick Nyongesa Situma (Erick), saw the appellant who was known to him. The appellant was riding his motorcycle, and was carrying the deceased, who was in a school uniform, on the motorcycle. Apparently, that was the last time that the deceased was seen alive, as efforts to trace her were not fruitful. Her decomposing body was subsequently recovered from a well on 2nd June, 2012. The body was dressed in a school uniform and was apparently tied up in a sack. The well was on the property of John Njoroge (Njoroge).

5. On 13th June, 2012, Dr. Patrick Musike (Dr. Musike) of Matunda County Hospital conducted a postmortem examination on the body of the deceased. The body was largely decomposed, but Dr. Musike noted a linear fracture on the parietal bone, and formed the opinion that the cause of death was head injury. Following investigations done by PC Otieno, Linet and Lilian made statements, that the appellant wanted to marry Cherono, but was not comfortable with the deceased; consequently, Cherono did not like the deceased and often mistreated her; that a few days before the deceased's disappearance, Cherono had beaten up the deceased so severely, that the matter was reported to the police; that Cherono was arrested and charged; and that she was subsequently placed on probation. Attempts by the investigation officer to get Cherono were not successful.

6. In his defence, the appellant did not call any witness, but gave an unsworn statement in which he explained that on 29th May, 2012, he went to Kiminini Police Station, as he had learned that Cherono (whom he referred to as his wife), had been arrested. He did not get any help from the Officer Commanding the Station (OCS), as the officer demanded money from him. The following day he met Erick who informed him that the deceased had disappeared. Cherono was released on 31st May, 2012 after being placed on probation. She admitted having beaten the child for licking her neighbour's sugar. The appellant denied having carried the deceased on his motorcycle on 29th May, 2012. He explained that he had only gone to make a report to the police. He further denied having killed the deceased.

7. The learned Judge of the High Court, in finding the appellant guilty, noted that the evidence against him was purely circumstantial. The learned Judge guided herself on circumstantial evidence, using the Court of Appeal decision in Tumeheire vs Uganda [1967] E.A. 328; and Abanga alias Onyango -vs- Republic, Criminal Appeal No. 32 of 1990 (UR). The following extract of the judgment of the High Court, shows how the learned Judge analyzed the circumstantial evidence:

> " 13. In this instant the neighbours loved the deceased. PW3 stayed with her despite both Cherono and the accused staying in the next room for what PW3 says was wont of care. PW7 and other neighbours got Cherono arrested two days prior to the deceased disappearance due to Cherono's frequent assault. On the deceased in his testimony (sic) the accused says he was unhappy with Cherono's behavior, of assaulting the child. Although PW4 is the only one who saw the accused carrying the child on his bike on the material day, Cherono had intimated to PW7 that she suspected the accused and she indeed escorted him to the police station. Secondly the accused on being questioned by PW7 where he had been since the child disappeared he did not give an account save that no one had asked him about the killer. Thirdly the testimony of the accused gives him away he does not give an account of where he was on the 29th of May save that he had gone to see Cherono at the police station. The accused stayed next to Linet who had been searching for the child, as one close to the child he does not say what efforts he put in place to have

> the child found. This I find partly strange. He met Erick on 30.5.2012 who told him the child was lost on 31.5.2012 when Cherono told him again. He does not say what he did. If indeed he cared for the child as one who lived with the child's mother and had gotten the child a school as he alleged why is it that he was not bothered about her whereabout. Did Cherono know something when he suspected him? In my view the evidence of PW4 and the information gathered by PW5 that the accused disliked the fact that Cherono had a child and his non-action and attitude after the disappearance of the child; and removing Cherono from the scene as she was incarcerated then the only other person who would have taken away the life of Brigid is the accused as, she got on his way, she got his woman arrested and incarcerated. In my view malice aforethought can be deduced from the foregoing. Further in my considered view the 3 necessary tests of circumstantial evidence apply in this case and all evidence pieced (sic) together leave no other conclusion other than the crime was committed by none else but the accused."

