



**Ndiku v Republic (Criminal Appeal 119 of 2020)  
[2023] KECA 954 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 954 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 119 OF 2020  
MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA  
JULY 28, 2023**

**BETWEEN**

**JOHN MAINGI NDIKU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal against the Judgment of the High Court at Nairobi (Ombija, J.) delivered on 21st November 2012 in Criminal Case No. 100 of 2009)*

**JUDGMENT**

1. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars were that on October 31, 2009 at Mukuru Kwa Reuben Slums within Nairobi Province he murdered LWK.
2. The appellant denied the charges, leading to a trial in which the prosecution called 9 witnesses in support of its case. PW1, David Kaindi Kingesi at the material time owned a pub where he sold alcoholic and non-alcoholic drinks, and had employed the appellant as a pub attendant. On the material day at around 8:30pm, the deceased walked into the pub. She ordered for a soda and thereafter removed a small bottle from her pocket; the bottle had some content in it which she poured into the soda. After a while, she started vomiting and the bar attendant directed her to a table to rest, he left the pub at around 9.00pm for home. He left behind the deceased. The witness ended up sleeping at the appellant's house as his house was locked. The appellant went to his house at around 1.00am having apparently closed up the bar at 11.00pm. In the morning, he went to his house and the appellant came and told him that he had left the deceased in the bar, having locked her inside as it was raining heavily. They went back to the pub together and found the deceased lying on the ground dead. He reported the matter to the police who came and took away the body.



3. PW2, BKM and PW3, AN were sons of the deceased and on the material day, they learnt that their mother had died in a pub. They visited the scene where they found their mother lying dead facing upwards inside the pub. PW4, Julius Mwangi Kabunbe, the deceased's husband, identified the deceased's body to the doctor for purposes of carrying out a post-mortem. He also visited the scene where he found the deceased's body which had no underwear; the neck had a swelling, bruises and finger nail impressions.
4. PW5, Dr. Zephania Kamau based at Police Surgeon examined the appellant on July 17, 2010. He assessed his age to be around 38 years, he had no bodily physical injuries and was mentally fit. PW6, Dr. Peter Ndegwa performed the post-mortem on the deceased's body. Externally, she had bruises around the neck and below the chin, the feet were cyanosed meaning there was no supply of oxygen to those areas, neck muscles were bruised, rectum had collapsed, there were bruises around the anus as well as the internal genitalia. He formed the opinion that the cause of the death was asphyxia due to manual strangulation, sodomy and rape. He also concluded that the bruise on the head could have been caused by fingers or a blunt object.
5. PW7, PC Jackson Wanangwe attached to Industrial Area Police Station received the report of the incident on November 1, 2009. He visited the scene where he observed that the door to the pub looked like it had been broken into, the deceased's body lay inside with blood oozing from the neck. Her clothes had sand which suggested there had been a struggle and the neck looked as if it had been strangled. He called the scene of crime personnel who came and photographed the body and moved it to the City Mortuary. PW8, PC John Kanyungo also of Industrial Area Police Station was the initial investigating officer who interrogated relevant witnesses, visited the scene, took statements, arranged for post-mortem, took relevant specimens to the government chemist for analysis, compiled the file and handed it over to the DPP for necessary instructions. He narrowed down the finding of his investigations to the appellant as the prime suspect since after the pub closed down, he remained inside with the deceased and was the last person to be seen with her.
6. PW9, Dr. Albert Kathuri, a Government Analyst on September 20, 2009 received 3 items for analysis. These were; an anal and vaginal swab of the deceased and a blood sample of the appellant. Upon analysis, he found that there was no presence of semen or spermatozoa and the blood sample was of blood group A.
7. At the close of the prosecution's case, the trial court found that the appellant had a case to answer and accordingly placed him on his defence. He gave a sworn testimony. He stated that he served the deceased a soda into which she poured chang'aa and she immediately started vomiting, causing her to fall off her seat. Some customers assisted him to move her aside to a corner to rest. As it was raining heavily, he decided to lock her inside the pub as he thought it was safer and she was in a drunken stupor. When he went to open the pub in the morning, he found her dead. He went and informed PW1 who told him to report the matter to the police station which he did. The police went to the pub and took away the body and on the following day he was arrested. He denied committing the offence.
8. The trial court held that the whole case turned on circumstantial evidence the totality of which was that only the appellant could explain how the deceased, in a drunken stupor and sleeping at a corner been strangled, raped and sodomized, culminating in her demise. The inculpatory facts were inconsistent with the innocence of the appellant and incapable of explanation on any other hypothesis than that of guilt. The trial court upon conviction sentenced him to suffer death.
9. Dissatisfied, the appellant has now preferred the instant appeal.



