Ogunde v Republic (Criminal Appeal 30 of 2020)
[2023] KECA 724 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 724 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 30 OF 2020

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

JUNE 9, 2023

BETWEEN

PAUL ODHIAMBO OGUNDE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court at Nairobi (S. N. Mutuku, J.) delivered on 7th March 2019 in Nairobi HCCC No. 60 of 2015)

JUDGMENT

1. The appellant, Paul Odhiambo Ogunde was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge are that on the night of 8th and 9th June 2015 at Buruburu Phase V Estate within Nairobi County, he murdered Agnes Mwikali Mutua (the deceased).

2. He pleaded not guilty and case proceeded to trial, where the prosecution called 10 witnesses. After hearing the evidence, the trial court convicted the appellant and sentenced him to 20 years imprisonment. The appellant was aggrieved by conviction and sentence, and preferred an appeal to this Court.

3. The evidence that was before the trial court was that, the deceased went to visit Nicholas Odati, PW2 (Nicholas), at his house at Kahawa Sukari at 11.00 am on 8th June 2015. She wanted to rekindle their previous relationship.

   She left at 4.00 pm, and called Nicholas at 6.00 pm just before she got home. This was the last time they talked because he was informed the next day that she had died. When he saw the deceased's body in the mortuary, she had a black eye, blood clot on the nostrils, and was wearing the same clothes she wore when she visited him, a coloured and striped top and blue jeans.

4. Nicholas stated that he first met the appellant at college in January 2014, where the appellant worked as a director. He was informed that the appellant and the deceased were in a relationship, but when he asked the deceased about it, she informed him that the appellant was her ex-boyfriend. He later came to learn, when he visited her after she had given birth, that she was living with the appellant, and the baby was not his.

5. On the day she visited him, she received calls on her phone which she took outside the house. She had told Nicholas that the appellant had called to inquire as to her whereabouts. She looked disturbed every time he called.

6. After she left his house, he sent her a WhatsApp message after 10.00 pm to find out whether she was okay, because when she left, he could tell she was scared. The message was delivered but not opened. The next morning, he received the news of her death.

7. On the material day, PW 4, Caroline Mweni Musembi (Caroline) the deceased's house help was working in the deceased's home where she stayed with the deceased, the appellant and their child aged 1 year old. She found the appellant preparing to go to work. He left soon thereafter, and at about 11.00 am the deceased left her with the child saying that she was going to PW1, Mary Munyu Makau's (Mary), her sister's house. At 4.00 pm, the appellant returned from work, and inquired from Caroline as to the deceased's whereabouts. He thereafter left with Caroline's phone, and returned at 8.30 pm with the deceased. Caroline served them with dinner, which they ate without talking to each other. Thereafter, Caroline went to bed at 12.00 midnight. She was woken up at about 10.00 am when police came to her room and instructed her to take the baby. They proceeded to Mary's house where she learnt that the deceased had been murdered. She stated after she went to sleep, she did not hear any commotion. She did not know what happened while she slept.

8. On June 9, 2015, while stationed at Buruburu police station on general duties with 3 other officers, at around 1.30 am, PW 6 No. 65850 CPL Alex Nyongesa (Cpl. Nyongesa) attached to Diplomatic police unit in Buruburu, Crime Office and Report Office personnel, received a man who had driven into the station. He greeted them and told them that he had murdered his wife. He identified himself as Paul Odhiambo Ogunde, the appellant and that he lived in Buruburu Phase 5. Cpl. Nyongesa stated that the appellant informed them that he had strangled his wife using an iron box cable and that she was in the house where they lived. He went with the appellant who unlocked a 2 bedroomed house for them. In the store, they found a woman lying dead with an iron box cable still round her neck. She was facing up. She had a cut above the left eye. At that point, Cpl. Nyongesa called the OCS, who also came to the scene. In the house fast asleep, was a one year old baby and a house help. They woke them up, and after the OCS arrested the appellant, the baby and house help were moved to Harambee Estate 2, to stay with a relative.

10. Cpl. Nyongesa observed that the sitting room was organized, but there had been a commotion in the store, as there was broken cutlery, cups, glasses and plates on the floor. The deceased had a cut above her left eye. It was not bleeding, but it was a fresh wound. The appellant told him that he had murdered her following a domestic quarrel, which degenerated into a fight which ended up with the deceased being strangled with the iron box cable. On probing him further, the appellant told him 'nimeua bibi yangu' (I killed my wife); that he had strangled her using iron box cable following an argument, because she had left their home and switched off her phone. The appellant looked relaxed and had no injuries.

11. On June 9, 2015 at 6.00 am, Mary, the deceased's older sister was woken up by her husband, Josiah Nyahuraka as officers from Buruburu police station had come to their house. The officers informed her that the deceased had been assaulted to death by her boyfriend the appellant. They had brought the deceased's 6 months old baby for her to take care of.

12. Together with her husband and brother, Michael Mutua PW5 (Michael) she accompanied the police to Buruburu police and thereafter to Buruburu Phase 5 where the deceased lived. The police who had the key opened the door to the house and in the store, lying on the floor, she saw the deceased with an iron cord round her neck. The cord was still attached to the iron box. There was an injury on the right side of her face. She was wearing a trouser and spaghetti top. The store had crates of beer and other items. The sitting room was in disarray, with an old mattress on a seat. Mary entered the bedroom to pick a bed sheet in which to carry the body. The bed was not made and looked slept in.

13. Mary stated that she did not know that the appellant and the deceased lived together and that she knew that the deceased lived with Nicholas; that the deceased and the appellant had been friends for 4 to 5 years, and that he had another family, a wife and children. The appellant's relationship with the deceased was an on and off affair, and the deceased would complain that the appellant was often absent, and that his father did not approve of their relationship. She confirmed that she was 3rd born in the family and the deceased was the last born, and that almost everyone in the family knew of the deceased's relationship with the appellant; that the appellant was well known to her. She knew him as a family man and his wife was her friend, and that the deceased's relationship with Nicholas begun 5 months before she died.

14. She reiterated in cross examination that when they got to the deceased's house, they found it locked, but the police had the key. It was as though they had previously visited the scene. There were no blood stains in the house, but the iron box had blood stains; and the wound on the deceased's face had blood, but the bleeding had stopped. The injury was fresh and visible. From what she observed, it was only the cord of the iron box that had blood stains.

15. After a while, scenes of crime officers came to the house and were there for 30 minutes. Later, relatives gathered at the scene to view the body, whereafter a police officer removed the iron box and cord from around her neck, and took the body to Kenyatta University mortuary.

16. PW 7, No 235245 IP Isaack Thiaka (Isaack) attached to Buruburu CID office on scenes of crime duties testified that on June 10, 2015 while on duty at Buruburu area, Cpl Nyongesa requested him to accompany him to a scene of murder in Buruburu. He stated that he took nine photographs of the scene.

    1. Photographs 1 and 2 show general view of the body lying facing upwards.
    2. Photograph 3 shows general view of the body lying face down.
    3. Photograph 4 shows close up view of deceased's face.
    4. Photograph 3 also shows deceased's face.
    5. Photograph 6 shows iron cable around deceased's neck.
    6. Photograph 7 shows iron with its cable around neck of deceased
    7. Photograph 8 and 9 shows marks on deceased's neck.
    8. Last photo shows bloodstains on the neck.

    He testified that he printed the photographs and produced them as evidence in court. He confirmed that the report attaching the photographs was incomplete.

17. PW3, Dr John Maina Mburu, (John) a medical doctor of psychiatry examined the deceased and concluded that he was fit to plead; that the appellant was coherent and had no signs of mental disorder

at the time of examination. He stated that the appellant informed him that he had a fight with his wife, that the fight was not planned and that he was remorseful and repentant of whatever had happened.

18. Michael, went to Kenyatta University Mortuary where he identified the deceased on June 10, 2015. On the same day, PW 9 Dr. Johansen Oduor, (Johansen) a pathologist examined the deceased's body. He was informed that the deceased was murdered by her boyfriend at their house in Buruburu Phase 5 with the cord connected to an iron box.

19. Dr. Johansen's report indicated that, it had multiple bruises on the face with swelling of eyes and ligature contusion around the neck. There were bruises on right shoulder, right side of neck bleeding under the skin of both under arms which meant that they were defence injuries. There was central cyanosis depicting someone whose blood lacked oxygen when she died. Internally there were multiple areas of bleeding on neck muscles and bleeding on hyoid barn. In the abdomen there were bruises. On the head there was bleeding on right side of head on the scalp and brain at the back. Trauma had caused bleeding on the head. It was his opinion that the cause of death was that of ligature strangulation.

20. PW 10, No 72450 Cpl Kennedy Cherambos (Cpl. Cherambos) testified that he was based in Buruburu police station and was the investigating officer together with his colleague, one Charles Muthomi who is deceased; that on 9th June 2015 at about 1.30 am they were informed of a murder by the appellant; that the appellant reported that on the morning of 8th June 2015, he left his wife, the deceased and their 9 months old daughter sleeping in the house with the house help, Caroline. That later, he tried to call his wife, but could not reach her through her mobile phone and that when he managed to speak to her at 2.00 pm, she did not explain why she had not responded earlier. He left work and went home at 3.00 pm, but did not find her there. She returned at 9.00 pm, and they quarrelled and fought.

21. Cpl. Cherambos stated that when they went to the scene, they found the deceased lying in a store with an iron box cord tied around her neck. The room was in disarray. They called the scenes of crime officers who secured and photographed the scene. Later, the body was transferred to Kenyatta University Funeral Home. He confirmed that the photographs displayed what they saw at the scene. There were bruises on deceased's face and the iron box cord round her neck. The iron box was Philips by make; that it was left in the custody of the deceased police officer and could not be traced in their stores.

22. When placed on his defence the appellant testified that he is a hotelier by profession involved in consultancies for start-up hotels and bars and catering for events and owner of Barmisco Hospitality and Commercial Training Institute. He stated that he is married with 2 families. His first marriage was in 1998 which is blessed with 3 sons aged 24, 19 and 15 years and the second marriage to the deceased was blessed with one daughter, aged 4 years.

23. He met the deceased in 2007 when she was staying with her sister in a neighbouring house in Umoja Inner core. They started living together in 2009 in Zimmerman. After 6 months they moved to Donholm for 2 years, then Ngong road, then Buruburu.; that he had a good relationship with family of the deceased and although he had not paid dowry, he used to chip in when the family was in need of financial help. He stated that he took part in family gatherings, weddings and funerals and was recognized as a son in law; that the deceased was respectful and loving and that she worked as a co-director at the college and other companies they ran. She was in charge of administration in the college which had 30 students and used to do supplies payments and salaries.

24. He stated that he had 3 confrontations with her. When he had pain urinating and was tested, he was informed that he had gonorrhoea which the doctor informed him was sexually transmitted; that he confronted the deceased who admitted that she was in another relationship. Prior to this, the deceased had lied to him that she had gone to the salon, but had come home without getting her hair done. A few days later, he started feeling discomfort in his urine. The second scenario took place some months

later when he had the same disease diagnosed and the third was when he started experiencing severe diarrhoea and when they went to the hospital, they both tested positive for HIV.

25. With regard to the murder, on June 8, 2015, he woke up at 5.00 am, made breakfast which he ate with the deceased and left for work at 6.00 am. The deceased called to check up on him at about 10 am. Around the same time, he called her and could not reach her. Due to a severe headache, he decided to go home at 1.00 pm. Upon arriving at home, he found that the deceased was not there, and when he asked the house help of her whereabouts, she informed him that the deceased had left around 10.00 am and had gone to her sister's house. At 3.00 or 4.00 pm, the deceased called and told him that she had seen his calls. He testified that the deceased told him that she was far and would come back after 2 weeks. She asked him to meet her at Kenol petrol station where he went and waited upto 7.20 pm. When she arrived, she told him that she had gone to Eastleigh to buy clothes, and there was no network. He doubted her response, as the malls had network, and, she did not have any clothes. Upon questioning her further, she told him that she had gone to meet a friend, apologized and promised not to leave house without telling him. He stated that they went back to the house and after dinner they showered together and went to bed.

26. When he asked for his conjugal rights, the deceased became wild and told him that she had been intimate with a young man during the day and that caused them to have an argument. He then began packing her clothes, and told her he would take her to her parents. About 12.30 am, the deceased started crying and told him that he could not do that. He then went to sleep, only to wake up and find her missing. He stated that he looked for her in all the rooms and when he went to the store, he found her lying on the floor with her head facing up. He stated that he called her and pushed her, but she did not respond and that was when he realised that she was dead.

27. He stated that he saw an iron box cord around her neck and pieces of broken glass and disorganized crates; that there were blood stains on wooden crates and boxes, and the stools were lying on the side; that he was confused, and went to police station where he reported her death, and came back with police. He showed them the body in the room. He denied committing the offence.

28. As stated earlier, upon hearing the prosecution and defence evidence, the trial court convicted and sentenced the appellant. It is this decision against which the appellant brings this appeal on grounds that; the judgment of the trial court was against the weight of the evidence, and was therefore untenable; that the trial court failed to properly consider the principles applicable to circumstantial evidence; that the trial judge was in error in finding that the failure to produce the murder weapon was not fatal; that no evidence was produced to determine to whom the blood on the iron box cable belonged to which rendered the prosecution's case unproved; that the learned judge failed to consider the appellant's defence, which was prejudicial to him and denied him a fair trial under Article 50 of the *Constitution*; that the judge failed to consider that the cause of death being ligature strangulation which could have been self-inflicted; that the court did not take into account the appellant's defence of provocation on account of the extreme promiscuity on the deceased's part, and finally, that the sentence imposed by the trial court was harsh and oppressive.

29. When the appeal came up for hearing on a virtual platform, learned counsel Mr. Ombija appeared for the appellant while learned prosecution counsel Ms. Matiru appeared for the State. Both the appellant and the respondent filed written submissions.

30. In his submissions, the appellant submitted that the learned judge's conviction was against the weight of the evidence adduced and therefore not tenable in law. Counsel submitted that the circumstantial evidence had a weak chain, as there was want of proof in linking the appellant to the offence. It was submitted that the photographs taken at the scene of crime by PW7 were inadmissible for failing

to comply with the requirements of section 78 of the *Evidence Act*; since no proper certificate was produced; that the provision is mandatory; that if the photographs and the medical report were excluded, there was no evidence of the injuries sustained that could be relied upon by the court; that further, the findings of Dr. Johansen crystallised in the postmortem report were merely an opinion and hence not binding on the court. Counsel concluded that since the medical report was not corroborated with any other evidence, nothing supported the offence of murder, or that the appellant was responsible for the deceased's death.

31. It was further submitted that malice aforethought was not established; that though there was evidence of iron box and iron cord recovered at the scene, it was not produced in court as an exhibit; that consequently, there was nothing that explained the cause of death.

32. In addition, it was submitted that no confession was recorded in the terms set out by section 25 A of the *Evidence Act*, and therefore, any evidence suggestive of an admission on the appellant' part was inadmissible in law; that it was quite possible that the deceased committed suicide out of postpartum depression having given birth just 9 months before her death.

34. It was further submitted that the appellant's defence was plausible; that given the events as they transpired, the defence of provocation was available to him; that the deceased challenged his manhood claiming to have slept with a much younger person, Nicholas, but this notwithstanding, the judge did not take into account that provocation is a complete defence to the information of murder.

35. Finally, counsel submitted that the respondent did not prove the prosecution's case to the required standards and finally, he complained that the sentence imposed by the court was harsh, oppressive and excessive having regard to the circumstances of the case.

36. In the submissions by the State, learned counsel Miss. Matiru submitted that the conviction was safe; that the case was based on circumstantial evidence of the photographs that were taken of the scene, the presence of the murder weapon, an iron box cord that was recovered from the scene, and the witness evidence that attested to the injuries that the deceased has sustained.

37. It was further submitted that, the post-mortem report indicated that the deceased died from ligature strangulation, which was corroborated by the iron box cord tied around the deceased's neck, and the strangulation injuries; that though the appellant had sought to advance a suicide theory at the trial, the doctor was clear that the deceased's death was not as result from self- inflicted suicide, but from strangulation following an assault by the appellant; that he was angry that the deceased, his live-in girlfriend had lied about visiting her sister, and instead had been with another man on the day she died.

38. Regarding the complaint that the trial court relied on a confession made to Cpl. Nyongesa, counsel asserted that the trial court reached a conviction without relying on such evidence.