8. The appellant filed a memorandum of appeal in person, and a second memorandum of appeal was subsequently filed by his advocate, together with written submissions. This second memorandum of appeal was treated as a supplementary memorandum of appeal. In brief, the grounds relied upon by the appellant were four. These were, that the appellant's constitutional rights were violated during the trial; that the appellant was convicted on the evidence of a single witness whose evidence was not corroborated; that malice aforethought was not proved against the appellant; and that the prosecution evidence was speculative, imaginative, and not credible, as it amounted to a frame up against the appellant. The supplementary grounds which were three, were that: the evidence before the High Court did not support the offence charged; the appellant was convicted on purely circumstantial evidence which was not corroborated nor did it meet the required standard of proof; and that the appellant was condemned to a sentence which was excessive, harsh, unconstitutional and unlawful.

9. Learned counsel for the appellant, Ms. Caroline Kagoya, filed written submissions, as did Laban Ngetich, Senior Prosecution Counsel from the Office of the Director of Public Prosecution (ODPP), who filed submissions on behalf of the respondent. During the plenary hearing of the appeal, learned counsel Ms. Kagoya appeared for the appellant, while Ms. Mwaniki from the ODPP, appeared for the respondent. Each counsel adopted and highlighted the written submissions that had been filed.

10. For the appellant it was submitted that the burden of proof in criminal cases rests upon the prosecution, and that the prosecution had the burden to prove the elements of the charge against the appellant. Relying on Republic -vs- Andrew Omwenga [2009] eKLR, counsel for the appellant submitted that the prosecution needed to prove that the deceased died as a result of the unlawful omission or commission of the appellant; that in killing the deceased the appellant was actuated by either express or implied malice aforethought; and that the prosecution was able to place the appellant at the scene of the murder.

11. Regarding the death of the deceased, counsel conceded that the evidence of the prosecution witnesses in this regard was supported by the medical evidence given by Dr. Musike. On the cause of death, it was submitted that there was no evidence at all, linking the appellant with the deceased, on the date the alleged death occurred, and that the evidence relied upon by the prosecution, was nothing short of imagination. In addition, there was no evidence regarding malice aforethought, as the trial court relied on hearsay evidence, that fell short of proving not only that the appellant killed the deceased, but also any malice aforethought on the part of the appellant. Further, the prosecution did not tender any

evidence to show that the appellant was at the scene of the crime, or that he could have committed the offence to the exclusion of anyone else.

12. In regard to the appellant's defence, counsel relied on Republic -vs- Chivatsi & Another (1989) eKLR, urging the court to find that the prosecution not only failed to prove its case beyond any reasonable doubt, as the same was merely circumstantial, but also failed to connect the appellant to the offence. She pointed out that the prosecution evidence was marred with a lot of inconsistencies.

13. On sentence, the appellant's counsel argued that the death sentence was not only inimical to international law and customs, but is also unconstitutional, as it violates the appellant's right to be free from cruel, inhuman and degrading treatment, right to inherent dignity and right to life. Counsel also relied on the Supreme Court decision in Francis Karioko Muruatetu & Another [2017] eKLR, maintaining that the High Court did not have any regard to the appellant's mitigation. Counsel therefore urged us to allow the appeal.

14. On her part, learned counsel for the respondent submitted that the prosecution evidence was properly evaluated. She pointed out that in regard to proof of death and cause of death, the evidence of Njoroge, Esther and PC Otieno confirmed that the deceased died, while Dr. Musike produced a postmortem examination report which confirmed that the deceased died as a result of head injuries. As regards the actus reus, counsel submitted that Erick saw the appellant with the deceased, on the day the deceased disappeared; Erick was heading with the deceased towards Ndalu market near where the body of the deceased was recovered; and the appellant was the last person to be seen with the deceased before her body was recovered. She argued that the evidence pointed to the appellant as the one who caused the fatal injuries inflicted upon the deceased.

15. On malice aforethought, counsel for the respondent submitted that Section 206 of the Penal Code enumerates the circumstances under which the intention to kill, commonly referred to as the mens rea for murder, is deemed to have been established. Counsel argued that in this case malice aforethought was established under Sections 206(a)(b) & (c) of the Penal Code, as the extent of the injuries on the deceased was confirmed by Dr. Musike, and the appellant was the last person to be seen with the deceased near the scene where the body was later recovered. Relying on Sawe -vs- Republic [2003] KLR 365, the respondent submitted that in the present case, there was no other co-existing circumstances weakening the chain of facts relied on by the prosecution, and the circumstantial evidence pointed directly to the appellant.