10. The appellant filed his memorandum of appeal raising 6 grounds of appeal which he later amended in his supplementary consolidated grounds of appeal as follows: that the doctrine of circumstantial evidence was not properly applied; that the offence of murder was not sufficiently proved; that the medical evidence that was tendered to support the charge was not conclusive that he was culpable; that two crucial witnesses were not called; that section 200(3) of the [Criminal Procedure Code](#) was not complied with; and that the prosecution's evidence was riddled with inconsistencies and contradictions.
11. When the matter came up for hearing before us on December 14, 2022, learned counsel, Mr. Asitiba appeared for the appellant while learned prosecution counsel, Ms. Ngalyuka appeared for the respondent.
12. Mr. Asitiba relied on his consolidated supplementary memorandum of appeal dated March 22, 2022, and submissions and a bundle of authorities dated 21<sup>st</sup> March 2022. He submitted that the conviction of the appellant was purely based on circumstantial evidence and suspicion. He argued that suspicion, however strong cannot infer guilt. He pointed out that PW1 left his pub and went to the appellant's house on account that his wife was not at home; that the prosecution's failure to call his wife was fatal. Further, the watchman who guarded the pub was also never called as a witness while his evidence would have shed light as to what happened that night after the appellant left the pub. Counsel also submitted that the prosecution did not establish PW1's *alibi*, that he was not indeed at the scene when the deceased was killed; and that the appellant was not accorded a fair trial as the trial court failed to comply with section 200 of the [Criminal Procedure Code](#) as he was not asked whether he objected if the matter proceeding from where it had reached after it was taken over by a succeeding judge.
13. Counsel also poked holes in the shoddy manner that the police conducted the investigations, faulting the fact that they visited the scene more than 12 hours after the incident. He further pointed to the inconsistencies in the evidence of PW7 and PW8. He pointed out that, PW8 stated that after visiting the scene, he observed that the door to the pub appeared to be locked while PW7 testified that it was broken into. Based on this contradiction, the trial court ought to have given the appellant the benefit of doubt, and to consequently arrive at a finding that the threshold for proof of the case beyond reasonable doubt had not been met. He urged us to allow that appeal.
14. In rebuttal, Ms. Ngalyuka while relying on submissions dated 13<sup>th</sup> December 2022, submitted that PW1's *alibi* was properly countered by the evidence he gave. Contrary to the appellant's submission, it was incumbent upon the appellant to discharge the burden under section 111 of the [Evidence Act](#), that since he was at the scene of crime at the time the deceased was allegedly killed, he was not responsible for her death. As regards the assertion that section 200 of the [Criminal Procedure Code](#) was not complied with, counsel submitted that the appellant was represented in the trial by an advocate, and he could not be heard to say that he had not given his advocate instructions on how he wanted the matter to proceed after it was taken over by a succeeding judge. The advocate was his agent and was therefore deemed to be his mouthpiece during court proceedings. It was her prayer that the appeal be dismissed.
15. In a quick joinder, Mr. Asitiba urged us to note that the case was poorly investigated for which reason we should reach a positive finding in favour of the appellant.
16. We have considered the record of appeal as well as submissions made by the respective counsel. This being a first appeal, this Court is mindful of its duty as a first appellate court as enunciated by this Court in [Erick Otieno Arum v Republic](#) [2006] eKLR as follows:

“It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence



adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court) also has a duty imposed on it by law to carefully examine and 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”

17. Having regard to our obligation as stated above, we have isolated the issues for determination to be whether; the appellant was denied a fair trial; the prosecution failed to call crucial witnesses; and whether the prosecution proved the offence of murder against the appellant.
18. On whether the appellant was accorded a fair trial, he alleged that when the succeeding Judge took over the trial, he was not informed of his right under section 200(3) of the Criminal Procedure Code. The provision deals with instances where a criminal trial is handled by more than one magistrate and how the succeeding magistrate should treat the proceedings recorded by his predecessor. It states as follows: -
  - (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right
19. Section 201(2) of the Criminal Procedure Code on the other hand provides that:

Rules as to taking down of evidence (1) .....