39. On proof of malice aforethought, it was submitted that the appellant was the last person to be seen with the deceased when she was alive, and was the person who later discovered her lifeless body with an iron box cable tied round her neck; that the appellant acted with malice, and intended to cause the deceased, at the very least, grievous bodily harm; that, ultimately his actions, that were clearly premeditated, led to her death.

40. Turning to the defence of the provocation, it was submitted that this was not canvassed in the trial court by the defence. Consequently, counsel concluded, all the ingredients for the offence of murder were proved to the required standard.

41. From the appellant's submissions, the issues that fall for this Court's determination, are namely; i) whether the prosecution proved its case to the required standards, and whether the circumstantial

evidence adduced against the appellant was sufficient to sustain a conviction; ii) whether there was a confession; iii) whether *mens rea* or malice aforethought was established beyond reasonable doubt; iv) whether the defence of provocation was available to the appellant, and finally whether, the sentence imposed of 20 years imprisonment was excessive and harsh.

42. This being a first appeal, this Court should be mindful of its duty as first appellate court. This duty was well articulated by this Court in *Erick Otieno Arum vs 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 analyze 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"

43. In order for the offence of murder to be established, the prosecution must establish three elements. First, the death of the deceased must be established; secondly, that the death of the deceased was caused by an unlawful act or omission by the appellant; and finally, that the appellant committed the unlawful act or omission with malice aforethought.

44. Regarding the first requirement, the fact of the deceased's death is not in dispute. According to the post mortem report of Dr. Johansen, a pathologist, the body of the deceased had multiple bruises on the face with swelling of eyes and ligature contusion around the neck. There were bruises on right shoulder, right side of neck bleeding under the skin of both under arms which meant that they were defence injuries. There was central cyanosis depicting someone whose blood lacked oxygen when she died. Internally, there were multiple areas of bleeding on neck muscles and bleeding on hyoid barn. There were also bruises in the abdomen. There was bleeding on right side of head, on the scalp and brain at the back. Trauma had caused bleeding on the head. It was his opinion that the cause of death was that of ligature strangulation.

45. There were also photographs that were taken by the scene of crime officer, in particular, IP Thiaka. The photographs provided graphic details of the external bruises on the face and body of the deceased. They show that the deceased suffered a very violent death.

46. In concluding that the deceased died, the learned judge stated thus;

> " The doctor stated that the injuries he noted on the body of the deceased were consistent with assault and that all injuries were inflicted on the deceased before she died. The evidence has satisfied me that the death of the deceased occurred."

47. The appellant has contested the admissibility of the post mortem report and the photographs. We shall address these contestations later in the judgment. Needless to say, all the prosecution witnesses testified as to her death. Her lifeless body was found in her house in a room used as a store. The appellant admitted that he discovered her body, and reported her death at Buruburu police station. Cpl Nyongesa and Cpl. Cherambos processed the scene where the deceased's body lay, and later, it was taken to Kenyatta University mortuary where it was identified by her brother Michael, and a postmortem conducted by Dr. Odour. It is not therefore in doubt that the deceased died.

48. As to whether the appellant was responsible for her death, it is not in dispute that the prosecution's case was founded on circumstantial evidence. The question that required to be ascertained is whether

the evidence sufficiently pointed to the appellant as having been responsible for the deceased's death. In this regard the learned judge had this to say;

> " My careful reading, analysis and consideration of all the evidence, both from the prosecution and the defence, satisfied ne (sic) that the evidence upon which this court can draw an inference of accused's guilt is firmly established; that the circumstances in this case are of a definite tendency to unerringly point towards the guilt of the accused and that the circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability that the crime was committed by the accused and no one else."

49. Elaborating on the principles of circumstantial evidence, in the case of *PON vs Republic* [2019] eKLR this Court explained;

> " To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are Rex V Kipkerring Arap Koske & 2 Others [1949] EACA 135 and Simoni Musoke V R [1958] EA 71. In Rex v Kipkerring (supra) the court explained that;
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> > " In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

50. The appellant has argued that the chain of circumstantial evidence was weak, since the appellant's involvement in the deceased's death was not proved. That this was because, firstly, the deceased died from suicide and not strangulation and the postmortem report being a mere opinion, could not be relied upon by the court. Secondly, the photographs taken at the scene by IP Thiaka were inadmissible, as they did not comply with section 78 of the *Evidence Act*, and third, the failure by the prosecution to produce the iron box and cord was fatal to the prosecution's case.

51. So as to reach a determination on whether the deceased's unlawful acts were the cause of the deceased's death, having regard to the issues raised, will require a re-evaluation of the evidence that was before the trial court.

52. The events as they unfolded were that, the deceased and the appellant lived together in their two bedroom house in Donholm. On the fateful morning, the appellant made breakfast for himself, the deceased and their baby, and he thereafter proceeded to work. The deceased called him at about 10.00am, and when he tried to call her back, she did not answer her phone. She left the house shortly thereafter, but before leaving she told Caroline, the house help, to inform the appellant that she had gone to her sister's place in case he called. She instead went to Nicholas' house where she remained until 4.0 pm. Nicholas' relationship with the deceased had begun in March 2014.

53. He stated that they were planning to get married. While there, she received phone calls, and told Nicholas that they were from the appellant. Nicholas stated that when she left him to return home,

she seemed scared. The last time he spoke to her was at 6.00 pm when she called to inform him that she was nearly home.

54. When the appellant, who had been trying to reach the deceased on her phone since 10.00 am arrived at their home at about 3.00pm, he found the deceased had left the house. When he enquired as to her whereabouts from Caroline, she informed him that the deceased had gone to Mary's house.

55. The deceased called him much later and asked him to pick her up at the Kenol petrol station. He met her at 7.30 pm, and they went home. According to Caroline, they ate their dinner without speaking to each other, and after clearing away the dishes, she left them together at about midnight went to sleep.

56. It was the appellant's evidence that after they had eaten, he showered with the deceased, and they too went to sleep. He asked for his conjugal rights, and when the deceased refused to accede to his request, a commotion ensued because he says she was cheating on him. It is not therefore in dispute that the appellant was the last person to be seen in the house with the deceased. See the case of *Chiragu & another v Republic* [2021] KECA 342 (KLR). He also confirmed reporting her death at Buruburu police station to Cpl. Nyongesa and Cpl. Cherombos.

57. What the appellant has denied is responsibility for her death. He claimed that she was experiencing post partem depression and committed suicide after they quarrelled. In addressing the issue, the learned judge found that there was no viable reason that warranted the deceased committing suicide. The judge went further to add;

> "It is worth mentioning at this stage that the defence has put up a theory that the deceased committed suicide...it is worth noting that the defence cross examined Dr Odour on this theory. The doctor clarified that self-induced suicide is hanging while strangulation is different. The doctor stated that the injuries he noted on the body of the deceased were consistent with assault, and that all the injuries were inflicted on the deceased before she died. This has satisfied me that the death of the deceased occurred. That death was caused by ligature strangulation".

58. The evidence of the prosecution witnesses is clear that when they saw the deceased in the store, she had an injury over her eye, and the iron box cord still attached to the iron box tied around her neck.

59. The evidence of Mary, Cpl. Nyongesa and Cpl. Cherombos was that when they opened the door to the house, they saw the deceased lying on the floor of the store, with an iron cord round her neck still attached to the iron box. The iron box had blood stains. She was wearing a trouser and spaghetti top, and there was an injury on the right side of her face. The store was in disarray. She was lying amidst broken bottles, cups and glasses. There can be no doubt that prior to her death, there was a violent commotion.

60. Dr Johansen reported that she sustained injuries consistent with blunt force trauma that caused multiple bruises on the face. Bruises could also be seen on right shoulder, the right side of her neck. There was bleeding under the skin of both under arms, that were defence injuries. Internally there were multiple areas of bleeding on neck muscles and bleeding on the hyoid barn; the abdomen had bruises. On the head was bleeding on the right side of head, on the scalp and brain at the back. Trauma had caused bleeding on the head. The injuries set out on the report were demonstrative of severe assault on the deceased by the appellant, all of which were deliberately intended to afflict grievous harm.

61. More importantly, the postmortem also showed swelling of eyes and ligature contusion around the neck, and there was central cyanosis depicting someone whose blood lacked oxygen when she died. The doctor's opinion was that she died from ligature strangulation.

62. We have carefully considered the evidence and come to the conclusion that the evidence did not point to suicide as the cause of the deceased's death. Though the appellant had sought to reduce the post-mortem report to a mere opinion, and which was not capable of being relied upon, so as to advance his suicide theory, the clear description given of the injuries the deceased sustained would point to the appellant, who was placed at the scene at the time, as having viciously assaulted the deceased. He repeatedly hit with a blunt object all over her body. Given the severe nature of her injuries, which Dr. Johansen stated were inflicted prior to strangulation, it is rather farfetched to imagine that she would have endured such a grotesque attack, sustained the debilitating injuries described, and then have the strength to try and hang herself. Hanging would have involved her tying the iron rod around her neck and hanging herself from the roof which given the circumstances of the case was well nigh impossible. On the contrary, what the evidence shows is that after viciously assaulting her, the appellant cornered her in the small store, tied the iron box cord around her neck, and strangle the life out of her, as demonstrated by the ligature contusion around her neck. This was not a case of suicide, but strangulation of the deceased by none other than the appellant, and we so find.

61. As to whether the court was entitled to rely on the doctor's report to inform of the cause of death, citing the case of *Parvin Singh Dhalay vs Republic* [1997] KLR 514 in the case of *Yahya vs Republic* [2022] KECA 389 (KLR) this Court set out the law on expert evidence thus;

> " We think we should at this stage say something about the opinions of experts when they appear to assist the courts. It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so".

62. Hence, before rejecting expert evidence, in the form of medical opinions, such evidence must be considered together with the rest of the evidence placed before the court. In this case, the ligature contusion around the neck, and central cyanosis depicting someone whose blood lacked oxygen, and the iron box cord around the deceased's neck, all supported the doctor's opinion that the deceased died from strangulation.

63. But that was not the only available evidence of strangulation. IP Isaack attached to Buruburu CID scenes of crime duties took nine photographs of the scene. The photographs showed the deceased lying on the floor facing upwards, with the iron box cord around her neck that had been used to strangle her. The strangulation was consistent with the injuries sustained.

64. But having said that, the appellant also sought to discredit the photographic evidence in the trial court by asserting that section 78 of the *Evidence Act* was not complied with. In addressing this issue, the trial court stated that;

> " The only issue the defence raised in respect of IP Thiaka's evidence was in connection with compliance with Section 78 of the *Evidence Act* and whether he was the officer who took the photographs produced in court. These issues were handled during the proceedings and a ruling made. Even if this court, where to find that the requirement of the law was not followed, which is not the case, there is evidence of Mary and the police officers who visited the scene. The evidence was very clear on what they noted at the scene where the body was found. The injuries on the body of the deceased have been described by other witnesses, including Mary".

65. In other words, the trial court found that the production of the photographs by IP Isaack complied with the requirements of section 78 of the *Evidence Act*, and that as a consequence, the court could rely on such evidence.

66. In so far as section 78 of the *Evidence Act* and the admissibility of the certificate accompanying the photographs is concerned, it is provided that;

> "(1) In criminal proceedings a certificate in the form in the First Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.
>
> (2) The court may presume that the signature to any such certificate is genuine.
>
> (3) When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it."

67. We have gone through the proceedings, the certificate, and the manner in which the photographs were produced, and would agree with the learned judge that the production of the photographs complied with the law. IP Thiaka was duly gazetted by the Director of Public Prosecution; he took the photographs and produced them. He also duly signed the certificate, and the court was entitled to presume that on this basis, the certificate was genuine. We therefore find the allegation that the certificate and the photographs were improperly produced to be lacking in merit.

68. But even were the photographs to be completely disregarded, the prosecution witnesses' evidence was also corroborative of strangulation. They gave a graphic description of the scene prior to the photographs being taken. Mary testified that whilst in the deceased's house she entered the store,and saw the deceased lying on the floor. An iron box cord was tied around her neck still attached to the iron box. Cpl. Nyongesa also corroborated Mary's evidence and their evidence in turn was corroborated by the doctor's report that the deceased died from ligature strangulation.

