



**Keval v Republic (Criminal Appeal 67 of 2020)
[2023] KECA 251 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KECA 251 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 67 OF 2020
MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA
MARCH 3, 2023**

BETWEEN

OMARI WAITHAKA KEVAL APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya (S. N. Mutuku, J.) delivered on 30th May, 2019 in Nairobi HCCR Appeal No. 5 of 2012)

JUDGMENT

1. This is an appeal from the judgment of Mutuku, J delivered on May 30, 2012 in Nairobi HCRC No 5 of 2012 in which the learned Judge convicted the appellant for the offence of murder contrary to section 203 as read together with section 204 of the *Penal Code* and sentenced him to 15 years imprisonment. The particulars of the information were that on the January 2, 2012 at Happylands Flats, in Harambee Estate of Buruburu within Nairobi County the appellant murdered Yvonne Njoki Maina, hereinafter, “the deceased”.
2. The prosecution called a total of 13 witnesses to prove its case against the appellant. From the record, the appellant and the deceased, had been lovers for a long time. According to Romauld Waweru Maina, PW2, brother to the deceased, the appellant and the deceased had been lovers for over seven years whereas Joseph Peter Maina, PW3 the father of the deceased, put it 10 years. The two had a child together. However, their relationship was not a happy one according to the evidence of the family of the deceased. It was described as being toxic and abusive. It is obvious to this Court from the evidence of the brothers and father of the deceased that the family of the deceased was not in favour of the relationship and did not want it to continue. The deceased was involved in a similar relationship with another man, Geoffrey Wambugu Ngugi, PW1. It appears that the family of the deceased were in favour of this latter relationship.



3. At the time the incident leading to this case arose, the deceased was living with her parents in Ongata Rongai from where she was picked by the appellant in company of his friend Wellington Mabua Ombuni (PW5) on January 1, 2012. Evidence shows that after picking the deceased, they left for Nairobi West where PW5 was running an electronics business. After a short while, they left for Majengo to pick some miraa and returned to Nairobi West at about 11.00pm. They then left Nairobi West again for South B, where they continued chewing miraa inside the appellant's vehicle. The trio thereafter left for Westlands, to a club called Lazoras where they took alcoholic drinks and continued chewing miraa. After a long night of miraa chewing and drinking the appellant and the deceased retired to the appellant's house at Happylands Flats. The following day in the morning, PW1 called the deceased on her mobile telephone but the call was not answered. Later that morning at about 11.00am, he received a call from the deceased's number with a male voice on the other end. The person identified himself as Omari and wanted to know who he was. PW1 told him that he was the deceased's boyfriend. Shortly after this altercation he heard screams but was not able to identify whether it was a man or woman screaming. His evidence is captured as follows:

“ I heard, 'come and talk on this phone'. I heard scream then heard, 'come and help me take this one to hospital.’”

4. It is after hearing this that he immediately called the parents of the deceased and told them that the deceased may not be well and that they should check on her. PW3, confirmed to the court that upon receiving the call from PW1 he tried calling deceased's number without success. Later, the appellant called the deceased's brothers, PW2, and Eugene Stephen Gatheru, PW4, and informed them of the death of the deceased. The information he volunteered was that the deceased had jumped from appellant's flat on the 5th floor and he had rushed her to Metropolitan Hospital in Buruburu. The family of the deceased went to Metropolitan Hospital and found the body of the deceased inside a Matatu belonging to the appellant. She had been pronounced dead on arrival at the hospital. The body was then removed to Umash Funeral Home after the scene of crime officer, PC Joseph Kipsaimo (PW9) had taken photographs of the same. The post mortem was subsequently conducted by Dr Johanson Oduor (PW7). According to the report, the deceased sustained multiple bruises on the forehead below the hairline and on the arm and hands, stab wounds on the back of the ring finger on the right hand and middle finger of the left hand, extensive bruises on the left side of trunk from pelvis area, on the left leg below the skin and left buttocks.

5. Internally, the PW7 noted the following injuries; bleedings on the muscles of the neck, multiple fractures on the back, and on the 2nd to 5th ribs on the left side, on the 2nd and 3rd ribs on the right side, sternum bone, pelvis; skull fractures, extensive scalp haematoma, excessive bleedings on layers covering the brain and fractured spine at the level of the thorax. In the opinion of PW7:

“The injuries are consistent with a fall from height. However, the absence of fractures of the limbs raises a possibility of a person who may have been unconscious and was thrown from height. There is also possibility of strangulation from neck injuries.”

6. The specimens of the deceased's liver, kidney, blood and stomach were extracted for analysis. The toxicology analysis was conducted by Joyce Wairimu Njoya (PW8), a Government Analyst. She did not find any chemically toxic substance that could have contributed to the death of the deceased. Blood samples extracted from the deceased and the appellant were examined by Elizabeth Waithera, PW10, a Government Analyst and compared with the blood stains found on various cloth items collected from the appellant and the deceased. These items included deceased's purple brassiere, under pant, orange blouse, blue jeans, grey socks, appellant's white shirt and sky-blue trousers. DNA profiles generated



from the brassiere, orange blouse, blue jeans, grey socks, all belonging to the deceased, and white shirt and sky-blue trousers belonging to the appellant, compared with DNA profiles from the deceased's blood sample showed that the bloodstains on those clothing items were from the deceased's blood. PC Pharis Thoya (PW11) investigated the case with IP Lucy Mbithi, now deceased. The evidence of PW11 was that the two officers were on the way to the Metropolitan Hospital upon receiving the report that the deceased had been taken there when CIP Matoke, the OCS Buruburu Police Station, called them and instructed them to go to Happylands Flats in Harambee Estate. They went to the place and entered House No C16. Inside that house they found the appellant, CIP Matoke and other police officers.

7. From his own observation, the house was not disturbed. A note was recovered from a table in that house. It had writings suspected to belong to the deceased. At the time they went to the scene the deceased had been taken to hospital. PW11 called PW9 to the scene to take photographs. PW9 went to the Metropolitan Hospital as well where he took more photographs of the body of the deceased which were all tendered in evidence. The note recovered from the house which had some words as “you think I am like you” and sample handwritings of the deceased were examined and compared by Jacob Mugeni Oduor, PW12, a document examiner. His findings were that the note was written by the same author that is, the deceased. PW11 testified further that at first the matter was reported as a suicide but after the post mortem report came out it showed attempted strangulation and stab wounds on the hands of the deceased. This made the investigators change their mind and prefer an information of murder against the appellant because the appellant and deceased were the only people inside the house at the time of the incident giving rise to the offence.
8. In his defence, the appellant admitted to picking the deceased from her parents' home in Ongata Rongai, in the company of PW5 and spending the night with her chewing miraa and drinking. He confirmed going to his house in Happylands Flats in the wee hours of January 2, 2012 with the deceased. He also confirmed they were the only two people inside that house that night. His evidence is captured by the trial court as follows:

“We went to the bedroom. We did not argue all this time. We were both happy. We were discussing business and did not argue at all. We went to sleep. In the morning at about 10.00am of January 2, 2012 Yvonne told me that she wanted to go home to prepare clothes for the son to go to school. She received a call. I saw her running towards the balcony. I do not know who called her. She ran to the balcony and I wondered what she had heard. I went to check on her. She opened the kitchen door and climbed on the balcony rails. I shouted at her not to jump but before I finished the warning she let go and fell from the 5th floor to the ground. After the call we did not talk. I did not have time to talk to her. Events happened very fast.”

9. The trial court having considered and weighed both the prosecution and appellant's case, found that the prosecution had proved its case against the appellant beyond reasonable doubt, convicted him before sentencing him to 15 years imprisonment.
10. The appellant being dissatisfied with the conviction and sentence aforesaid, has appealed to this Court on the grounds that we have narrowed down to whether: the offence was proved as required; the trial court erred in relying on the evidence of PW1 to PW4 and PW7 to find a conviction and finally, whether crucial witnesses were not called and the consequences thereof.
11. The appeal was canvassed by way of written submissions with limited oral highlights. On whether the information was proved beyond reasonable doubt, the appellant through Mr Michuki, learned counsel, submitted whilst relying on the case of *Republic v Motongori Marwa Gosiani* [2019] eKLR that the offence of murder carries three ingredients proof: the fact and the cause of death of the



- deceased; that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused; and proof that the said unlawful act or omission was committed with malice aforethought. To the appellant, none of these ingredients were proved to the required standard.
12. On overly relying on the evidence of PW1 to PW4 and PW7, it was submitted that it was clear from the evidence that PW1 was a suitor to the deceased, PW2 and PW4 were brothers to the deceased whereas PW3 was her father. These witnesses were thus likely to be biased against the appellant. According to PW4, the appellant had not been accepted by the deceased's family and there was indeed bad blood between them as they were not supportive of their relationship. That the trial court was in the circumstances under a duty to warn itself of the dangers of relying on such evidence to convict the appellant. He buttressed this submission by relying on the case of *Daniel Karube Sambo v Republic* [2007] eKLR, for the proposition that where there exists bad blood between the accused and the family of the complainant is a reason why the trial court cannot in good conscience uphold the conviction of the appellant based on such sole evidence in the absence of any other supporting evidence.
 13. On over reliance on the evidence of PW7, the doctor who performed the postmortem, it was submitted that sections 48(1)(2) and 49 of the Evidence Act defined the value and admissibility of expert evidence. PW7 fell in the category of an expert witness. He submitted that in light of the statutory death penalty that could be imposed upon conviction, the trial court should have approached his evidence with greater circumspection.
 14. The appellant submitted that the expert witness failed in his mandate in his post-mortem report, since he did not ascertain the cause of death. First, he did not give an opinion as to the cause of death but simply indicated, inter alia, that the injuries were consistent with a fall from a height before proceeding to indicate that the absence of fractures on the limbs raised the possibility of a person who may have been unconscious and was thrown from a height. Further, there was the possibility of strangulation. As it is therefore, the cause of death was not established to the required standard and the trial court should not have relied on it to convict the appellant. If anything, the doubts created as to the actual cause of death should have been resolved in favour of the appellant. It was submitted further that his evidence called into question his impartiality and coupled with the fact that there was no evidence of a scuffle between the appellant and the deceased, there was a high possibility that the deceased's injuries could have occurred during the fall or were historical injuries preceding the events of January 2, 2012 and that the findings of the trial court discounting those possibilities were baseless and therefore erroneous.
 15. On failure to call crucial witnesses, the appellant submitted that the two (2) minors had informed PW11 that they heard some noise from 5th floor and when they looked up they saw the deceased jump. The prosecution did not avail these witnesses yet their evidence was crucial in determining how the deceased met her death. He further submitted that this evidence could have corroborated his own evidence. He reiterated that it's the prosecution's duty to call all witnesses who are necessary to establish the truth or otherwise of their case. In the present case it failed to do so by not calling the two witnesses. That it was clear that the two witnesses' evidence would have been adverse to the prosecution's case. This was contrary to the duty required of the prosecution as ably stated in the celebrated case of *Bukenya v Uganda* [1972] EA.
 16. In opposition to the appeal, the respondent through Ms Matiru, learned Prosecution Counsel submitted with regard to PW7 that sections 48(1)(2) and 49 of the *Evidence Act* addresses the value, admissibility, and weight to be attached on expert evidence. PW7 fell in the category of an expert witness. He described his qualifications to the court, and his evidence was not shaken when cross examined by the defence. There was no reason for the court not to rely on his expert opinion.



17. On the ingredients of the offence, it was submitted that the death of the deceased was proved by the evidence of PW3, PW2, and PW4, who all confirmed that the deceased was dead by the time they arrived at Metropolitan Hospital. The scene of crime photographer, PW9, also took photographs of the deceased, confirming that she was indeed dead. The appellant too in his own evidence confirmed this fact but attributed it to suicide. The evidence of PW7, who examined the body of the deceased and performed the post mortem and formed the opinion that the cause of death was as a result of a fall from a height. There was also a possibility that, in the absence of fractures of the limbs, the deceased may have been unconscious and was thrown from a height. Finally, there was also a possibility of strangulation from neck injuries. So that, the death of the deceased and its cause were succinctly established by credible evidence.
18. As to whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the appellant, it was submitted that there was absolutely no doubt from all the evidence on record that the death of the deceased was caused directly by the actions of the appellant. It was the testimony of the appellant himself that he, and the deceased ended up together alone in his flat where they slept peacefully. However, when PW1 called the deceased on her mobile phone, he heard a man who identified himself as Omari, (the appellant), demanding that the deceased picks the phone and talk to PW1. Later, the appellant claimed that the deceased had committed suicide. The very act of the appellant demanding that the deceased talks to PW1, and then shortly thereafter, claimed that she committed suicide, coupled with the evidence of PW7 and corroborated with some of the prosecution witnesses confirmed that he was the one that caused the death of the deceased. Counsel referred to the case of *Tubere S/o Ochen v Republic [1945] 12 EACA 63* for this proposition.
19. Regarding malice aforethought, it was submitted that section 206 of the [Penal Code](#) defines and gives ingredients of “malice aforethought” which the prosecution must prove. In this case, the act of the appellant strangling and thereafter pushing the deceased to her death from the 5th floor was intended to cause her death, which established malice aforethought. The appellant was the last person seen with the deceased, and the evidence of the Post Mortem negated his claims of suicide.
20. With regard to crucial witnesses, it was submitted that the prosecution called all necessary witnesses to prove its case beyond reasonable doubt. The deceased’s family testimony was well corroborated by all the witnesses called, and there were no inconsistencies or contradictions in their testimonies. There was therefore no need to call the minors. According to counsel, these were peripheral and not crucial witnesses and failure to call them did not attract any adverse inference as suggested by counsel for the appellant.
21. We have considered the record, the rival oral and written submissions and the law. This is a first appeal and the duty of a first appellate court of re-evaluating the evidence and giving an appellant a re-hearing of the case has been set out severally by this Court. For instance, in *Okeno v Republic [1972] EA 32*, this Court stated thus as regards the mandate of a first appellate Court:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions 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 conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”



22. In our view, the issues for consideration in this appeal are whether: the offence of murder was proved beyond reasonable doubt; there was over reliance on the evidence of PW1, PW3, PW4 and PW7 to find the conviction; and lastly, whether there was failure to call crucial witnesses.
23. On the 1st issue, for the prosecution to secure a conviction on the information of murder, it had to prove three ingredients against the appellant. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the ingredients were listed as follows: the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and, that the accused had malice aforethought in committing the offence.
24. In our view, the death of the deceased was proved by among others the evidence of family members of the deceased, specifically PW1, PW2 and PW 3 who all testified that when they arrived at Metropolitan Hospital they found the body of the deceased lying inside the matatu belonging to the appellant. They rushed to the doctor who informed them that he had already confirmed that the deceased was no more. The appellant himself in his defence confirmed the death of the deceased too. Lastly, the body of the deceased was examined at Umash Funeral Home by PW7 who confirmed the death of the deceased and the cause. His findings on the injuries that the deceased suffered and his opinion as to the cause of death have been set out elsewhere in this judgment, and which we need not rehash. Suffice to state that, from the evidence, the death of the deceased and its cause was proved. We cannot therefore fault the trial court for coming to the same conclusion.
25. The appellant stated that the deceased committed suicide by throwing herself from the 5th floor of his flat. However, the prosecution case was that the appellant killed the deceased before throwing her to the ground from the said flat. PW1 in his evidence, shed light on the call he had made whose details we have reproduced elsewhere in this judgment. It would appear that the deceased was involved in a love triangle with both the appellant and PW1. As it happens in such relations there is always element of possessiveness and abuse of trust and bitterness. It may not be way off the mark to assume that when the appellant picked the phone from his nemesis, became truly upset with the deceased which culminated in an altercation or physical confrontation leading to him strangling her and thereafter throwing her over the balcony rails. This conclusion is buttressed by the evidence of PW7, in which he opined that the injuries sustained from that fall were not the only injuries that the deceased suffered as there were other signs of strangulation and defensive stab wounds on the fingers of both hands and further bruises on the knuckles of the left hand which were equally attributed to being hit by another person. The trial court in dealing with the issue was of the opinion that “The above evidence from the doctor coupled with that of Wambugu who told the court that after accused asked him to state who he was he heard screams point to a confrontation between the accused and the deceased. Although he did not identify who was screaming, given the events of that morning, there is a possibility that it was the deceased screaming”.
26. We entirely agree with the above reasoning by the trial court. It seems to us that the appellant was not happy with the response he got from PW1 on the cell phone and a confrontation ensued, given the defensive wounds alluded to by PW7. There being no eye witness, the trial court rightly reverted to circumstantial evidences and after analyzing the same correctly found that there was enough evidence from the circumstances, that the deceased did not jump from the balcony to her death but rather was pushed given the fact that there was no other person in the house save for the appellant and the deceased. We have no reason to doubt or depart from that reasoning of the trial court.
27. We must now determine whether the appellant, with malice aforethought, inflicted the injuries that resulted in the death of the deceased.



28. Malice aforethought was defined in the case of *Nzuki v Republic [1993] KLR 171* where this Court stated that before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with the following intentions, the test of which is always subjective to the actual accused's intention to cause death; to cause grievous bodily harm; where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.
29. In the case before us, having found that there was evidence of injuries on the deceased's hands and neck and perhaps, the deceased being pushed off the balcony it goes without saying that, the appellant knew that the consequence of these actions would lead to either the death or grievous harm of the deceased. We are thus satisfied just like the trial court that malice aforethought was proved to the required standard.
30. Further from our evaluation of the evidence, the lamentations by the appellant that the trial court overly relied on the evidence of PW1 to PW4 and PW7 to convict him has no factual basis. The witnesses testified as to what they observed. The mere fact that PW2 to PW4 are members of the same family, does not water down the weight and probative value of their evidence. PW7, advanced two theories as to how the deceased could have met her death, either from jumping from the 5th floor or being strangled and rendered unconscious before being tossed from the 5th floor of the building. However, he discounted the death by the fall in view of lack of fractures on the limbs. These are views of an expert and given the circumstances of this case, those theories are plausible. However, whichever way one looks at it, the death of the deceased was as a result of falling from 5th floor whether tossed unconscious, alive or after being strangled. PW7 advanced and justified the factual basis of his conclusions and the trial court choosing to rely on his evidence cannot by any stretch of imagination be said to have overly relied on the evidence of this witness to convict the appellant.
31. On the last issue, the appellant submitted that the two minors said they heard a noise from 5th floor and when they looked up they saw the deceased jump. This was part of the evidence gathered during investigations and which ought to have been tendered but was not. That these two witnesses were crucial and would have supported his contention that the deceased committed suicide. According to the appellant, it was clear that the evidence of the two would have been adverse to the prosecution's case and that is why they were locked out. That the failure to call them clearly curtailed the court's ability to establish the truth.
32. The issue of calling witnesses by the prosecution has been dealt with by this Court in several cases. The starting point however is section 143 of the *Evidence Act*, which provides, inter alia:
- “No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.”
- In *Julius Kalewa Mutunga v Republic* [2006] eKLR this Court held as follows:
- “...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”
33. This Court again reiterated the above position in the case of *Alex Lichodo v Republic* [2015] eKLR which in sum held that: the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent; the court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case, and where the evidence called



is adequate, the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

34. Therefore, failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to establish the truth, and may contain gaps which could have been filled by a witness who was not called. Just like the trial court, we do not consider the minors to have been crucial witnesses. The theory of the deceased committing suicide by jumping to her death was discounted by PW7. The evidence of the appellant himself that they were the only two occupants in the house at the time of the incident and that the deceased threw herself out of the house from the balcony, coupled with the evidence of PW1 that he heard through the phone a conversation and the calls made to the deceased parents were all corroborated by the evidence of the doctor who produced the postmortem report. The evidence of the two minors was thus to us not necessary per se and their testimony would not have changed the chronology of events as well stated by the prosecution witnesses. We therefore, do not find merit in this ground and reject the same.
35. From the foregoing, we think that we have said enough to demonstrate that the evidence against the appellant was safe to sustain a conviction. Accordingly, the appeal is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A K MURGOR

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JUDGE OF APPEAL

G W NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

