



**Mwambegu v Republic (Criminal Appeal 63 of 2020)
[2023] KECA 866 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 866 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 63 OF 2020
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
JULY 7, 2023**

BETWEEN

JUMA KITUKU MWAMBEGU APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (R. Nyakundi J.) delivered on 29th October 2020 in High Court Criminal Case No. 12 of 2018)

JUDGMENT

1. Juma Kituku Mwambegu, the Appellant herein, has appealed against his conviction for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code Act* and sentence of thirty-five (35) years imprisonment imposed by the High Court at Malindi (R. Nyakundi J.) pursuant to a judgement delivered on 29th October 2020 in Malindi High Court Criminal Murder Case 12 of 2018. The particulars of the offence were that the Appellant murdered Katite Thoya Ngumba (hereinafter “the deceased”) on 25th August 2018 at Mongorani Area in Chumani within Kilifi County. A trial was conducted by the High Court after the Appellant entered a plea of not guilty, in which the Prosecution called three (3) witnesses in support of their case and the Appellant gave sworn testimony and did not call any witnesses.
2. Tumaini Mzungu (PW1), a niece of the deceased, testified that the Appellant and the deceased lived together and fought often. That on 25th August 2018 the deceased had told her that the Appellant stole the deceased’s Kshs 500/- and on the next day, the deceased reported to PW1 that the Appellant had threatened her. PW1 testified that there was a burial the following day in which she expected the deceased to attend, but in which she was absent. She later heard of the death of the deceased, whose body was collected in the bush. Benson Ngamba (PW2) confirmed that he received a report that the deceased, who was his sister, was missing. He informed the village elders, chief and police, and after



- a search, the deceased's decomposing body was found in the forest and the Appellant was arrested. He also testified that PW1 informed him that the Appellant was in a relationship with the deceased. Cpl Ambrose Wambua (PW3) who was at the material time based at the Kilifi DCIO, testified that he received instructions to take the Appellant into custody and recorded his statement. According to PW3, on the day of the funeral the Appellant and deceased left their house together, and that the Appellant returned alone. Further that the body of the deceased was found on 5th September 2018, he attended the post mortem that was conducted on the body and produced the postmortem report as exhibit 1.
3. After the close of the prosecution's case, the Appellant was put on his defence, and he gave sworn evidence and denied being in a relationship with the deceased. He also denied causing the death of the deceased. He admitted knowing the deceased as he had worked for her, and added that the case is fabricated against him.
 4. The learned judge in convicting the Appellant, found that the evidence of PW1, PW2 and PW3 and the post mortem report proved the death of the deceased and the cause was unlawful acts of assault causing death and therefore malice aforethought was proven. In addition, that PW1 knew the Appellant and his identification of was free from error. The Judge noted that the Appellant was the last person seen with the deceased; that his defence failed to controvert the evidence that the deceased was his mistress and they were together on 25th August 2018. The Judge, while placing reliance on the case of *Abdalla Bin Wendo & Another* (1953) 20 EACA 166, held that since the Appellant and the deceased were seen together, the inference was that he and no one else killed the deceased. Lastly, the learned Judge found that the Appellant's defence did not give a reasonable explanation on the circumstances under which he was last seen with the deceased, therefore adverse findings could be made against him.
 5. Aggrieved by his conviction and sentence, the Appellant preferred this appeal and challenged the High Court's decision on the following grounds; that the Prosecution's case was riddled with material contradictions; that the Appellant was not properly identified as the assailant, and was denied his right to disclosure under Article 50(2)(a)(b)(j) and (m) of the Constitution. We heard the appeal on the Court's virtual platform on 14th March 2023, and the Appellant was present appearing virtually from Malindi Prison, and was also represented by learned counsel, Mr. Tukero Ole Kina, while the Respondent was represented by the learned Prosecution Counsel, Ms. Ngina Mutua. The learned counsels highlighted their respective written submissions dated 8th March 2023 and 13th July 2022.
 6. Mr. Ole Kina informed us that he had abandoned the ground that the Appellant was denied his right to disclosure under Article 50(2)(a)(b)(j) and (m) of the Constitution and urged the remaining grounds together. It was his submission that the trial Judge in his analysis concluded that the Appellant was the last person to see the deceased alive, and had a duty to explain what happened to the deceased. The counsel however questioned whether the Appellant was indeed the last person to be seen with the deceased and whether there was any evidence connecting the Appellant to the death of the deceased, and urged that aside from knowing the Appellant, none of the prosecution witnesses identified and tied the Appellant to the cause of death of the deceased.
 7. Counsel observed that from the evidence of PW 1, it was not possible to know when the deceased left her house for the last time and whether the Appellant left with her, or whether the Appellant was the last person seen with the deceased. Further, it was unclear from the evidence of PW 1 whether the deceased's money was taken on 25th August 2018 or before; whether the communication of the threats was before or on the material day, and how the deceased could have seen PW 1 on the following day if she died on 25th August 2018 as alleged in the charge. The counsel noted that while it was trite law that a party is not required to call any specific number of witnesses to prove a fact under section 143



of the *Evidence Act*, the failure to call a crucial witness in this case was fatal, and reliance was placed on the case of *Bukenya vs Uganda* (1972) EA 549 and *Donald Majiwa Achilwa & 2 others vs Republic*, CR. App No. 34 of 2006 for the proposition that the Court may draw adverse inference from the prosecution's failure to call important and readily available witnesses, in cases where the evidence called by the prosecution was barely adequate.

8. In conclusion, it was Mr. Ole Kina's position that the facts as recorded presented a very weak case and the evidence adduced was not adequate to form the basis for a conviction on such a serious charge as murder. In addition, that the evidence did not exclude the possibility that any other party other than the Appellant could have murdered the deceased and reliance was placed on the decision in the case of *Joan Chebichii Sawa vs Republic* [2003] eKLR. Lastly, the counsel submitted that section 111 of the *Evidence Act* was not applicable, in view of the contradictions in the date of death, the date of the funeral and the day when the deceased was said to have seen PW1 to report the threats communicated to her by the Appellant before her death. Therefore, that the burden of proof had not shifted and the learned trial Judge was wrong to have concluded that the Appellant had to explain the death of the deceased.
9. In opposition to the appeal, Ms. Mutua submitted that there was circumstantial evidence that met the threshold to warrant the appellant's conviction and cited the case of *R vs Kipkering Arap Kosge* (1949) 16 EACA 135, and that the trial court, guided by *Abdalla Bin Wendo & Another vs R* (1953) 20 EACA warned itself of the dangers of conviction based on a single identifying witness; that the appellant's identification was proper. On the allegations of contradictory evidence, it was submitted that the testimony of the 3 prosecution witnesses was credible, cogent and pointed to the Appellant's guilt; that the appellant's defence did not shake the prosecution case.
10. As this is a first appeal, the duties of this Court are set out in the case of *Okeno vs. Republic* [1972] EA 32 as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [1958] E.A 424.”

11. An evaluation of the evidence adduced during the trial shows that there was no direct evidence linking the Appellant to the death of the deceased, and his conviction was solely based on the circumstantial evidence of a single identifying witness, namely PW1. The threshold for sustaining a conviction in a criminal trial on the basis of circumstantial evidence has been laid down in several authorities of this court. In *Abanga alias Onyango vs Republic*, CR. App No. 32 of 1990 (UR) it was 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.”

12. Likewise, this Court held as follows in *Sawe vs. Republic* [2003] KLR 364:

“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.”

13. The circumstantial evidence that linked the Appellant to the death of the deceased as narrated by PW1, was that the Appellant and deceased were in a relationship, the Appellant used to threaten the deceased and stole her money, and that PW1 last saw the deceased with the Appellant. On this basis the learned trial Judge invoked the criminal law doctrine of “last seen with”, namely that since the Appellant was the last person to be seen with the deceased and the deceased was later found dead, then he should explain her death. This Court (Makhandia, Mbogholi-Msagha & Omondi, JJA) explained the application of the doctrine of “last seen with” as follows in *Chiragu & Another vs Republic* (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR):

“24.....Regarding the doctrine of “last seen with” we will revert to Nigerian case of *Moses Jua V. The State* (2007) LPELR-CA/IL/42/2006. The court, while considering the ‘last seen alive with’ doctrine held:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

In yet another Nigerian case considering the same doctrine, in *Stephen Haruna v. The Attorney-General of The Federation* (2010) 1 iLAW/CA/A/86/C/2009 the court opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

Quoting from another jurisdiction, to be specific India, the courts there have developed the doctrine further. In the case of *Ramreddy Rajeshkhanna Reddy & Another v. State of Andhra Pradesh*, JT 2006

(4) SC 16 for instance the court held:

“That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that



possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

25. Locally, this doctrine has been invoked in the case of *Republic v EEK* [2018] eKLR...”

14. Therefore, for “the last seen with” doctrine to be applicable, there should be overwhelming circumstantial evidence and corroboration that exclusively links the accused person to the death of deceased both in terms of timing and cause. This was not the case in the present appeal. In particular, there were gaps in the evidence adduced by the prosecution as regards the date of the deceased’s death, with PW1 testifying that she saw the deceased a day after 25th August 2018, while PW3 testified that her body was found in the bush on 5th September 2018. It is thus not clear when the death of the deceased occurred, nor whether the Respondent was with the deceased at the actual time of her death, and how the death occurred.
15. In addition, there was no collaboration of the evidence of PW1, and from PW1’s and PW2’s version of events, there was a period when the whereabouts of the deceased and Appellant are unaccounted for, and therefore a break in the chain of events. PW1 testified that after seeing the deceased the day before the burial when she came to report that the Appellant had threatened her, that “She (the deceased) did not come to the burial, hence I did not see her. I came only to learn of her death. Her body was collected in the bush. The body was already decomposed. They accused was at Bamba-That is where he lives when not with the deceased”. PW2 on his part testified that on receiving the report that the deceased was missing, “I checked with PW1. She confirmed that the deceased has not been seen. PW1 stated that there was a boyfriend of hers whom they had a relationship”. PW1’s and PW2’s evidence was therefore incapable of definitively pointing to the Appellant as the person who caused the deceased’s death.
16. We therefore find that the circumstantial evidence relied upon by the prosecution was so weak and tenuous as to be unsafe to find a conviction, nor could it be the basis of the application of the “last seen with” doctrine. The trial Judge therefore erred in convicting the Appellant on the basis of insufficient evidence.
17. We accordingly allow the appeal, quash the conviction of the Appellant for the offence of murder, and set aside the sentence of thirty-five (35) years imprisonment imposed on the Appellant. The Appellant shall be set free forthwith unless otherwise lawfully held.
18. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY 2023

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