16. On sentence, the respondent conceded that pursuant to the Supreme Court decision in Francis Karioko Muruatetu -vs- Republic [2017] eKLR, the mandatory nature of the death penalty was declared unconstitutional, and, therefore, the Court should revisit the sentence. The respondent urged that in doing so, the Court should consider the circumstances under which the offence was committed; the age of the appellant; the mitigation offered by the appellant; whether the appellant appeared remorseful, and if so, what steps if any that he undertook towards reforming. Also of relevance is the period the appellant has already spent in custody, and whether the appellant was a first-time offender. Counsel pointed out that the offence was committed in a gruesome and heinous manner, and that the appellant did not appear remorseful.

17. This Court's mandate to hear and determine this appeal is anchored on Section 379(1) of the Criminal Procedure Code, which provides for appeals to this Court on both matters of law and fact, from a conviction and sentence of death in a trial by the High Court.

18. Our duty in hearing the appeal, remains that of a first appellate court, which as stated in Okeno v. Republic [1972] EA 32 is as follows:

> 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. The first appellate court must itself, weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. 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, see Peters vs. Sunday Post [1958] E.A 424."

19. The duty of this Court was also restated by this Court in David Njuguna Wairimu vs. Republic [2010] eKLR as follows:

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

20. With the above obligation in mind, we have considered and re- evaluated the evidence that was adduced before the trial court as contained in the record of appeal, taking into account the contending submissions made by the respective parties, the authorities relied upon, and the law, in order to come to our own conclusions on the evidence and the pertinent issue on whether the charge against the appellant was proved to the required standard.

21. We start with Section 203 of the Penal Code, which provides that: "Any person who of malice aforethought causes death of another person by an unlawful Act or omission is guilty of murder." This means that for the offence of murder to be established, three main elements must be proved. First, the death of the deceased must be proved to have occurred. Second, it must be proved that the death was caused by an unlawful act or omission on the part of the accused person, and finally, it must be proved that in committing the act or omission, the accused person had malice aforethought.

22. The fact of the occurrence of the deceased's death, was not substantially disputed. The evidence of Njoroge, Lilian and PC Otieno, confirmed that the body of a child was recovered from a well within the property of Njoroge. Lilian who knew the deceased, stated that she was able to identify the recovered body of the child, as that of the deceased, using the school uniform that the child was dressed in, as well as her facial appearance. Cherono, who was also present at the well, is also reported to have identified the body as that of the deceased who was her child. There was, therefore, sufficient evidence that the body of the child which was recovered from the well was that of the deceased.

23. PC Otieno, who participated in the recovery of the body of the deceased from the well, is the one who identified the body to Dr. Musike, who carried out a post mortem examination. It is evident that the

post mortem examination which was done on 13th June about ten days after the body was recovered, was done when the body was quite decomposed. This notwithstanding, Dr. Musike was able to discern an injury on the deceased's head, from which he concluded that the deceased died as a result of the head injury. The question is who caused the head injury to the deceased? And did the person have any malice aforethought?

24. There was no direct evidence linking the appellant to any act or omission that resulted in the deceased's injury. The evidence against the appellant was, therefore, basically circumstantial evidence. The principles applicable in regard to circumstantial evidence have been developed and distilled by this Court, and its predecessor over the years.

25. In PON v Republic [2019] eKLR the Court rendered itself as follows:

> " In its ordinary meaning, direct evidence would be that which directly links a person to a crime; that which is based on an eyewitness account, on personal knowledge or observation. The direct evidence sought in the matter the subject of this appeal is - who saw how the deceased meet her death. There is no such evidence hence the recourse to circumstantial evidence. Though not direct, circumstantial evidence, as this Court stated in *[Musili Tulo V. Republic Criminal Appeal No. 30 of 2013](#)*:
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> > .... is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.'
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> To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that 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 V Kipkerring Arap Koske & 2 Others [1949] EACA 135 and Simoni Musoke V R [1958] EA 71. In Rex V Kipkerring (supra) the court explained that:
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> > 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 which 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.'
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> Simoni Musoke V 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 V. R Criminal Appeal No. 56 of 1998, the Court stated that:
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> > It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:
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> > i. the circumstances from which an inference of guilty 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'

These dicta find their origin from an old decision of the House of Lords in Teper V. R. [1952] AC 480."

26. In Re*public v Mohammed & another (Petition 39 of 2018)* [2019] KESC 47 (KLR) the Supreme Court cautioned on the application of circumstantial evidence as follows:

> 58. 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."

59. 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 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, …"

60. As was further stated in the case of *Musili v. Republic CRA 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.16 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."

27. The circumstantial evidence implicating the appellant was, first and foremost, that of Linet and Lillian. Their evidence was that the appellant was living with Cherono and wanted to marry her, but the deceased was an obstacle, because the appellant did not like the fact that Cherono had a child. According to Linet and Lillian, when the deceased went missing, the appellant did not show any concern. The most incriminating evidence, however, was the evidence of Erick, who testified that he met the appellant on 29th May 2012, the day the deceased disappeared; the appellant was riding a motor cycle, having the deceased as a pillion passenger on the motorcycle; and this is apparently the last time that the deceased was seen alive.

28. On the doctrine of “last seen with” in [*Chiragu & another v Republic (Criminal Appeal 104 of 2018*](https://new.kenyalaw.org/akn/ke/judgment/keca/2021/342/eng@2021-12-17)) [2021] KECA 342 (KLR) this Court (differently constituted) stated:

> “To boost their case against the appellants however, the prosecution invoked the criminal law doctrine of “last seen with”. That as the appellants were the last people to be seen with the deceased and the deceased was later found dead then they must have had a hand in her death. 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:
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> > “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.”
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> 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:
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> > “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.”
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> 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:
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> > “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.”

29. In Moingo & Another -vs- Republic [2022] KECA 6 KLR, this Court applied the doctrine of “last seen with” as follows:

> “The fact that the deceased was last seen in the hands and restraints of the appellants, a prima facie case was established to require the appellant 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 absence of any explanation, the court is justified in drawingan inference that the accused killed the deceased."

30. Similarly, in Dida Ali Mohammed Vs R Criminal Appeal No. 178 of 2000 (UR) this Court in a bench in Nakuru applied the last seen with doctrine as follows:

> " 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 matters 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."

31. More recently, in a Samuel Gitau Kamau - vs- Republic, Criminal Appeal No. E131 of 2022, in a judgment delivered in September, 2024, this Court in a bench in Mombasa applied the last seen doctrine as follows:

> " 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….
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> When the totally 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."

32. Coming back to the facts before us, the appellant, in his defence, did not deny the fact that he was living with Cherono, or that Cherono had actually been arrested for beating up the deceased. He also admitted that he was a boda boda rider. He conceded that at the time of her disappearance, the deceased was living with Linet, but he denied having met Erick while carrying the deceased as a passenger on his motorcycle. The question, therefore, is whether the appellant was established to have been the person last seen with the deceased.

33. In regard to the doctrine of "last seen with", the prosecution depended entirely on the evidence of Erick who was categorical that he met the appellant a person well known to him, and that the appellant was riding his motorcycle and had the deceased who was in her school uniform, as a passenger. Erick also knew the deceased, as well as her mother Cherono. Erick stated that the appellant was riding towards Ndalu market, and there was evidence from Njoroge, Linet and Lilian that the body of the deceased was recovered from the area around Ndalu market, and that the body was still in the school uniform.

34. It is true that the evidence of Erick was that of a single witness, however in our view corroboration, though desirable, was not mandatory as there is no statutory legal requirement in that regard. Moreover, Section 143 of the *Evidence Act* provides that: "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."

35. It suffices that the trial Judge who saw and assessed the demeanour of Erick, believed his evidence, and we have no reason to doubt Erick's credibility. The deceased was found missing by Esther from the verandah of the house where she had left her. This was before midday, as Linet who came back home found both the deceased and Esther absent. Esther had apparently gone to look for the deceased. Linet left by 12 noon, and by then, neither Esther nor the deceased had come back. On the same day, the appellant was seen at about 6pm with the deceased and she was dressed in her school uniform.

36. The appellant in his defence explained that on 29th May, 2012, he went to the police and that he did not carry the deceased on his motorcycle. However, the appellant contradicted himself, first, stating that he went to the station to follow up on Cherono whom he had learnt had been arrested, and then later, stating that he went to the police station as a parent to the deceased to make a report on her disappearance. The appellant claimed to have learnt of the deceased's disappearance from Erick whom he insisted he met on 30th May, 2012, and not on 29th May. How then could the appellant have gone to the police station on 29th May, to report the deceased's disappearance, if indeed, by then he was not aware of the deceased's disappearance?

37. The appellant's evidence that he did not meet Erick on the 29th May, 2012 or that he was not carrying the deceased as a passenger, was not credible in light of the evidence of Erick, who saw him clearly with the deceased. In addition, both Linet and Lilian testified that he did not show any concern over the deceased's disappearance. We are satisfied that the appellant was established to have been the person last seen with the deceased prior to the deceased's death and that the deceased was dressed in her school uniform.

38. The deceased having been established by the prosecution to have been found dead a few days after having been seen with the appellant, under the proviso to Section 111(1) of the *Evidence Act*, the appellant is deemed to be having special knowledge of what may have happened to the deceased in the intervening period, from the time he was seen with the deceased and the time the body of the deceased was recovered in a sack from the well. This shifted the burden upon the appellant to explain what happened in that intervening period if, indeed, he was not responsible for the deceased's injury and death.

39. The appellant did not offer any explanation as to what happened to the deceased or what could have led to the deceased's decomposed body being found in the well with the head injury. In light of the evidence that was before the trial court, the only rational conclusion is that the appellant was the one who caused the deceased the head injury, put the body of the deceased which was still in her school uniform, in a sack, and threw it into the well. From our evaluation of the evidence, and considering the appellant's defence, we find that Cherono was in custody and was only released after the deceased had gone missing. She could not, therefore, have caused the deceased's disappearance, or the head injury that led to the deceased's death. We are satisfied that the circumstances that were established before the trial court were incompatible with the innocence of the appellant, and are not capable of explanation upon any other hypothesis, other than that the appellant was the person who caused the injury to the deceased resulting in her death, and disposed of the body in the well. The circumstances in which the injury was inflicted on the body of the deceased and the manner in which the body was disposed of, left no doubt that the person who inflicted the injury and disposed of the body, intended to cause the deceased's death and therefore malice aforethought can be inferred under Section 206 (1) of the Penal Code. Consequently, the trial Judge cannot be faulted for having found the appellant guilty, and we uphold the appellant's conviction.

40. The appellant complained that his constitutional rights as provided in the bill of rights were violated, but he did not identify any specific right or explain how the same was violated. On our part, we have

considered the record and have not found any substantive or procedural violation of the appellant's rights.

41. Finally, on sentence, upon conviction, the appellant who was represented by an advocate, one, Mr. Murunga, offered no mitigation, and was sentenced to death, the learned Judge observing that the only available punishment for the offence of murder, is death. We appreciate that this was just before the decision in Francis Karioko Muruatetu & Another -vs- Republic [2017] KESC 2KLR, in which the Supreme Court declared the mandatory nature of the death sentence, as provided under Section 204 of the Penal Code to be unconstitutional. Given the circumstances of this case, in which the appellant heinously caused the death of an innocent child, in such a grisly manner, we think that a deterrent sentence was called for. However, in the spirit of the Muruatetu decision, we set aside the death sentence and substitute thereto a sentence of thirty (30) years imprisonment.

42. The upshot of the above is that the appeal against conviction is dismissed, and the appeal against sentence is allowed to the limited extent of substituting the death sentence with a term sentence of thirty (30) years imprisonment. By dint of section 333(2) of the Criminal Procedure Code, the same shall be computed from January 21, 2015 as the appellant has been in custody since that day. Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF NOVEMBER, 2024.

HANNAH OKWENGU

....

JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR