



REPUBLIC OF KENYA



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**Oguko v Republic (Criminal Appeal 32 of 2022)
[2023] KECA 757 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KECA 757 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 32 OF 2022
MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA
JUNE 22, 2023**

BETWEEN

RICHARD NYAKINA OGUKO APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi
(Lesiit, J.) dated 29th October, 2017 in Nairobi HCCRC No. 40 of 2017)*

JUDGMENT

1. Richard Nyakina Oguko, “the appellant”, was charged before the High Court with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars were that on July 23, 2017 at an unknown time in Dagoretti South Sub-County within Nairobi County he murdered LN, “the deceased”.
2. The prosecution in an endeavor to prove its case against the appellant called 7 witnesses.
3. According to the evidence of PW1, Dr Joseph Maundu, then attached to Police surgery, the appellant was taken to his office by Criminal Investigations Directorate “CID” Nairobi with allegations of murder on July 23, 2017. He had a cut wound on the forehead and anterior part of the neck. There were soft tissue injuries in the lumbar region, just above the hip. He had a lacerated wound on the right lateral (outer) elbow region. The injuries were about 4 weeks old. They were consistent with the use of a blunt and sharp weapon. He classified the injuries as harm. He then conducted a mental assessment and concluded that the appellant was mentally fit to stand trial at the time.
4. PW2, JOM lived in Ngara with his sister, the deceased. On July 23, 2017, they parted with the deceased at Park Road Stage at noon as he went to town to see the aunt. Before leaving the house that morning, the deceased had informed him that she was going to meet one, Richard whom she had constantly been talking to. That she was going to meet him for the first time that day. They had agreed that



the deceased after visiting her friend, would pick him up from their aunt's place and proceed home together. However, this never came to pass as she only called him to inform him that she was in Ngong Forest with the friend. That was to be the last communication he had with the deceased.

5. PW2 after waiting for long and there being no response to his several calls, decided to call their mother and informed her of the developments, he was told to wait until the following day. The following day, with still no response from the deceased, PW2 decided to file a report of a missing person with Ngong Police Station. On August 18, 2017, he received a phone call from one, Mr Muriuki a police officer who asked him to go to the City Mortuary to identify a body of a dead lady. He in the company of one Cyrus, identified the body of the deceased based on what she had worn on the last day they parted, and the scar on her leg.
6. PW3, Nemwar Kawaya bought a cellphone from the appellant. He had been told of the cell phone when he went to a barbershop on July 3, 2017.

He was shown the phone which belonged to the appellant and he got interested. Eventually, he bought it from the appellant at Kshs 4,500 only to be arrested later on allegations that the phone had been stolen. It transpired that the phone belonged to the deceased.
7. PW4, PC Joseph Gatheo then attached to Dagoretti DCI offices, on 26th July 2017 while at Kabete Police Station received a call from CID informing him that there was a dead body found in Ngong Forest, Mutoine Block. He proceeded to the scene in the company of PC Rose Ndolo and Sgt Boki and came across the body of an adult African woman lying dead. The body had a bra, around her neck, a blouse, and shoelace, all of which were tied to a tree. The deceased had swollen eyes, bruises on her back and chest. There were bloodstains in the mouth and the nose. He documented the scene through photography.
8. PW5, Sgt John Boki, on July 26, 2017 at around 1.38pm received a call from a Forest Ranger, one, Bethwet Naliali who informed him that there was a dead body at Mutuini Block in Ngong Forest He proceeded to the scene and found body of an unknown woman aged between 20 to 25 years lying under a thicket in that forest. It appeared that the deceased had been strangled with a piece of clothing tied to a shrub. On further examination, he noted an injury on the left eye. He preserved the scene by securing it and informed scenes of crime who came and photographed the body. Later, the body was moved to City Mortuary.
9. PW6, Dr Sylvester Maingi, a Government Pathologist based at City Mortuary conducted a post mortem on the body of the deceased on August 23, 2017, the body having been identified by PW2 and CB a cousin. The clothing were soiled and the body had started decomposing with skin spilling. There was a ligature around the neck. The body had multiple upper and lower limb bruises. In both upper limbs, were defence injuries. The vulva and vagina were reddened and had superficial bruises which indicated recent sexual activity. He concluded that the cause of death was asphyxia due to ligature strangulation.
10. PW7, PC Muriuki, investigated the case after a “missing person” report filed by PW2 and his family at Ngong Police Station on August 1, 2017. PW7 arrested one, Alois on the August 17, 2017
11. The appellant in his sworn defence made key admissions in this case. He admitted that he met the deceased on July 23, 2017 as planned. After visiting his relatives with the deceased in Karen and Dagoretti, they walked through a path, which was a shortcut from Dagoretti to Lenana bus Stage where they were to take a vehicle to town. In between, a quarrel ensued between them.
12. The reason for the quarrel was, first because the deceased refused to pick up a phone call made on her cell phone twice. When he insisted she picks it, the appellant heard a male voice accusing the deceased



of lying to him by going to see someone else. Thirdly, when he confronted her about the relationship she had with the caller, the deceased cheekily told him that he was not the only person she can give her body to. That he got upset with the response and hit the deceased on the head as a result of which she fell down and lost consciousness. He panicked and left the deceased at the scene taking away her phone. He later gave the phone to his brother Josephat who in turn sold it to Nemwar. He however denied ever being paid for it.

13. The trial court having carefully considered and evaluated the evidence by both the prosecution and the defence, was persuaded that the appellant had committed the offence charged. Accordingly, it convicted the appellant and sentenced him to 30 years imprisonment.
14. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on grounds that the trial court erred in points of law by failing to observe that: the elements of the offence were not proved; the circumstantial evidence relied upon did not meet the threshold; section 124 of the *Evidence Act* was not complied with; and, disregarding appellant's sworn defence statement without assigning any reason(s).
15. The appellant through Mr Attanja submitted that there was no eyewitness to the murder. That the evidence led was circumstantial evidence that did not meet the threshold. That though he had a quarrel with the deceased culminating in fight that rendered the deceased unconscious and that he had nonetheless no hand in her death. That there was no proof of mens rea and actus reus. He admitted before the court in his own sworn statement of defence that he was actually with the deceased when a fight broke out between them leading to the appellant hitting the deceased until she became unconscious. It was therefore possible that someone else would have killed her. There was no weapon recovered by the police at the scene of the crime. Therefore, the appellant ought not to be crucified that he killed the deceased knowingly.
16. On the doctrine of last seen with, Mr Attanja submitted that the appellant was not seen last with the deceased, therefore, it is not known when he left the deceased on the roadside. There was no data given to show the movement of the appellant on that day. On provocation, Mr Attanja submitted that the appellant was provoked by the deceased comment that "you are not the only person who I share my body to". In conclusion, counsel submitted that the appellant was remorseful for the actions that took place on that day. He was a young man who has reformed and is even ready to go to the family of the deceased and seek reconciliation.
17. The respondent was represented by Ms Vitsengwa, learned prosecution counsel who stated that there were three key ingredients that must be proved in the offence of murder: First, the death of the deceased and its cause; secondly, that the appellant committed the unlawful act that led to the death; and, thirdly, that the appellant did so with malice aforethought. That the death of the deceased was proved through the evidence of PW2 her brother, who identified her body for purposes of post mortem. An autopsy was subsequently conducted by PW6, who concluded that the cause of death was asphyxia due to ligature strangulation.
18. During trial, in his defence, the appellant admitted to the death of the deceased but denied strangling her. Relying on the case of *R. v Kipkering Arap Koske & Another*, 16 EACA 135, it was submitted that the circumstantial evidence led by the prosecution pointed irresistibly to the appellant in the commission of the offence. That the appellant and the deceased were in a relationship. Indeed, the appellant conceded this much and alleged that the deceased was his girlfriend. That the last person known to have seen the deceased alive was the appellant who admitted to meeting her on July 23, 2017.
19. PW2 testified that the deceased and the appellant had been talking on the phone and the deceased informed her on July 23, 2017, that she was headed to town to meet him. The deceased was missing



from July 23, 2017 at about 6.30pm when her phone was switched off to July 26, 2017, when her lifeless body was found in Ngong forest. PW4 reported a missing person incident to police who assisted him by tracing the deceased phone found with the appellant. During the trial, the appellant admitted to having taken the deceased phone after beating her mercilessly until she fell down unconscious. He also admitted to having left her lying on the ground, boarded a matatu and headed back to his home at Mukuru kwa Njenga. Despite having her phone, he never informed PW2 or the deceased's family as to what had happened to the deceased.

20. It was further submitted that there were five incriminating pieces of evidence pointing to the guilt of the appellant which include the fact that the appellant was the last known person to have seen the deceased alive. Secondly, when put to his defence, he admitted to having beaten the deceased with his bare hands until she fell down and left her on the ground unconscious. Thirdly, the deceased phone was traced back to the appellant. Evidence was tendered wherein PW3 testified to have bought the said phone from the appellant. Additionally, the body of the deceased was discovered in Ngong Forest, Mutoine Block. It had been there for some days.
21. The appellant testified that he walked with the deceased on a footpath in the forest that was allegedly a shortcut to Lenana Bus Stage. That there was nobody else in the vicinity, there was nothing to point to any other person other than the appellant as the person who could explain her death. The state in which the deceased body was found, rubbish any claim that the appellant did not strangle her. The numerous bruises mentioned in the medical evidence demonstrate that there was extreme physical violence to the deceased not only on her head but her limbs and chest too which fact points to malice aforethought.
22. Lastly, the appellant did not make any effort in tracing the deceased family to inform them where the deceased was despite having taken her phone. He was well aware she had a brother that was living with her and he admitted to have heard her speak to her mother on phone. He continued with his life unbothered, sold the deceased phone with her sim card in it, and later, travelled to Kisii to vote. That the allegation that the trial court rejected his sworn defence without giving reasons was misplaced and meant to mislead this Court. It was evident that the appellant was clutching on straws.
23. The trial court delivered an elaborate judgment in which the defence was summarized and analyzed. It also acknowledged the appellant's admissions on oath and even outlined the said admissions. Further, the appellant's defence of provocation was equally rejected by the trial court by determining that the defence as envisaged under sections 207 and 208(1) of the *Penal Code* was not available to the appellant in the circumstances.
24. This is a first appeal. As such, it is the duty of this Court to reconsider and re-evaluate the evidence adduced before the trial court with a view to reaching its own independent determination on whether or not to uphold the conviction and sentence of the trial court. See *Okeno v Republic* [1972] EA 32.
25. We have carefully considered the record of appeal, submissions by counsel and the law. The grounds of appeal set out elsewhere in this judgment can actually be collapsed into two thematic areas; whether the prosecution proved ingredients of the offence of murder beyond reasonable doubt against the appellant, and secondly, whether the circumstantial evidence adduced was sufficient to sustain the conviction against the appellant.
26. The prosecution in a charge sheet of murder (information) has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased and its cause occurred; that the death was caused by an unlawful act of commission or omission by the accused; and, that the accused had malice aforethought as he committed the said act. See *Nyambura & Others v Republic* [2001] KLR 355.



27. As to the death of the deceased, we agree with the trial court's finding and the submission by the respondent that there was no dispute that the deceased was murdered. There was sufficient evidence to that effect. All witnesses save for PW7, attested to the death of the deceased which was corroborated by the production of the postmortem report by PW6 that confirmed the death and the cause thereof. Indeed, even the appellant himself admitted hitting her on the head and leaving her unconscious but denied being responsible for her death.
28. The big question however is whether it was the appellant who was responsible for the death of the deceased? Alternatively, did the prosecution prove beyond reasonable doubt that it was the appellant and nobody else who committed the unlawful act that led to the death of the deceased? From the evidence tendered before the trial court, it is clear that none of the prosecution witnesses actually saw or witnessed the appellant or indeed any other person kill the deceased. Thus, there was no direct evidence linking the appellant to the death of the deceased. The prosecution case on this aspect therefore, hinged on circumstantial evidence. In the case of *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, this Court had this to say on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”

29. Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Suffice to mention *Abanga alias Onyango v Republic* Criminal Application No. 32 of 1990 (UR) in which this Court held as follows:

“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.”

This Court amplified the above position in the case of *Sawe v Republic* [2003] KLR 364, thus:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”



30. The circumstantial evidence tending to link the appellant to the offence was that of PW2, the brother to the deceased. The deceased was in a relationship with the appellant. The deceased had told him that she was going to visit the appellant, and later when he called the deceased, he was told that they were with the appellant in Ngong Forest and would call him back later.
31. The other strand of circumstantial evidence is that of the cell phone that belonged to the deceased. The evidence from the record is to the effect that PW2 knew the cell phone very well. The police used the phone to track the appellant. The story behind it was that the cellphone was sold to PW3 by the appellant while at a barbershop. That he paid KShs 4,500 leaving a balance of KShs 200, which the appellant called to request while in Kisii where he was later arrested by the police. The evidence linked the appellant to the immediate person who had the cellphone and who successfully sold it to a third party. PW7 explained at length how the investigative team used some mobile phone data to track the phone. Further, the appellant admitted to having been with the deceased when she was alive. The body of the deceased was discovered in the same forest. Further, though he was aware that he had assaulted the deceased and left her unconscious, and taken her phone, he never bothered to contact PW2 or any other relative of the deceased to tell them of her whereabouts.

Lastly, the appellant made several admissions in his statement of defence. Those admissions were not confessions for which sections 24 to 29 of the Evidence Act would have come into play.

32. Having analyzed the evidence above, we are in agreement with the trial court that indeed, it was the appellant who caused the death of the deceased. The appellant was placed as the last person to have been with the deceased. It was the duty of the appellant in those circumstances to explain how the deceased met her death. In the absence of a satisfactory explanation, the trial court was justified in drawing the inference that the appellant killed the deceased. Contrary therefore to the submissions of the appellant, the circumstantial evidence relied upon by the prosecution met the threshold and therefore the trial court was right to convict the appellant on that evidence.
33. How about malice aforethought? The answer to this issue lies in section 206 of the Penal Code which provides in relevant part:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance:-

- 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.”

This Court has construed this provision in numerous cases including in Ekaita v R (1994) KLR 225, where it was held that:

“For the purposes of this appeal, where the accused knows that there is a serious risk that the death or grievous bodily harm will ensue from his acts, and he proceeds to commit those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as a result of those acts constitutes malice aforethought. It does not matter in such circumstances whether the accused desires those consequences to ensue or not.”



34. Having considered the entire record and examined the evidence as a whole minutely and exhaustively, we have come to the conclusion that the appellant was aware that there was a real risk that his assault on the deceased could result to grievous harm or lead to her death. We find just like the trial court, from the nature of injuries sustained by the deceased, that the appellant viciously assaulted her with the intention of causing at the very least, grievous bodily harm. We are satisfied that in the eyes of the law, the appellant assaulted the deceased with malice aforethought.

35. In the result, this appeal lacks merit and is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