69. Related to this is the appellant's assertion that the failure to produce the iron box as evidence, was fatal to the prosecution's case. The High Court also addressed this issue, and concluded that the failure by the prosecution to produce the iron box as the murder weapon was not fatal. This was more particularly because the witnesses who saw the deceased lying in the store confirmed that the iron box cord with the iron box still attached to it was tied round her neck. This sufficiently demonstrated that strangulation with the iron box cord was the means by which she was murdered, and therefore, the deceased did not commit suicide. Rather, her death was by strangulation by the appellant who was the last person to have been with her.

70. In point of fact, when the inculpatory facts are pieced together, they form a chain so complete that the only conclusion that can be reached is that the appellant and no one else murdered the deceased. No doubt, the circumstantial evidence overwhelmingly pointed towards the guilt of the appellant and we are satisfied that the trial judge rightly concluded that his unlawful actions were the cause of the deceased's death.

71. Having so found, we turn next to determine whether malice aforethought was proved. Section 206 of the *Penal Code* defines malice aforethought in the following terms:

> " 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."

72. In the case of *Rex vs Tubere s/o Ochen* (1945) 1Z EACA 63, Eastern Court of Appeal the predecessor of this Court observed;

> " In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured."

73. From the injuries inflicted on the deceased, it is clear that the appellant intended to cause death or grievous harm to the deceased. Dr. Johansen indicated that the deceased died from strangulation. The nature of the injuries inflicted all over her body were brutal and vicious. As a final assault, the appellant strangled her to death with the iron box cord. From the manner in which she died, it is evident that the appellant intended to kill her. We therefore find that malice aforethought of the appellant was proved beyond reasonable doubt.

74. The above findings notwithstanding, the appellant has belatedly raised the defence of provocation. He complained that it was available to him, but the trial judge omitted to take it into account.

75. A consideration of the judgment discloses that the trial judge remarked in this regard that;

> " ...it seems that the accused did not act in the heat of passion so as to amount to provocation even though he did not raise provocation as a defence."

76. We have considered the record, and at no time did the appellant advance the defence of provocation. The thrust of his defence was always that he did not murder the deceased, and that she committed suicide. By seeking to raise the belated defence of provocation, the appellant in effect was admitting to have murdered the deceased in a fit of rage after she provoked him.

77. In the case of *Peter King'ori Mwangi & 2 others v Republic*[2014] eKLR this Court explained the defence of provocation thus;

> " ...So what is provocation? In the case of Duffy [1949] I ALL ER 932; provocation was defined as "some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary

loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ..."

78. This Court in the case of *Chepus v Republic* (Criminal Appeal 135 of 2018) [2023] KECA 129 (KLR) observed that;

> " The degree of provocation is a factor in assessing whether the appellant's actions were guided by the heat of passion thereby depriving him the reasoning standard of an ordinary man or whether the provocation would still be operating on his mind so as to deprive him of the power of self-control"

79. The appellant's evidence is clear. At all times, he denied murdering the deceased. His evidence did not show that he was provoked to the extent of losing his mind. The attempt to raise the defence of provocation is unsustainable given the circumstances, and, the appellant's claim that it was available to him, yet the learned judge disregarded it is unmerited and is dismissed.

80. Similarly, we dismiss the claim that the trial judge relied on Cpl. Nyongesa's evidence that the appellant strangled the deceased as a confession is without basis. The trial judge neither considered it to be a confession, and nor was it taken into account as such in the judgment.

81. As for the sentence, under section 204 of the *Penal Code*, the sentence for a conviction of murder is death. In this case, after taking into consideration the appellant's extensive mitigation, and relying on the guidelines set out in the Supreme Court case of Francis Karioko *Muruatetu &Another vs Republic* [2017] eKLR, the trial court concluded;

> " For justice to be served, this court considers a custodial sentence is appropriate. Having taken into account all the factors of this case, it is my considered view that a custodial sentence of 20 years will serve the purpose. I therefore sentence the accused to 20 years in prison."

82. In view of the above considerations, and the judge's clear exercise of discretion to impose a sentence of 20 years instead of the death sentence, we find that we have no reason to interfere with the sentence which we even consider to be lenient.

83. In sum, we uphold the conviction and sentence. The appeal is without merit, and is dismissed as such.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR