



REPUBLIC OF KENYA



**Nyamwaro v Republic (Criminal Appeal 246 of 2019)  
[2024] KECA 1834 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1834 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 246 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
DECEMBER 20, 2024**

**BETWEEN**

**CAROLINE NYANGATE NYAMWARO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from Judgment of the High Court of Kenya at  
Kisii (Ougo, J.) dated 28th March 2019 in HCCRC No. 10 of 2017)*

**JUDGMENT**

1. Caroline Nyangate Nyamwaro, the appellant herein, was arraigned before the High Court, on information, that she had committed the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. According to the information which was duly signed by Edwin Otieno, a Senior Prosecution Counsel, in the Office of the Director of Public Prosecutions (ODPP), the appellant is alleged to have murdered Samuel Mureithi Kenyanya (deceased) on 11<sup>th</sup> April, 2017 at Getanga Sub-location in Sameta Subcounty within Kisii County.
2. During the trial, seven witnesses testified for the prosecution, while the appellant gave an unsworn statement. In brief, PW1-LKR (L), who is mother to the deceased's child and daughter in law to PW4-EB (E), left her two children, A, who was five years old and SM, who was about one year three months old, playing with M, a daughter to the appellant, as she went to the shamba.
3. E, who was in the tea plantation, heard A crying, and she went back to the home to see what was happening. She met with A running towards her. He was bleeding and had a cut on the head. A fell and E held him. It was then that E saw the appellant with a panga. She was apparently chasing A, and when E asked her why she had cut the child, she threatened to attack E, who screamed and many people responded, including L. When L went to E's house she found the deceased lying face downwards with



- a cut on the neck. Both A and the deceased were rushed to hospital where the deceased was pronounced dead.
4. On the same day, PW7 Chief Inspector Paul Okumu (CIP Okumu), found the appellant lying unconscious, surrounded by villagers in a maize planation. She had apparently been subjected to mob justice, for attacking the children. She was arrested and taken to hospital. CIP Okumu visited the scene and recovered a panga; he also took blood samples from the appellant and the deceased; the appellant's skirt and the T-shirt which were blood stained; and forwarded them to the government analyst.
  5. PW6-Polycarp Luta Kweyu, a government analyst, received the exhibits and carried out examination. He found that the panga, skirt and T-shirt had blood stains whose DNA profile matched that of the deceased and A, but had no DNA genetic relationship with appellant's profile.
  6. Dr. Morebo Momanyi (Dr. Momanyi), performed a postmortem examination on the body of the deceased and found a cut wound measuring 12cm on the back of the neck extending to the cervical bones with a fracture on the third and fourth cervical bones. He concluded that the cause of death was as severe hemorrhage due to deep cut wounds on the neck.
  7. In her defence, the appellant denied knowing the deceased child or A or L. She said she was just chased by people, and she fell down on the way. She did not know what was going on, and she asked the Court to forgive her, as she did not know what happened.
  8. The learned Judge in her judgment, found that the deceased was cut on the neck and that there was no witness who saw the appellant cut the deceased. The Judge, however, found circumstantial evidence from the evidence of E who testified that she saw A running towards her while the appellant was chasing him with a panga; and the recovery of a panga from the scene by CIP Okumu. In addition, the DNA result indicated that the panga, the appellant's skirt and T-shirt had blood whose DNA profile matched that of the deceased, and that since the appellant was the last person left with the deceased child, the offence could not have been committed by any other person. The learned Judge found malice aforethought in the manner that the deceased child was attacked with a panga. She, therefore, convicted the appellant of the offence, and subsequently sentenced her to twenty years imprisonment.
  9. Being dissatisfied with the judgment, the appellant lodged an appeal, in which she has filed a memorandum of appeal, raising four Bgrounds. In a nutshell, the appellant faults the learned Judge of the High Court for convicting her of the offence of murder, when the prosecution failed to prove the case beyond reasonable doubt, and when there was no evidence of any malice aforethought; she also faults the learned Judge for misapprehending the facts; applying wrong principles; and drawing erroneous conclusions.
  10. In support of the appeal, the appellant filed written submissions through learned counsel Byron Menezes. She identified four main issues for determination. First, whether the trial court correctly applied the principles of circumstantial evidence; second, whether the appellant committed the unlawful act which caused the death of the deceased; third, whether the appellant had malice aforethought; and finally, whether the sentence imposed on the appellant was appropriate taking into account her circumstances.
  11. On circumstantial evidence, the appellant relied on Republic - vs- Kipkering Arap Koskei & another 16 EACA 135, and Republic -vs- Richard Itweka Wahiti [2020] eKLR. It was submitted that the learned Judge misdirected herself, by relying on the evidence of one witness, and implying that the appellant was the last person to be seen with the deceased; and that there was no other witness who confirmed the evidence of E. Chiragu & another -vs- Republic [2021] KECA 342 (KLR) was cited for the proposition



that even where evidence establishes that an appellant was last seen with the deceased before death, it is desirable to exercise caution and look for some other corroborative evidence.

12. As regards the question whether the appellant committed the unlawful act which caused the deceased's death, it was submitted that L stated that she did not see the panga that had been allegedly used by the appellant, and this discrepancy was never resolved by the trial Judge; that the forensic analysis that was conducted did not directly link the appellant to the crime; and that the finding by the government analyst regarding the appellant's skirt and T-shirt, having blood from the deceased was not conclusive evidence that it was the appellant who committed the crime.
13. On malice aforethought, the Court was referred to *Roba Galma Wario -vs- Republic* [2015] eKLR; and *R. -vs- Moloney* [1985] AC 905, for the proposition that the Court must consider the question whether death or very serious injury, was a natural consequence of the appellant's voluntary act; and whether the appellant foresaw that consequence as being the natural consequence of his actions. It was submitted that the appellant was unable to know what was happening when she was arrested. The Court's attention was drawn to the fact that the mental assessment that was done on 13<sup>th</sup> April, 2017, revealed that she was mute. Another mental test done on 17<sup>th</sup> May, 2017, showed that she could speak, but she denied knowledge of whatever happened. It was therefore argued that there was no premeditation of the offence in the appellant's mind; that though the defence of insanity was not raised, she suffered a mental disorder; and the trial court ought to have made a final finding of guilty but insane. The appellant cited *Leonard Mwangemi Munyasia -vs- Republic* [2015] eKLR, in which this Court observed that it was the duty of the trial court to inquire specifically into the question of insanity, not only in situations where such defence was raised, but also where it became apparent to the court from the appellant's history that insanity may be an issue. *Richard Kaitany Chemagong -vs- R* [1984] eKLR; and *Wakesho -vs- Republic* [2021] KECA 223 (KLR) were also relied on. The Court was urged to find that malice aforethought was not established, and that none of the elements of the offence of murder were proved by the prosecution.
14. On sentence, the appellant pleaded that the twenty years imprisonment that was imposed upon her, was excessive. The Court was urged to interfere with the sentence and reduce it, taking into account that the appellant has a child of tender years, who needs her, and that the death of the deceased arose in circumstances which were mysterious. The Court was, therefore, urged to allow the appeal, quash the appellant's conviction; and substitute thereto a special finding that the appellant did the act charged, but was insane at the time she did it; and that the sentence of twenty years be reviewed.
15. The respondent also filed written submissions which were duly prepared by Joseph Kimanthi, Senior Assistant Director of Public Prosecutions. It was submitted that there was no doubt that the deceased died as most of the witnesses confirmed that fact; that Dr. Momanyi who performed the postmortem examination stated in his evidence that the cause of death was severe injuries secondary to deep cuts on the neck; that although there was no witness who saw the appellant cut the deceased, the circumstantial evidence was sufficient. In this regard the evidence of E was clear that she saw the appellant chasing A who already had a cut on the head; that the appellant was armed with a panga and even threatened to cut E; that there was no other person at the boma at that material time; that it is only the appellant who had the opportunity to commit the offence; that the DNA results showed that the appellant had been in contact with the deceased and A; and that the prosecution establish that the appellant used a panga to kill the deceased.
16. As regards malice aforethought, the respondent referred to *Joseph Kimani Njau -vs- Republic* [2014] eKLR, and submitted that the appellant cut the neck of the deceased with a panga with full knowledge that the act of cutting the deceased with a sharp panga would cause death or grievous harm to the victim; and that the fact that she aimed at the neck of the deceased also confirmed her intention.



17. On the issue of insanity, it was submitted that this was not alluded to throughout the trial, and even in her defence. It was therefore an afterthought and could not be raised at this stage. The Court was referred to Section 11 of the Penal Code, which provides that every person is presumed to be of sound mind, and to have been of sound mind, at any time, which comes into question until the contrary is proved. It was submitted that the evidence of E was corroborated by the evidence of Dr. Momanyi and Kweyu.
18. Finally, on the issue of sentence, the respondent submitted that the sentence of twenty years imprisonment, that was imposed on the appellant, is manifestly lenient taking into account the brutal manner in which the murder of the deceased was executed, and also considering the loss of life of such a young child, without any justification. The Court was, therefore, urged to dismiss the appeal.
19. This being a first appeal, our duty as the first appellate court is well laid out in *Okeno -vs- Republic* [1972] EA 32.

“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. R.*, [1957] E. A. 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 conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post*, [1958] E. A. 424.”

20. With that obligation in mind, we have carefully considered the evidence that was before the High Court, the contending oral and written submissions made before us, and the law. The appellant is aggrieved by the judgment of the High Court in which she was convicted of murder contrary to section 203 as read with section 204 of the Penal Code. The question that we must determine is whether the ingredients of the offence of murder were established, that is, whether there was proof of the deceased's death and cause of death, and whether it was established that, the deceased's death arose as a result of a direct consequence of an unlawful act or omission on the part of the appellant, and, if so, whether the appellant committed the unlawful act or omission with malice aforethought.
21. Both parties are agreed that the death of the deceased is not in dispute. There was also the evidence of Dr Momanyi who performed the postmortem examination and observed that the body of the deceased had a deep linear cut wound, on the posterior aspect of the neck, which extended to the cervical bone with a fracture of third and fourth cervical bone. Dr. Momanyi concluded that the cause of death was severe hemorrhage due to deep cuts on the neck. The evidence was therefore clear that the deceased died; and that the cause of death was severed bleeding due to the deep cut injury on the neck.
22. The bone of contention is basically whether the injuries were the result of an act or omission on the part of the appellant. In this regard, the learned Judge was conscious that the prosecution did not avail a direct witness who saw the appellant kill the deceased. However, the learned Judge was satisfied that there was circumstantial evidence. This is how she analyzed the circumstantial evidence:

“PW4 gave evidence that she heard A cry and when she went to see what had transpired, she saw him ran towards her while the accused chased him with a panga. PW7 gave evidence that they recovered a panga from the scene of crime and submitted it along with the accused



person's clothing to the government chemist for analysis. PW6 gave evidence that DNA result indicate that the panga, the accused person's skirt, and T-shirt had blood of the deceased and that of A. When examined by the court, PW4 testified that the accused was the only (sic) in the boma and that L was at the shamba. L testified too that she left her two children playing with the accused's daughter and that after 20 minutes, she heard her mother in law saying the child was dead. She ran back and found Samuel cut at the neck. There is no room that the offence could have been committed by any other person other than the accused, and I find that prosecution proved beyond reasonable doubt that the accused used the panga to kill the deceased."

23. In Republic -vs- Ahmad Abolfathi Mohammed & another [2019] KESC 48 (KLR), the Supreme Court explained circumstantial evidence as follows:

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

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

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

57. This is why, way back in 1928, the English Court of Appeal asserted that circumstantial evidence "is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics."

24. On our examination of the evidence, we are satisfied that the learned Judge in the above quoted extract of the judgment, properly analyzed the circumstances that were established before the High Court. This included the appellant being seen chasing five-year-old A with a panga. A was bleeding and had a cut wound on the head. A and his little brother, the deceased, had just a few minutes earlier, been left by their mother playing. The deceased was found outside the house lying face down with a serious cut on his neck. Who else could have cut these two children other than the appellant who was wielding a panga and chasing one child while the other was already lying dead? This evidence pointed directly to the appellant who was the only person left in the home, as the assailant. Any doubt regarding this evidence was sealed by the forensic evidence, which confirmed that the blood stains on the panga and



the blood stains on the appellant's skirt and T-shirt matched the DNA profile of the deceased. How else could the blood stains of the two children, have gotten onto the appellant's clothing, if she did not come into contact with the children in the process of the attack?

25. Taking note that the appellant was the only person who was with the children when they were injured, she was the one having special knowledge of how the deceased could have been injured. under Section 111 of the *Evidence Act* the burden of proof shifted to the appellant to explain what may have happened. Nevertheless, the appellant has not provided any plausible explanation as to what could have happened, and therefore the presumption under section 119 of the Penal Code, comes to play, leading to the conclusion that it was the appellant who inflicted the fatal injuries on the deceased. Section 119 of the *Evidence Act*, states as follows:

“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.”

26. Although the appellant attempted to rely on the defence of insanity, no such defence was pleaded in the first instance, nor was there any evidence upon which such defence could be sustained. The appellant was represented by counsel in the High Court and also in this Court. Both Courts made orders for the appellant to be mentally examined and assessed. There was no history or report of mental illness in any of the medical reports presented to the courts. There were instances when the appellant acted mute or behaved strangely, but this seemed to have been mere theatrics, as the doctors' examinations revealed she was of sound mind. In the circumstances, we find that the appellant's defence was properly rejected.

27. We come to the conclusion that the appellant was proved to be the person whose conduct caused the injury, that resulted in the deceased's death. The manner in which the little boy was attacked, and the weapon used, left no doubt that there was malice aforethought. As was stated by this Court in a similar situation in *Daniel Muthee – v- R, CA No. 218 of 2005* (UR) cited by the Court in *Peter Kiambi Muriuki v Republic* [2013] KECA 452 (KLR

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code. In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

28. As regards sentence, we agree with the respondent that in light of the heinous offence which she committed, the appellant is lucky to have received such a lenient sentence of twenty years only. We, therefore, find no merit in this appeal. We uphold the appellant's conviction and sentence, and dismiss the appeal in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF DECEMBER, 2024**

**HANNAH OKWENGU**

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**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**

