



REPUBLIC OF KENYA



**Ndehi v Republic (Criminal Appeal 121 of 2020)
[2023] KECA 811 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 811 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 121 OF 2020
MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA
JULY 7, 2023**

BETWEEN

JAMES IRUNGU NDEHI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment of the High Court at Nairobi
(N.R.O. Ombija, J.) delivered on 5th March 2015 in HCCC No 89 of 2009)*

JUDGMENT

1. This is a first appeal from the judgment of the High Court delivered on March 5, 2015 where the appellant, James Irungu Ndehi was charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code.
2. The particulars of the information were that on the September 14, 2009 at Kamae sub-location in Kiambu West District of the former Central Province, he murdered Marion Waithera Irungu (the deceased).
3. The appellant pleaded not guilty and at the trial, the prosecution called 7 witnesses. The appellant was placed on his defence and gave sworn statement. Upon considering the evidence, the High Court convicted the appellant for the offence and sentenced him to death.
4. Aggrieved, the appellant filed this appeal, and in a supplementary memorandum of appeal the grounds were that; the learned judge failed to appreciate that the trial was unfair and grossly infringed on the tenets of the Constitution particularly articles 25, 27 and 50; in misapprehending the evidence, which rendered the appellant's conviction unsafe as the prosecution did not prove its case beyond reasonable doubt since malice aforethought was not established; in failing to consider the evidence objectively which violated section 107 of the Evidence Act; in failing to appreciate that the evidence of the prosecution witnesses was incredible, as they relied on hearsay and suspicion and that the



investigations were inconclusive; that the evidence of Cpl John Ngeno, PW7, was not admissible as he was below the rank of a Chief Inspector or Police Superintendent and he was neither an expert nor psychiatrist. The trial judge was further faulted for rejecting his defence which was plausible and remained un rebutted, and for meting out a harsh and excessive sentence which contravened article 50 (2) (p) of the Constitution.

5. Both the appellant and the respondent filed written submissions. When the appeal came up for hearing, learned counsel, Mr S.N Thuku appeared for the appellant. In highlighting the submissions, counsel stated that the trial judge failed to appreciate that after he was arrested, the appellant was detained in custody for 3 weeks before being presented in court and that no reason for the delay was provided; that as a consequence, his rights under article 50 (4) of the Constitution were violated.
6. It was further submitted that there was no evidence of his age and mental assessment was produced, and that the P3 form produced did not suffice as an age and mental assessment report; that further, the prosecution did not prove its case to the required standard and in particular, malice aforethought was not established; that the alleged defilement was not proved, and the trial judge wrongly relied on circumstantial evidence that did not point to the appellant as having been culpable for the offence. Counsel further submitted that the appellant's defence was not considered and that the court's findings were based on speculation and suspicion.
7. On the appellant's legal representation, counsel asserted that it was ineffective, since counsel on record did not cross examine the deceased's aunt, Dorcas Wangare, PW2, and there were no submissions on whether there was a case to answer.
8. With respect to the sentence imposed, it was submitted that it was unconstitutional, as the trial judge did not consider the mitigating factors such as whether he was mentally assessed.
9. In their submissions, Mr Muriithi, learned prosecution counsel for the state submitted that the prosecution proved all the ingredients of the offence of murder; that although the prosecution relied on circumstantial evidence, the evidence all pointed to the appellant as the perpetrator of the offence. It was submitted that, the appellant was living alone with the deceased in a two roomed house for 6 years after his wife died and his other children had relocated to live with other relatives; that the appellant gave contradictory account of the events of the night of 14th and September 15, 2009. It was submitted that he told the deceased's grandmother, Ruth Wangare, PW3, that the deceased had fallen down and died, and on the other hand he informed Simon Karanja Gicheha, PW4, the area Chief, that the deceased was unwell, and he had given her some pain killers.
10. Counsel contended that the trial court rightly found that, only the appellant could explain how the deceased who was well during the day having returned home from church, met her death, since they were living alone together; that the medical evidence on manual strangulation and possible defilement shortly before her death pointed to malice aforethought on the appellant's part.
11. On the violation of his rights for being unlawfully incarcerated and the harsh sentence, counsel submitted that the appellant was apprehended before the promulgation of the Constitution; that the investigation took some time to be completed, but even then, the appellant never raised the issue during the trial to enable the prosecution tender an explanation. Lastly, it was submitted, that the trial court imposed a mandatory sentence of death that was lawful and constitutional.



12. This being a first appeal, this court is mindful of its duty as a first appellate court. This duty was well articulated 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”
13. After adhering to the directives set out above, the issues that fall for this court’s determination, are namely;
- i) Whether the appellant’s rights under article 50 (4) were infringed;
 - ii) Whether the prosecution proved its case to the required standard, and whether malice aforethought was established;
 - iii) Whether the trial court took the appellant’s defence into account; and
 - iv) Whether the sentence was harsh and excessive.
14. We begin with the alleged violations of his rights under article 50 (4) of the [Constitution](#). First, the appellant alleged that he was detained in custody for more than three weeks before he was presented to court.
15. The record shows that the appellant was arrested on September 14, 2009, before the promulgation of the [Constitution](#) 2010. The retired Constitution, specified that a person arrested was required to be brought to court as soon as reasonably practicable and in any event within 14 days of his arrest, where he is arrested upon reasonable suspicion of his having committed an offence punishable by death. The appellant was brought to court on October 7, 2009 which was 23 days after he was arrested, a delay of 9 days.
16. As submitted by the respondent, this complaint was not raised in the trial court, so as to provide the prosecution an opportunity to explain the delay.
17. Having said that, this court has stated time without number that the mere fact that the appellant was not taken to court within the constitutional timelines does not vitiate the validity of the trial, unless it is demonstrated that the accused was prejudiced by the delay. The case of [Julius Kamau Mbugua v R](#) [2010] eKLR clarified that where an appellant is not produced in court within twenty-four hours, it would not lead to an automatic acquittal, but the appellant may be at liberty to seek damages in a civil action for the violation.
18. The appellant has not specified how and in what way he has been prejudiced, and if he has which he must demonstrate, he can always seek damages for such violation as he deems appropriate. There is no merit in this complaint, and we therefore dismiss it.
19. Second, the appellant complained, that he was taken for age and mental assessment without a court order. He challenged the production of P3 form that specified his age and provided an assessment of his mental status, which he contended was a violation of article 50 (4) of the [Constitution](#).



Article 50 (4) of the *Constitution* provides;

“Evidence obtained in a manner that violates any right or fundamental freedom in the bill of rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”

20. With respect to the alleged mental assessment, it is observed that the requirement of mental assessment though not founded on any law, is embraced as a practice. See *James Masomo Mbatia v Republic* [2015] eKLR.
21. The same could be said of an age assessment report. This would mean that the choice to undergo or not an age and mental assessments was upon the appellant to determine. He did not demonstrate that he declined to undergo the assessments or that they were undertaken without his consent.
22. But having said that, it is plain from article 50 (2) (j) that any evidence obtained in a manner that violates the rights or fundamental freedoms in the bill of rights shall be excluded, if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. We have considered the judgment, and find that at no point did the trial judge make reference to or rely on the impugned P3 form, to reach a determination of the issues before him, and neither was the appellant’s conviction based on the contents of the P3 form. In effect, the claim of infringement of his rights under article 50 (4) by his having to undergo an age and mental assessment is baseless, unfounded and without merit.
23. The final violation complained of was that, the legal representation he was accorded at trial by the counsel then on record was ineffective and hence adversely affected the findings of the trial judge
24. In the case of *Alloys Omondi Nanga v Republic* [2006] eKLR, where similar circumstances arose, the appellant there raised a constitutional complaint that the legal representation, he was accorded was below par. in addressing the issue, this court had this to say;

“In this case however, there is no material to support the constitutional issue raised. The record does not show that the appellant ever raised an objection in court or in writing to any of the two advocates or informed the court that he wanted to conduct his defence in person...In the circumstances of this case it is clear that the appellant neither rejected any of the two advocates assigned to conduct his defence nor informed the court that he intended to conduct his own defence in person. Instead, he acquiesced to the assignment of the two advocates to conduct his defence and benefited from the legal services for which the judiciary ultimately paid. In the above scenario, we do not find any substance in the constitutional issue raised.”

25. The record in the instant case is clear that the appellant did not at any point complain about the manner in which his counsel on record conducted his case, nor did he object to the quality of representation. He willingly acceded to the conduct of his defence by the advocates assigned to him, and the judiciary paid for his legal services. Having been a beneficiary of the legal services afforded to him, he cannot now be heard to say that they were wanting, this late in the day.
26. That said, we have considered the proceedings, and contrary to the appellant’s assertions, PW2 was cross examined by his counsel, and on case to answer, neither counsel for the prosecution nor the defence filed written submissions. This allegation is an afterthought and as such is dismissed.
27. The next issue was whether the prosecution evidence established the ingredients of the offence of murder. In order for the offence to be established, the prosecution must establish three elements. First,



- the death of the deceased and its cause must be established; secondly, that the death of the deceased was caused by an unlawful act or omission by the accused person; and finally, that the accused person committed the unlawful act or omission with malice aforethought.
28. So as to reach a determination of the issues raised, we require to set out the evidence, re-analyse it so as to reach our own independent conclusion.
 29. The evidence before the trial court was that; George Waireri Karinge (PW1), (George) recalled the events of September 15, 2009. At about 9.00 am, he was on his way to the local shopping centre when a group of women asked him for the cell-phone number of the area chief, Simeon Karanja. The ladies intended to report a murder. Instead of giving them the number, he called the chief on his mobile phone, and the chief acknowledged having already received the report of the death of the appellant's daughter. Shortly thereafter the chief visited the scene in the company of the women. They entered the house where the body was lying, and after viewing the body, the Chief locked the door of the house and left, entrusting the keys with one Macharia. The Chief asked George and the appellant to accompany him to Uplands Police Station. The appellant was detained at the Police Station, while some policemen, the Chief and George went back to the scene.
 30. George further stated that the child was a girl aged 9 years old, who had been living alone with the appellant after his wife had died.
 31. In cross examination, George confirmed that the appellant had other children who had gone to live with other relatives of his family, and that the deceased was not going to school. He stated that the appellant was well known to him.
 32. Dorcas Wangare, (PW2), an aunt to the deceased, attended the post- mortem of the deceased on the September 18, 2009, and identified the deceased's body. PW2 opined that the child could have been defiled and in the process passed on.
 33. The deceased's grandmother PW3, was informed by the appellant that the deceased had fallen down and subsequently died.
 34. The area Chief, PW4, was at home on September 15, 2009 when the appellant went to his house and informed him that his daughter died of an illness at 3.00 am in the morning. When he inquired as to the cause of death, the appellant told him that the deceased had been sick and he had administered pain killers; Maramoja, to her before her demise. The chief stated that he saw that the appellant was uneasy, as if he had something to hide; that he told him to inform the neighbours of the deceased's death. He stated that by that time, a crowd had gathered at the scene and were threatening to lynch the appellant. The police took the appellant away to station for his own safety.
 35. In cross examination, he confirmed that at the time of her death the deceased was staying with the appellant and that he did not see any sign of strangulation.
 36. Chief Inspector Ngetich Davies, (PW5), stationed at Uri Police Station booked a report of murder. He re-arrested the appellant. He accompanied the scenes of crime personnel and the area chief to the scene (the house of the appellant). Scenes of crime personnel took the sketch plan of the scene and photographs. Thereafter the body was taken to the City Mortuary to await post-mortem.
 37. After post-mortem the report was availed to him, and he found that it disclosed that the child died of strangulation in the course of defilement, he compiled a report, and the appellant was subsequently charged with the murder of the deceased.
 38. Dr Peter Muriuki Ndegwa, (PW6), a pathologist attached to the Department of Diagnostic and Forensic Services, Medico Legal Section recalled the events of September 18, 2009. While at the City



Mortuary, he performed a post-mortem examination on the body of the deceased. Thereafter, he formed the opinion that the cause of death was due to manual strangulation causing asphyxia with a possibility of defilement.

39. Internally, there were bruises on the left side of the neck and haemorrhaging resulting from lack of oxygen; that pressure seemed to have been exerted on the neck. He observed bruises on the vagina, in addition to blood-stains. A vaginal swab did not show that there were spermatozoa. He opined that this could be the result of use of a condom or withdrawal before ejaculation. He tendered the post mortem report in evidence.
40. Cpl John Ngeno, (PW7), attached to Lari Police Station produced a report by Dr Kamau that indicated that the age of the appellant was assessed at 63 years, and he was found mentally fit to stand trial.
41. In a sworn statement, the appellant testified that on September 14, 2009, while at his home in Kemae village, Lari, he went to the local church in the company of his daughter. They returned home after the service. At 9.00 pm, after supper, his daughter fell ill. He then went for medicine at the local shopping centre. He bought 2 tablets of Maramoja and 2 other tablets of medicine whose name he could not remember. The following morning, he tried to wake up the deceased, but in vain. He then reported the matter to the village elder who in turn reported the incident at Lari Police Station. Subsequently, he was detained at Uplands Police Station and eventually arraigned in court on allegations that he murdered his daughter. He denied the charge.
42. In the instant case, the fact of the deceased's death is not in dispute. The appellant reported to the chief that the deceased had died during the night, and the post-mortem report of Dr Ndegwa, PW 6 concluded that the deceased died from strangulation causing asphyxia with a possibility of defilement, as there were bruises in her external and internal genitalia. It is not in doubt therefore that the deceased died.
43. As to whether the appellant was responsible for the deceased's death, it is observed that the prosecution's case was grounded on circumstantial evidence that pointed to the appellant as the person who murdered the deceased.

In this regard, the learned judge had this to say;

“Against that backdrop of evidence, as to who strangled and possibly defiled the deceased, on the fateful night, was a fact particularly within the accused's knowledge. Only he could explain how the deceased who was well during the day, and even accompanied him to the local church for service, happened to have been strangled and defiled leading to her eventual death.

The accused sworn statement by way of his defence does not appear to me to discharge that burden put squarely on him under section 111 (1) of the *Evidence Act*... of proving circumstances which would exonerate him from blame. In doing so, I have not lost sight of the provisions of section 111 (2) of the *Evidence Act* ... which in effect provides that section 111(1) does not diminish the obligation of the prosecution to establish by evidence the commission of the offense charged. It is with this in mind, that I make a finding that the evidence against the accused is purely circumstantial. The inculpatory facts are inconsistent with the innocence of the accused and incapable of explanation on any other high posit purposes other than guilt”.

44. This court has variously laid out the principles to be applied to cases relying on circumstantial evidence to arrive at a conviction. They are that;



- a) the inculpatory facts must be incompatible with the innocence of the accused;
- b) they must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused;
- c) there must be no other co-existing circumstances weakening or destroying the inference; and
- d) every element of the unbroken chain of evidence to prove the case must be proved by the prosecution. See *Peter Mugambi v Republic* [2017] eKLR.

In the case of *Kariuki Karanja v R* [1986] KLR 190, this court explained the elements of circumstantial evidence thus;

“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts: *Rex v. Kipkering Arap Koske*, 16 EACA 135. An aggregation of separate facts inconclusive because they are as consistent with innocence as with guilt is not good enough evidence.”

45. Evidence adduced by George and PW4, the area chief was that the appellant lived with the deceased. This fact was also confirmed by the appellant himself. The area chief testified that the appellant informed him that when the deceased, his daughter was with him on the fateful night, she complained of a headache. He gave her a pain killer and that she did not wake up the next morning. The pathologist, Dr Ndegwa concluded that the deceased died from strangulation causing asphyxia and haemorrhaging resulting from lack of oxygen; that pressure seemed to have been exerted on the neck. He observed bruises on the vagina in addition to blood-stains. Essentially, the appellant was the last person to be with the deceased that night, and he ought to have explained how she came to be strangled and sexually assaulted.