  - (2) The provisions of section 200 of this Act shall apply *mutatis mutandis* to trials held in the High Court.
20. From a perusal of the court proceedings, the appellant was represented by learned counsel, Mr. Oira throughout the trial. On September 28, 2010, parties were informed that the trial judge, Lesiit, J. (as she was then) who had taken the evidence of PW1 to PW4 was proceeding on transfer to Meru High Court. The trial was thereafter taken over by Ombija, J. On October 25, 2010, the trial judge invoked the provisions of section 200 after which the prosecution counsel submitted that he wished that the trial proceeds from where it had reached. The appellant’s counsel conceded whilst submitting that it was also his wish that the matter proceeds from where it had reached.
21. From the above, it is evident that the trial court discharged its duty and explained to the appellant his rights under section 200(3) of the Code. Secondly, since Mr. Oira was the appellant’s counsel in the trial, this Court can only infer and conclude that he had instructions and authority from him to represent him in the proceedings, and more so with regards to how the trial was to proceed after the transfer of Lesiit, J. In any event, under Article 50 (2) of the Constitution, an accused person has a right to legal representation and to choose, and be represented by an advocate, who in law is deemed to be his or her agent. The appellant did not raise an objection that Mr. Oira was not according him proper legal representation and services, or that he did not consult him when he told the court how the matter was to proceed before the succeeding judge. He is raising this ground too late in the day and for no apparent reason.
22. This Court in Shikari v Republic (Criminal Appeal 19 of 2016) [2021] KECA 302 (KLR) stated that:

“It is also our view that once the trial magistrate or judge complies with this statutory duty, this Court, being an appellate court and not having had the opportunity to observe the Appellant and his counsel during the trial, is not in a position to make a conclusion



that the response by the Appellant’s counsel was made without consultation or authority. In addition, the Appellant was personally present in court and had every opportunity to dispute or object to any representations made by the counsel on his behalf, and of communicating and demanding that witnesses be resummoned. However, the trial record indicates that the Appellant did not do so, and the only conclusion this Court can make in the circumstances is that the Appellant’s counsel response was made upon instructions from the Appellant.”

23. We thus find that the appellant was accorded a fair trial and the trial court did comply with the provisions of section 200(3) as read with section 201(2) of the *Criminal Procedure Code*. This ground must fail for want of merit.
24. As to proof of the offence charged, the appellant was charged with the offence of murder. Section 203 of the *Penal Code* provides for the ingredients of the charge of murder to include, the fact and cause of the death of the deceased; that the death was as a result of an unlawful act or omission on the part of the accused person; and that such unlawful act or omission was committed with malice aforethought.
25. The fact and cause of the death of the deceased are not in dispute in this case. Key prosecution witnesses, PW1,2,3,4,7 and 8 had the opportunity of visiting the scene where they saw the lifeless body of the deceased. PW6 conducted the post mortem on the body and formed the opinion that the cause of the death was asphyxia due to manual strangulation, sodomy and rape. He also concluded that the bruise on the head could have been caused by fingers or a blunt object.
26. The next issue is whether the prosecution proved that indeed it was the appellant who caused the death of the deceased. The trial court was correct in finding that the whole case turned on circumstantial evidence and properly warned itself on its threshold by relying on the case of *Sawe v Republic* (2005) KLR 364, 373. The court held that it was the appellant who was the last person to be seen with the deceased, having locked her inside the pub, thus her death was a fact specifically within his knowledge, and he only could explain how the deceased was strangled, raped and sodomized. This concludes the fact that the inculpatory facts were inconsistent with the innocence of the appellant and incapable of explanation of any other hypothesis other than that of guilt.
27. We agree with the learned Judge that there was no direct evidence as there were no eye witnesses who saw how the deceased met her death. As such, the prosecution’s evidence rested squarely on circumstantial evidence. PW2-PW9 were either relatives to the deceased who were informed that the deceased was lying in a pub dead. The others were the police officers or medical officers. It would, thus, be the logical conclusion to hold that the testimony of PW1 was what was materially relevant. He testified that he used to own the pub which was the scene of the crime in which he had employed the appellant as an attendant. On the material day, the deceased walked in at around 8:30pm and ordered a soda which she mixed with another liquid from her person. She then started vomiting and was moved to a corner to rest. He left the pub and went to his house which he found locked and so he went to the appellant’s house where he spent the night. The appellant came home at around 1.00am and it was not until later that morning that the appellant informed him that he had locked the deceased inside the pub because it was raining heavily. They went together to the pub and found the deceased lying on the ground dead. He reported to the police station and the police came at midnight to collect the body. In cross examination, he stated that there was a Maasai guard who kept watch outside the pub and that it was not unusual for a customer to be locked in the pub.
28. The required legal threshold to sustain a conviction against an accused person based on circumstantial evidence as stated in *R v Kipkering Arap Koske* [1949] 16 EACA 135 is that, such evidence must exclude



co-existing circumstances which would weaken or destroy the inference of guilt. In *Sawe v Rep* [2003] KLR 364, this Court expressed that:

“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.”

29. The trial court invoked the “last seen with doctrine”. On our part, we are not convinced that this alone proved the appellant’s culpability. It was PW1’s testimony that locking a customer inside the pub was a normal occurrence and was well within the mandate of the pub attendant. The trial court was in error to interpret the appellant’s carrying out his duty and by extension being humane enough to provide the deceased with shelter and not putting her out in the rain, as an inference of guilt. PW1 was also categorical that he was not asserting that the appellant committed the offence but was merely giving his narration of the material night’s events as they unfolded.
30. The trial court ought to have ensured that there was corroborative evidence and the prosecution ought to have adduced evidence that pointed to the appellant as the person who killed the deceased which it failed to do.
31. It is contended that material witnesses were not availed and we find this to be true. It would have been pertinent and beneficial to the trial court had the two witnesses, being PW1’s wife and the Maasai security guard to adduce evidence. They might have verified PW1 and the appellant’s whereabouts on the material night. For this omission, we can only conclude that the witnesses were not called because their evidence, if adduced, would have been adverse to the prosecution’s case. See *Bukenya & others v Republic* (1972) EA, 549.
32. Further, although the appellant was the last person to leave the pub, he, PW1 and the guard had the key to the pub. It is not beyond the realm of possibilities that another person was responsible for the deceased’s death and might have accessed the pub after the appellant’s departure. These circumstances leave many questions unanswered. For example, why did PW1 go to sleep in the house of the appellant? Why couldn’t he have waited for his wife to return from the market? These questions indeed cast doubt as to the appellant’s culpability.
33. From the foregoing, we find that the chain of events in the circumstances was undisputedly broken and did not lead to the inescapable conclusion that it is the appellant and no one else who committed the offence. Suspicion, as court’s have severally held, cannot infer guilt. The burden always remains with the prosecution to prove the case beyond reasonable doubt. The burden can never shift to the accused person to prove his/her innocence. It was incumbent upon the prosecution to look for corroboration or other material evidence implicating the appellant, to the exclusion of any other person. It is our view that the prosecution failed to discharge this onerous burden. It is also on this ground we find that the learned trial Judge erred in applying the ‘last seen doctrine’ to hold that the appellant was culpable.
34. On the whole, we are satisfied that the circumstantial evidence relied upon by the prosecution was so weak and tenuous as to be unsafe to found a conviction. As correctly submitted by the appellant, the prosecution failed to prove their case beyond reasonable doubt, and we accordingly find that the legal threshold for convicting the appellant based on circumstantial evidence was not met.



35. The foregoing aside, it is paramount to mention that the DNA analysis conducted by PW9 was of no help and could not salvage the prosecution's case. The conclusion arrived at was merely that the blood type found on the deceased's underwear was of group A. The question that begs is; blood group A belonging to whom or what? This was a most shoddy way of conducting investigations. It was as good as no DNA analysis was done as it did not link the blood type on the samples tested to anyone. We say no more under this head.
36. Having found that the prosecution failed to link the appellant to the death of the deceased, we shall not delve into other issues that were raised, as well as the propriety of the sentence.
37. In the upshot, we allow the appeal, quash the conviction and set aside the death sentence imposed on the appellant. We order that he be set free forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY, 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**

