**Kirui v Republic (Criminal Appeal 65 of 2018)**
**[2023] KECA 17 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KECA 17 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CRIMINAL APPEAL 65 OF 2018**

**F SICHALE, FA OCHIENG & LA ACHODE, JJA**

**JANUARY 26, 2023**

**BETWEEN**

**WILBERFORCE KIRUI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal from the Judgment of the High Court of Kenya at Kericho (Mumbi Ngugi, J (as she then was)) dated 24th October 2018 IN HC. CRIMINAL CASE NO. 12 OF 2014)***

## JUDGMENT

1 Wilberforce Kirui (the appellant herein) 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 the night of March 16 and 17, 2014, at Kabitungu village in Bureti Division within Kericho County, he murdered Faith Chepngeno Kirui.

2 The appellant was tried and convicted of the offence and sentenced to life imprisonment. Being aggrieved with both the conviction and sentence, the appellant has now filed this appeal and probably the last appeal, vide undated Memorandum of Appeal raising 6 grounds of appeal. The appellant subsequently thereafter filed a supplementary petition of appeal through his counsel raising the following grounds of appeal:

1. That the learned judge erred in law and fact in convicting the appellant and sentencing him to life imprisonment yet the prosecution did not prove its case beyond reasonable doubt.
2. That the learned judge erred in fact and in law in convicting the appellant despite failure by the prosecution to prove the ingredients of murder.
3. That the learned judge erred in law and fact in convicting the appellant and sentencing him to life imprisonment without considering the strong evidence of the defence.

4. That the learned judge erred in law and fact in convicting the appellant and sentencing him to life imprisonment by relying on insufficient and circumstantial evidence.

5. That the learned judge erred in law and fact in convicting the appellant and sentencing him to life imprisonment by failing to consider the strong defence and submissions by the defence.

6. That the learned judge erred in law and fact in convicting the appellant and sentencing him to life imprisonment yet the prosecution failed to produce crucial witnesses".

3 The appeal was urged by way of written submissions with oral highlights by the parties on September 28, 2022. When the parties appeared before us for plenary hearing, Mr. Mongeri, learned counsel appeared for the appellant whilst learned counsel, Ms. Kathambi appeared for the respondent. Mr. Mongeri relied on his supplementary grounds of appeal and submissions dated September 15, 2022 whereas Ms. Kathambi sought to rely on her written submissions dated September 10, 2022.

4 Mr. Mongeri for the appellant in his brief oral highlights before us sought to argue the grounds of appeal in two limbs namely; ground 1 and 2 as one and amalgamated the rest of the grounds as 1. It was submitted for the appellant that the ingredients of the offence of murder were not proved and that in the entire judgment, the learned judge did not enumerate why she found that the appellant committed the offence of murder and that there was no evidence of malice aforethought and that further, there was no prove that the appellant in anyway participated in the commission of the offence. It was contended that the learned judge relied on the fact that there were frequent quarrels between the appellant and the deceased, which was a normal occurrence.

5 It was further submitted that the investigations officer who testified found that the scene of crime was not disturbed; that the deceased had no injuries, a clear indicator that no force was used on the deceased, and that the prosecution failed to call the two witnesses who slept in the same house with the deceased.

6 Counsel further urged that looking at the defence by the appellant, it was very explicit as he had stated that he left the house at 10pm, and left the deceased together with her daughter and Catherine, only to be informed in the morning that the deceased had died. In conclusion, it was submitted that the appellant's conviction was not safe as it was based on circumstantial evidence and suspicion as there was no direct witness who saw what transpired.

7 Ms. Kathambi, learned counsel for the respondent submitted that contrary to the appellant's submissions, the prosecution established a strong case against the appellant for the offence of murder and that it was not right for the defence counsel to allude to the fact that frequent squabbles were normal; that after the commission of the offence, the appellant ran away from home having known what he had done and that even in his defence he stated that he threw/ pushed the deceased but did not intend to harm her and that if that was the case, it would not have been possible for the deceased to die of a compressed larynx.

8 It was further submitted that the doctor had clearly stated that the deceased died due to lack of oxygen and if she was asleep and the appellant being a man strangles her on the neck, there was no way the room would be disturbed;that since the cause of death was lack of oxygen due to strangulation, that had no relation between the room being neat and the way the deceased was killed.

9 Finally, it was submitted that the evidence of PW5 was very clear that there were only three people who spent the night in that house namely Daisy a younger sister to PW5, the deceased and the appellant and that they slept in the same house but in different rooms and that it was not true that there was a Catherine who slept in that house. Consequently, we were urged to uphold both the conviction and sentence of the appellant.

10 We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a first appeal, this Court is mindful of its duty as 1st appellate court. This duty was well articulated by this Court in *Erick Otieno Arum v Republic* [2006] eKLR as follows:

> "It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e) a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same"

11 A brief analysis of the evidence in the trial court is necessary so as to reach our own independent conclusion on the guilt or otherwise of the appellant. The evidence before the trial court was as follows: PW1 was Ibrahim Kiyegon Keter and a cousin to the appellant. It was his evidence that on March 16, 2014, he was going to the shops when he found some elders discussing the appellant's family which had wrangles. The elders then requested him to speak to the appellant and the deceased. He tried to speak to them but they could not listen and the appellant was accusing the deceased of infidelity.

12 It was his evidence that the deceased was employed while the appellant was not and that the deceased tried to explain that she was working for the sake of the children. The appellant then requested them to leave saying they could not solve their problems and the following day he was informed by his daughter (Viola) that things were not good at the appellant's home and when he went there, he found the deceased had died.

13 PW2 was Faith Chepkoech the appellant's in-law. It was her evidence that on March 16, 2014, at 8 pm, she had gone to the appellant's home to get milk and found the appellant's 2 children cooking and upon enquiring where their mother was, they told her she was in the room. At around 5am in the morning, her husband (PW3) called her and asked her to go and wake up the appellant's children. After a while, the appellant's son (PW5) came and asked where her husband (PW3) was and requested her to go and see their mother (the deceased). She then proceeded to the appellant's house and found Dan (PW5's brother) who stopped her from entering the house. However, after a while, Dan let her in and opened the door and put on the lights. She then called the deceased 3 times and touched her, but she was unresponsive. She saw the deceased's tongue hanging with foam from the mouth.

14 PW 3 was Kipkoech Kirui Erick, the appellant's brother. He testified that on March 16, 2014 at 5pm he was at home which was adjacent to the appellant's house when he heard commotion from the appellant's house. He proceeded there and found the appellant restraining the deceased from leaving. They then had a discussion and he managed to calm them down, and then went back to his house.

15 The appellant then called him requesting him to wake up his children to go to school but he forgot and since he had already left for work, he called his wife (PW2) and requested her to go and wake up the appellant's children. Later on, PW2 informed him that the deceased was not alright and he called his father and informed him. PW2 later called him and informed him of the death of the deceased. He went home and found the body of the deceased lying in bed.

16 PW4 was Raymond Metet, a brother to the deceased. It was his evidence that on March 16, 2014, at 7:30 pm he called the deceased who said that she would be coming home the following day as the appellant had fought her. The following day, he learnt that the deceased had died.

17 PW5 was Dennis Cheruiyot, a son of the deceased and the appellant. It was his evidence that March 16, 2014, he had arrived home from school when he found PW1, the deceased, the appellant and her younger sister (Daisy) talking in the sitting room and the appellant told them that the deceased wanted to leave but they refused to let her go as it was getting late. It was his evidence that the deceased was persistent on leaving but the appellant told her not to leave until morning; that they then requested the deceased to make supper for them but she declined and went to sleep, whereupon he decided to prepare supper as the following day was a school day and further, that they had their supper at about 8.30.pm and went to sleep in a different house with his brother (Dan) whereas the deceased, his sister and their father slept in the same house but in different rooms. The following morning at around 6.20 am, his sister Daisy woke them up and told them to go and see their mother. He then went into the bedroom alone and found the deceased dead. He informed his grandfather, Daisy and a neighbor called Catherine. It was his further evidence that the appellant was not present at the time. He testified that sometimes the deceased and the appellant would quarrel.

18 PW6 was Dr. Kevin Wambugu, a medical officer attached to Kapkatet District Hospital. He produced a post mortem report in respect of the deceased that was performed on March 20, 2014. According to his findings on changes after death, there was no rigor mortis or putrefaction and he estimated the time of her death to be between 48-72 hours. Externally, there was central and peripheral cyanosis noted on the nailbed and lips, an indication that the deceased died from deprivation of oxygen. There was also ruptured blood vessels in the eyes and bleeding with very red eyes and a biting down on the tongue and a wound that had bled. Her larynx was displaced and mobile which was not common in a normal person.

19 Internally, the larynx had been lynched and displaced from its normal position and the lungs deflated and had no air and were discolored blue, an indication of deprivation of oxygen. In the cardio vascular system, there was dark blood in her major vessels and the heart muscles had been discolored dark brown, an indication that there had been acute diffraction of oxygen before her death. He formed the opinion that the cause of death was hypoxia by asphyxiation with a crushed larynx. He further stated that the main cause of death was lack of oxygen and in the deceased's case due to compression of her larynx which caused the asphyxia.

20 PW7 was Richard Rotich, the investigating officer who testified that on March 17, 2014, he was at Roret police station when a report of sudden death was brought at the station at 9.30 am. He booked the report and accompanied the reporter to the scene. On arrival, he found the body of a female adult on a bed covered with a blanket. He interrogated the available witnesses and later recorded statements from the witnesses and charged the appellant with the offence of murder.

21 Put to his defence, the appellant in an unsworn statement denied having committed the offence and admitted that indeed their relationship with the deceased was rocky. He further stated that on the fateful night, they fought; that they used to fight regularly but he did not know what happened to the deceased;that he left the house at 10.00 pm and that he had no intention of injuring or killing the deceased.

22 From the pleadings on record the issues that fall for our determination are as follows:

1. Whether the learned judge erred in law and fact in convicting the appellant despite failure by the prosecution to prove the ingredients of murder.

2. Whether the learned judge erred in law and fact in convicting the appellant and sentencing him to life imprisonment by relying on insufficient and circumstantial evidence.

3. Whether the learned judge erred in law and fact in convicting the appellant and sentencing him to life imprisonment without considering the strong evidence of the defence.

4. Whether the learned judge erred in law and fact in convicting the appellant and sentencing him to life imprisonment yet the prosecution failed to produce crucial witnesses.

23 With regard to the first issue and as to whether the learned judge erred in convicting the appellant despite failure by the prosecution to prove the ingredients of murder, it was submitted, *inter alia,* that the learned judge did not enumerate why she found that the appellant committed the offence of murder yet, malice aforethought was not proved.

24 For prosecution to secure a conviction on a charge of murder, it has to prove three ingredients against an accused person. In *Anthony Ndegwa Ngari vs Republic* [2014] eKLR,this Court enumerated the elements of the offence of murder as follows:

a. The death of the deceased occurred;

b. That the accused committed the unlawful act which caused the death of the deceased; and

c. That the accused had malice aforethought."

25 With regard to the first element there is no doubt that indeed the death of the deceased occurred. PW2, 3, 4, 5, 6 and 7 all confirmed having seen the deceased's body. In addition, a post mortem report prepared by PW6 Dr. Kevin Wambugu confirmed that the main cause of death was due to lack of oxygen due to compression of the larynx. There is therefore no dispute that the deceased died.

26 Regarding the second element as to whether it is the appellant who committed the unlawful act *(actus reus*) which caused the death of the deceased, the evidence on record points at the appellant as the perpetrator of this heinous crime. We shall be reverting to this issue in detail shortly when dealing with our second issue of circumstantial evidence. Be that as it may and contrary to the appellant's contention that the judge did not enumerate why she found that the appellant committed the offence of murder, the learned judge in her judgment stated, *inter alia,* as follows:

> From the facts of this case, there cannot be, in my view, any other explanation for the death of the deceased than that the accused caused her death, with malice afterthought. The death of the deceased was as result of asphyxia from compression of the neck; compression with such force that her larynx was crushed, her lungs collapsed from lack of oxygen, the blood vessels of her heart had no oxygen and turned blue in colour; and she had bit her tongue hard during her ordeal that she caused it to bleed. No one else was in the house with the accused and the deceased, apart from their young daughter sleeping in another room, and there cannot be any possibility that anyone other than the accused strangled the deceased. He compressed her neck, and did not let up, or release the compression but ensured that she was dead. For having the temerity to want to escape from their troubled marriage. Did he strangle her in her sleep? Perhaps, given that no one heard any commotion, and according to the investigation officer there was no sign of a struggle."

27 From the above passage from the judgment of the judge, nothing could be far from the truth.

28 As to whether the appellant had the necessary malice aforethought to commit an offence of murder, Section 206 of the *Penal Code* defines malice aforethought in the following terms:

29 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;

c. An intent to commit a felony;

d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony." (emphasis added).

30 In the instant case PW6 who prepared the post mortem report in respect of the deceased stated that the main cause of death was due to lack of oxygen due to compression of her larynx which caused the asphyxia. The doctor further added that her larynx was displaced and mobile which was not common in a normal person.

31 In the case of *Daniel Muthee –vs- Republic* Criminal Appeal No. 218 of 2005 (UR), this Court while considering what constitutes malice aforethought stated *inter alia* as follows:

> When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in 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."

32 In the instant case the deceased died as a result of strangulation which caused asphyxia. So much force was used to strangle the appellant to the extent that her larynx was compressed/crushed. Additionally, the larynx was displaced and mobile which the doctor stated was not common in a normal person. Strangulation is a deliberate act and the appellant must have known or ought to have known that his actions were likely to cause death or grievous harm to the deceased. Ultimately, therefore, we are satisfied that the appellant had the requisite malice aforethought at the time the offence was committed. Consequently, nothing turns on this point and this ground of appeal fails.

33 The judge was further faulted for relying on insufficient and circumstantial evidence. It is indeed not in dispute that nobody witnessed this incident and it is exactly not known the exact time that the deceased was killed. It is also an undisputed fact that the appellant and the deceased used to have frequent wrangles and they would regularly fight and even on the day that the deceased was killed, she had fought with the appellant, a fact openly admitted by the appellant and that the deceased had even expressed her desire to leave the matrimonial home, but was prevailed upon not to go by the appellant and their children.

34 PW5's evidence was that after taking supper at about 8.30 pm, they went to sleep in a different house with his brother while his sister, the appellant and the deceased slept in the same house but in different rooms. At around 6.20 am in the morning, his sister Daisy woke them up telling them to go and see their mother (the deceased) who was already dead in the bedroom and that the appellant was not at home at that time.

35 The evidence of PW5 towards this respect remained unshaken even in cross examination. There is no indication whatsoever that there were other people in the house where the appellant, the deceased and their young daughter (**Daisy**) slept or that the room where they slept was broken into. According to

the evidence of PW5 the deceased was last seen with the appellant at about 8.30pm when they went to sleep.

36 In *Abanga alias Onyango –vs- Republic* CR. App NO. 32 of 1990(UR) this Court stated as follows as regards circumstantial evidence:

> It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (I)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii)the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

37 In the Nigerian case of *Stephen Haruna –vs- The Attorney-General of The Federation* (2010) 1 iLAW/CA/A/86/C/2009, the Court persuasively opined thus:

> 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."

38 On the whole from the circumstances of this case and for the reasons stated above and in absence of any satisfactory explanation from the appellant as to how the deceased met her death, we are satisfied that the circumstantial evidence relied upon by the prosecution was so strong, convincing and substantial as to be safe to find a conviction. There were no gaps, missing and broken links to break the chain of events and all the evidence tendered unerringly points to the guilt of the appellant as the perpetrator.

39 Additionally, the appellant being the last person who was seen with the deceased, he was duty bound to explain what happened to the deceased which he did not. Consequently, this ground of appeal is without merit and the same fails.

40 The judge was further faulted for failing to consider the strong defence of the appellant. The appellant in his defence stated, *inter alia,* that this case was fabricated and that they would quarrel and fight with the deceased regularly and that he had no intention of injuring or killing her. It is imperative to note that all the prosecution witnesses, save for PW6 and 7 were the appellant's relatives. As a matter of fact, PW5 was his son and no reasons were given as to why these witnesses would want to frame him. The judge while considering the appellant's defence stated, *inter alia,* as follows:

> The accused reiterated that they had fought, but he does not know what happened. He remembered that she had held him, and that he had pushed her away. He had then left home slightly after 10.00pm. He did not know, when he left, whether she was hurt or not. They had fought the way they used to fight regularly. He had no intention of "injuring her "and does not know what happened. Implicit in this statement is an acknowledgement that the accused did "injure" the deceased. Indeed, he strangled her, crushed her larynx, killed her. He did not care that his actions would cause her death, and doubtless intended that they should. The fact that he called his brother the following morning to tell him to wake up his children points to a person who knew precisely what he had done. He knew that his wife

was in the house, but was dead, and was not in a position to wake up their children to go to school. Trying to feign innocence- his refrain in his statement that they fought "as they used to regularly", and that he does not know what happened does not displace the strong prosecution case against him."

41 From the above passage, it is evident that the judge gave her reasons for rejecting the appellant's defence. The contention by the appellant that they fought with the deceased and he did not know what happened indeed shows that he was fearful of his actions. Additionally, the fact that he was not present when the deceased's body was discovered smacks of guilt on his part and that is the probable reason why he *"ran away"* knowing very well that he had killed the deceased.

42 The submission by the appellant that he left the deceased together with her daughter and one Catherine who slept in the main house was wholly erroneous as the appellant never mentioned anyone by the name of Catherine in his defence. Accordingly, we are of the considered view that the appellant's defence was rightly rejected and we have no reasons whatsoever to interfere with the judge's finding on this issue.

43 Lastly, the judge was faulted for convicting the appellant yet the prosecution failed to produce crucial witnesses. More specifically, the appellant took issue with the fact that one Catherine and the deceased's daughter Daisy were not called to testify yet they allegedly slept in the same house with both the deceased and the appellant. PW5 was categorical in his evidence in chief that the people who slept in the same house were the appellant, the deceased and her sister Daisy. He further stated that though these 3 people slept in the same house, Daisy slept in a different room. He further stated that Catherine was a neighbor who was one of those people who was called when the deceased's body was discovered. In re-examination he appeared to slightly contradict himself when he stated thus:

> On March 16, 2014, four people slept in the main house. These were my father, mother Daisy and Catherine. Catherine is the neigbour I had mentioned."

44 In our considered view, failure to call these two witnesses was not fatal to the prosecution's case for the following reasons; PW5 in his evidence stated that though Daisy, the appellant and the deceased slept in the same house, Daisy slept in a different room from the appellant and the deceased. She could therefore have not witnessed what could have transpired between the appellant and the deceased. Though he slightly contradicted himself in re-examination that Catherine also slept in the same room, he further clarified that Catherine was the neighbor he had mentioned. This slight contradiction however was not fatal to the prosecution's case. Additionally, there was evidence that the said Daisy was a minor and this is the probable reason why she was not called as a witness.

45 Further, this Court is alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of *Evidence Act* (Cap 80) Laws of Kenya provides:

> 143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"

46 Consequently, nothing turns on this point.

47 Additionally, the contention by the appellant that the investigation officer found the room tidy and that there was no sign of a struggle is really neither here nor there. As we had alluded to earlier, it is not exactly clear the exact time that the deceased was killed as her body was only discovered the following morning at about 6.20 am. The appellant therefore may have had the time to tidy up the room and as was observed by the judge, perhaps may be, just maybe, the appellant was strangled in her sleep. We say no more regarding this issue.

48 From the circumstances of this case and for the reasons aforestated, it is our considered opinion that the appellants' conviction for the offence of murder was safe and sound and well founded and we have no basis to interfere with the same. Consequently, the appellant's appeal on conviction must fail and the same is hereby dismissed in its entirety.

49 Lastly, it was submitted that the trial judge erred in law and fact in sentencing the appellant to life imprisonment. The appellant was charged with the offence of murder. Section 204 of the *Penal Code* CAP 63 of the Laws of Kenya prescribes a mandatory death sentence for a person convicted with the offence of murder.

50 In *Francis Karioko Muruatetu & Another vs Republic* SC Pet. No. 15 &16 of 2015, the Supreme Court on December 14, 2017, held that the mandatory nature of the death sentence prescribed for the offence of murder by Section 204 of the *Penal Code* was unconstitutional as it deprived the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. The court however did not disturb the validity of the death sentence and the same can still be imposed in appropriate cases.

51 In the instant case, appellant was sentenced to life imprisonment. The judge who gave detailed reasons while sentencing the appellant noted, *inter alia,* that the appellant had deliberately and without mercy, compressed the neck of the deceased with such force that her larynx was crushed, lungs collapsed due to lack of oxygen, the blood vessels of her heart had no oxygen and had turned blue in colour and she had bit her tongue so hard which caused it to bleed. She further noted that while she had great sympathy for the children, the appellant effectively rendered them without any parent.

52 We consider the circumstances under which the deceased met her death to be aggravated and we are not inclined to reduce the sentence meted out on the appellant in his favour.

53 Accordingly, the appellant's appeal is without merit and the same is hereby dismissed in its entirety.

It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JANUARY, 2023.**

**F. SICHALE**

**.....**

**JUDGE OF APPEAL**

**F. OCHIENG**

**.....**

**JUDGE OF APPEAL**

**L. ACHODE**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**