Section 111 of the *Evidence Act* provides that;

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

46. The appellant did not provide any explanation as to how the deceased died. In his defence, he maintained that he was with the deceased, and that they were the only two people in the house. His defence was that the deceased had a headache and possibly died of an illness. He did not explain how she came to be strangled. He also did not offer any explanation as to why she had bruises on the left side of her neck. Our re-evaluation of the evidence of both the prosecution and the defence, would



lead us to conclude that the appellant strangled the deceased while sexually assaulting her. In our view, the circumstantial evidence when painstakingly considered, was sufficient to render the appellant as the perpetrator of the offence. The facts were incompatible with his innocence, and were incapable of explanation upon any hypothesis other than that of the appellant's guilt. Of significance, is that all the prosecution evidence pointed to the appellant as the person who murdered the deceased.

47. On the question of whether malice aforethought was proved, section 206 of the *Penal Code* defines "malice aforethought" as;

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."
48. The deceased died from strangulation whilst being sexually assaulted as is evident from the post mortem report. When he held the child's neck, causing her to haemorrhage due to lack of oxygen, clearly, the appellant intended to cause the death or grievous harm to the deceased. We find, as did the learned judge, that malice aforethought of the appellant was present and was proved beyond a reasonable doubt.
49. Having found as we have above, we are satisfied that the prosecution proved all the ingredients of the offence of murder and, that the High Court analysed the evidence, and rightly concluded that the appellant murdered the deceased. In the circumstances, we uphold the finding of conviction by the trial court.
50. With regard to the allegation that the High Court disregarded his defence, we have examined the judgment and find this assertion to be unjustified. This is because after considering his defence, the learned judge stated thus;

"The accused sworn statement by way of his defence does not appear to me to discharge that burden put squarely on him under section 111 (1) of the *Evidence Act* [cap 80] Laws of Kenya, of proving circumstances which would exonerate him from blame".

51. In other words, having interrogated the appellant's defence, the judge came to the conclusion that, since the appellant had not provided any evidence that would show how the deceased was strangled and possibly defiled, particularly as he admitted that he was with her alone in the house that night, his explanation was that she was sick and he gave her some medication did not relieve him from being the person who strangled her that night. Without any explanation, he remained the person who unlawfully strangled and killed her. In effect, the High Court considered his defence, as a consequence of which this ground fails.



52. The High Court sentenced the appellant to death. The appellant asserted that the sentence meted out was harsh and excessive. On the other hand, the respondent submitted that the appellant was given a chance to mitigate and that the sentence imposed was legal.
53. With respect to the appeal against sentence, the appellant argues with reference to the case of *Francis Karioko Muruatetu v Republic* [2017] eKLR that the “...judge sentenced the appellant herein to death as provided under section 204 of the *Penal Code* which provision of law was subsequently declared by the Supreme Court of Kenya by way of a judgment dated December 14, 2017 to be unconstitutional.”
54. At this juncture it is important to point out, that we have said time without number that the Supreme Court’s decision did not declare the death sentence to be unconstitutional. The Supreme Court was unequivocal that;
- “The mandatory nature of the death sentence as provided for under section 204 of the *Penal Code* is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under article 26 (3) of the *Constitution*.”
55. So that, the death sentence remains constitutional, and it is only the mandatory imposition that was rendered unconstitutional. The appellant was provided an opportunity to mitigate. Through his counsel Mr Waweru, he stated that he was a first offender, and pleaded for leniency. Having considered the facts of the case, and the appellant’s mitigation, the trial court ordered the death sentence.
56. Since the death sentence is constitutional, and in view of the heinous acts committed against the deceased by the very person entrusted with her care and well -being, her father, there being no further mitigation having been placed before this court, we have no reason to interfere with the sentence imposed, we dismiss the appeal against sentence.
57. In sum, the appeal is unmerited and is dismissed in its entirety.
- It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH 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

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

