



REPUBLIC OF KENYA



KENYA LAW
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**Kimani v Republic (Criminal Appeal 41 of 2022)
[2023] KECA 1390 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1390 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 41 OF 2022
AK MURGOR, PM GACHOKA & S OLE KANTAI, JJA
NOVEMBER 24, 2023**

BETWEEN

ERICK KIMEU KIMANI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi
(Lesit, J.) delivered on 31st May 2018 in HC.CR. A No. 113 of 2014)*

Threshold for circumstantial evidence to satisfy to establish guilt beyond a reasonable doubt

The appeal arose from the conviction and sentencing of Erick Kimeu Kimani for the murder of an 8-year-old girl, RAW, on August 21, 2014, in Kawaida village, Kiambu County. The appellant was last seen with the deceased, whose body was later found near his home. The prosecution relied on circumstantial evidence, including a threatening note linked to the appellant. The trial court convicted him and sentenced him to detention at the President's pleasure, considering he was a minor at the time. On appeal, the court upheld the conviction but substituted the sentence with a 20-year custodial term.

Reported by John Ribia

Criminal Law – murder – elements – doctrine of last seen alive – sentencing – sentencing a murder convict that was a minor at the time of the murder – where the murder was gruesome - what elements must the prosecution prove in a case of murder - what was scope and application of the doctrine of “last seen alive” as used in murder trials - whether the trial court erred in sentencing a person who was a minor at the time he committed murder to be held at the President's leisure - Penal Code (cap 63) sections 25(2), and (3), 20, 204, and 206; Children Act (cap 141) section 191.

Law of Evidence – circumstantial evidence – threshold that circumstantial evidence must satisfy to establish guilt beyond a reasonable doubt - what was the legal threshold that circumstantial evidence must satisfy to establish guilt beyond a reasonable doubt - Evidence Act (Cap 80) section 111.



Brief facts

The appellant was charged with the murder of RAW, an 8-year-old girl, on August 21, 2014, at Kawaida village in Kiambu County. On the material day, RAW and her 4-year-old brother were left under the care of their house-help, PW5. At around 9:30 a.m., the appellant visited their home to collect his younger brother, N. The appellant requested the house-help to allow RAW and her brother to accompany him to their home. Later, PW5 went to retrieve the children but found only the younger brother at the appellant's compound. The appellant claimed RAW had returned home, but this was untrue.

A search ensued, and RAW's body was discovered near the appellant's home later that day. A subsequent investigation revealed a threatening note pinned on the door of the appellant's family home, which the prosecution linked to the appellant through handwriting analysis.

The appellant's defense included claims of coercion by unidentified men, who allegedly forced him to write the note and threatened him into silence. The trial court, relying on circumstantial evidence, the doctrine of "last seen alive," and the appellant's inconsistent statements, found him guilty. Being a minor at the time of the offence, he was sentenced to detention at the President's pleasure. The appeal challenged both the conviction and the sentence.

Issues

- i. What elements must the prosecution prove in a case of murder?
- ii. What was the legal threshold that circumstantial evidence must satisfy to establish guilt beyond a reasonable doubt?
- iii. What was scope and application of the doctrine of "last seen alive" as used in murder trials?
- iv. Whether the trial court erred in sentencing a person who was a minor at the time he committed murder to be held at the President's leisure.

Held

1. The prosecution in a charge of murder had a singular task of proving the following three ingredients in order to secure a conviction:
 1. that the death occurred;
 2. that the death was caused by the unlawful act of commission or omission by the appellant; and
 3. that the appellant had malice aforethought as he committed the said act.
2. None of the prosecution witnesses actually saw or witnessed the appellant or indeed any other person kill the deceased. There was no direct evidence linking the appellant to the death of the deceased. The prosecution's case on that aspect was hinged on circumstantial evidence. Circumstantial evidence must satisfy three tests:
 1. the circumstances from which an inference of guilt was sought to be drawn, must be cogently and firmly established;
 2. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
 3. the circumstances taken cumulatively, should form a chain so complete that there was no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.
3. The burden of proof in a criminal case never shifts to an accused person. The evidence of the appellant and the statements under inquiry kept mutating from one scenario to another. At first, the appellant denied recognizing the writing in the threatening message in the note and stated he could only recognize the paper which he had given to PW5. However, upon cross-examination, he admitted writing the note. He stated that during the morning period, he had escorted three men who had attended prayers in the deceased's home and that he was taken to a public ground where he was forced to copy the note in his own handwriting. The appellant could not answer he never informed anyone, including his father,



- PW7 about the incident. That was more significant since he stated that the three men told him not to close the main door of their house that night.
4. The admissions in the statements were not confessions for which sections 24 to 29 of the Evidence Act would come into play. The guilt or otherwise of the appellant would depend on whether the chain of events on the material day cogently and firmly established an inference of guilt against him and that the circumstances taken commutatively form a complete chain, such that there was no escape from the conclusion that the appellant committed the murder and no one else.
 5. It was the appellant who caused the death of the deceased and that the trial court properly applied the doctrine of 'last seen'. The doctrine of 'last seen alive' was based on circumstantial evidence where the law prescribed that the person last seen with the deceased before their death was responsible for his or her death and the accused was expected to provide an explanation as to what happened.
 6. The appellant picked the deceased and her brother, together with his own brother on the material day. He was the last person to be seen with the deceased. The body was recovered in their compound hours later. There was no break in the chain as PW5 went to the home of the appellant 30 minutes after he picked up the three children. Two of the children were in the appellant's home, despite his allegation that even the other child, T was not there when indeed PW5 could see T in the compound. He also did not justify why he lied to PW5 about the deceased and her brother, having gone to mama Wanja's place because that turned out not to be true. Concomitantly, he did not explain away the reason why, when he asked PW4 about the whereabouts of his brother and PW4 pointed in the direction of his brother, he took the opposite direction. Whereas the burden to prove the case rested entirely on the prosecution, the explanation given by the appellant as to what happened after he took the deceased was full of gaps and contradictions and being the last person seen with her he had a duty to give a proper explanation, in the terms spelt out by section 111 of the Evidence Act.
 7. The chain of events that pointed to the guilt of the appellant was strengthened by the recovery of the threatening note in their family house. Though he initially denied writing the note, he later changed the story and stated that he was threatened by three strange men. The appellant wrote the threatening note boasting about the murder of the deceased and this was confirmed by the PW8 the handwriting expert.
 8. The trial court was justified in drawing the inference that it was the appellant who killed the deceased. The deceased's mutating statements that he was shown the dead body by three strange men who threatened him; that he was forced to smoke cannabis sativa; that strange men gave him the threatening note to copy, and told him to ensure that the main door of their house was not locked on the material night; and that he never told anyone about them due to fear could not, by any stretch of argument, be deemed to be a proper explanation. The circumstantial evidence relied on by the prosecution met the threshold, and therefore, the trial court was right to convict the appellant on the evidence.
 9. The appellant was aware that the assault to the deceased could result in grievous harm or lead to death. The post-mortem report that was produced by PW8 noted ligature impressions around the neck; a thorough penetrating stab wound from the left to right side of the neck; the body was soiled and there were bruises behind the left ear; there was blood oozing from the left ear; internally there were severe blood vessels; there were subterraneous contusions on the left temporal scalp; depressed feature of left temporal bone; and fractured base of the skull with intracranial hemorrhage. Considering the horrendous injuries that were inflicted on an 8½-year-old girl, there was no doubt that the appellant knew or ought to have known that such injuries would cause death or grievous harm to the deceased and the argument that malice aforethought was not proved was nothing but a desperate attempt to clutch at straws. In the eyes of the law, the appellant assaulted the deceased with malice aforethought.
 10. The appellant was a minor at the inception of the case and the court had to bear that in mind when it came to sentencing. However, it did not take away the gravity of offence and the repercussions of his actions to the family of the deceased and to society at large, which still lingered on.



Appeal dismissed.

Orders

The sentence that the appellant was to serve at the President's pleasure was substituted with a sentence of 20 years that was to run from the date of conviction.

Citations

Cases

Kenya

1. *Abanga Alias Onyango v Republic* Criminal Appeal No 32 of 1990 - (Explained)
2. *Abmad Abolfathi Mohammed & another v Republic* Criminal Appeal 135 of 2016; [2018] KECA 743 (KLR) - (Explained)
3. *DOO v Republic* Criminal Appeal No 52 of 2015; [2019] KECA 416 (KLR) - (Explained)
4. *Ekaita, Nebart v Republic* Criminal Appeal 25 of 1994; [1994] KECA 107 (KLR) - (Explained)
5. *Gacheru, Bernard Kimani v Republic* Criminal Appeal 188 of 2000; [2002] KECA 94 (KLR) - (Applied)
6. *JMK v Republic* Criminal Appeal 24 of 2014; [2015] KEHC 3239 (KLR) - (Explained)
7. *Katana & another v Republic* Criminal Appeal 8 of 2019; [2022] KECA 1160 (KLR) - (Followed)
8. *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR) - (Followed)
9. *Njuguna, Richard Mwaura & another v Republic* Criminal Appeal 103 of 2013; [2019] KECA 1022 (KLR) - (Followed)
10. *Nyambura & others v Republic* Criminal Appeal 35 of 2000; [2000] KECA 144 (KLR); [2001] KLR 355 - (Applied)
11. *Onzere v Republic* Criminal Appeal 166 of 2016; [2023] KECA 643 (KLR) - (Explained)
12. *Sawe v Republic* Criminal Appeal 2 of 2002; [2003] KECA 182 (KLR); [2003] KLR 364 - (Explained)

Nigeria

Achie v State (1993) - (Applied)

Ismeni v State (2011) - (Followed)

Regional Court

Okeno v Republic [1972] EA - (Applied)

Statutes

Kenya

1. Children Act (cap 141) section 191- (Interpreted)
2. Evidence Act (cap 80) sections 24, 29, 111- (Interpreted)
3. Penal Code (cap 63) sections 25(2)(3); 203; 204; 206- (Interpreted)

Advocates

Mr. Kimanthi for the respondent

JUDGMENT

1. This is a first appeal against the appellant's conviction and sentence for the offence of murder, contrary to section 203 as read with section 204 of the *Penal Code*. As such, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial court with a view to reaching its own independent determination on whether or not to uphold the conviction and sentence of the trial court. See *Okeno v Republic* [1972] EA



2. Bearing in mind the foregoing, it would be apt to set out a brief background of the facts leading to this appeal. Eric Kimeu Kimani the appellant, was charged before the High Court with the offence of murder the particulars being that on August 21, 2014 at Kawaida village in Kiambu, within Kiambu County he murdered RAW, the deceased (a minor aged 8 years).
3. The appellant pleaded not guilty to the charge and the matter proceeded to trial where the prosecution called 12 witnesses. The appellant was placed on his defence, and upon considering the evidence, the trial judge convicted him for the offence of murder and sentenced him to be detained at the President's pleasure and that the case be brought to the attention of the President every 3 years.
4. PW1, JWG, the mother to the deceased lived with her family in Kawaida village, in Kiambu County. On August 21, 2013, she together with her husband left home for work at around 8.30 am. She left her two children RAW aged 8 ½ years and T aged 4½ years with their house girl, Gladys Chemutai (PW5). At around midday, PW5 called PW1 informing her that the appellant had picked up the deceased earlier in the morning and that the deceased was missing. She then called her husband and informed him of the disappearance of the deceased. She rushed home and after a search in the neighbouring plots that took hours, she heard women screaming and she fainted. Later she was informed that RAW was dead.
5. PW2, KWK, a minor then aged 12 years was the one who saw the body of the deceased as she was throwing rubbish into a pit. She called (PW3) who identified the body as that of the deceased.
6. PW3, MWN, then aged 13 years is a sister to the appellant. On the material day, she had gone for tuition and on returning home, she was informed by her friends that a child was missing. PW2 went to their house and requested that they go and look for the deceased, but their mother requested that they sweep the compound first. As PW2 was throwing away the rubbish, she screamed and said that there was a body near the fence.
7. PW4, Stephen Maina Wambui, was a next-door neighbour to the appellant. His evidence was that on the material day, he was standing outside his sister's gate when the appellant came out of the gate of their home. He asked him whether he had seen his brother N, to which he pointed in the direction he had seen N take with T (the deceased's younger brother). He stated that he was surprised as the appellant did not go in the direction that he had pointed but instead went in the opposite direction.
8. The prosecution's case was majorly anchored on the evidence of PW5, the house help who had been left with the children by PW1. It was her evidence that on the material day, N the younger brother of the appellant visited the deceased and T at around 8.30 am. The 3 children stayed together and at around 9.30 AM, the appellant went to the deceased's home to pick his younger brother and return to their home. N refused to go and the appellant requested that the deceased and her brother, T accompany them and she agreed. After 30 minutes, PW5 went to the home of the appellant to pick up the deceased and his brother. She did not find the deceased and was startled when the appellant asked her whether the deceased had returned home. She was surprised by this statement as the appellant is the one who picked the children and T, the younger brother to the deceased was still inside the appellant's compound. She then took T and they started looking for the deceased.
9. PW6 Ibrahim Kimani Wainaina, stated that the deceased and her family were members of his church. He added that he knew the appellant, together with his brother and mother as they were members of his church. It was his evidence that on August 21, 2013 at around 5.00 pm, he received a call from one Wakahoyo who told him to hurry home. He did and found people gathered near the appellant's home. He inquired about what had happened and was informed that a child had been thrown into a pit. He recognized the body of the deceased, with no visible injuries but there was blood on her face. A few days later, on August 25, 2014, the appellant's father informed him that he had found a paper



- pinned on his door, that contained a threatening message. Together with PW7, they called the police and chief, who came and collected the threatening notice.
10. PW7 David Kimani Njihia is the father to the appellant, who is his second-born child. It was his evidence that on the morning of August 24, 2014, he found a note that had been posted on the main door of their house. The note had a threatening message with a detailed explanation of what happened to the deceased and the motive behind the perpetrators' actions.
 11. PW8 Daniel Ngutu, Chief Inspector of police was the document examiner. It was his evidence that the threatening note was written by the appellant. PW9 is the police officer who took photographs of the body at the scene of the crime. PW10, CWN, is the one who identified the body for post mortem.
 12. PW11, Benson Okose, a police officer, was working at Karuri police station at the material time. He collected the threatening note and took samples of the handwriting that were later forwarded to the document examiner.
 13. PW12, Dr. Peter Ndegwa, is the pathologist who performed the post mortem. He formed the opinion that the cause of death was ligature strangulation neck injuries due to sharp force trauma and head injuries due to blunt force trauma.
 14. Upon considering the evidence, the trial judge put the appellant on his defence. In his sworn evidence, he stated that the deceased and his brother T had been sent by PW5 to get a charger from him, which he gave them. The two together with his brother, went to the home of the deceased. He stated that after some time, he went to the home of the deceased to get the charger and he saw PW5 running towards the gate crying. He went back home and later PW5 went to their home and asked him to help in tracing the deceased.
 15. He further testified that when he returned home, he saw three men who he did not know, in their compound. They held him and took him to a neighbouring plot, showed him the body of the deceased and informed him that they had killed her. They then forced him to smoke cannabis and threatened him not to say anything about the incident. He admitted that he never told anyone about the incident with the three men. After some time, the body of the deceased was discovered. He admitted to writing three statements under inquiry. Regarding the threatening note, he stated that it was the three men who produced a paper with writings and then forced him to write the threatening message on a piece of paper. In cross-examination, he admitted that the writings in the note and the specimen writing were the same. He finally stated that his three statements under inquiry were conflicting as he was confused and fearful when he was writing them.
 16. The trial court having carefully considered the evidence by both the prosecution and the defence was persuaded that the appellant committed the offence. Accordingly, it convicted the appellant. On sentence, the court noted that the appellant was between 15 and 16 years old of age at the time he committed the offence and therefore a child within the meaning of section 191 of the *Children's Act*. Accordingly, the trial court ordered that the appellant be detained at the President's pleasure and that the case be brought to the attention of the President every 3 years.
 17. Aggrieved by the conviction and sentence, the appellant lodged the appeal on grounds that:
 - i. The trial Judge erred in law and fact by failing to analyze and evaluate the entire evidence;
 - ii. The trial court relied on uncorroborated evidence;



- iii. The investigations were shoddy and the role of PW5 in the murder was not investigated;
 - iv. The evidence by the appellant was rejected without any plausible reason and the mitigating factors were not considered; and
 - v. Whether the sentence was lawful.
18. We have carefully considered the record of appeal, submissions by counsel and the law. The grounds of appeal can be collapsed into three thematic areas: whether the prosecution proved the ingredients of the offence of murder beyond reasonable doubt against the appellant; whether the circumstantial evidence adduced was sufficient to sustain the conviction against the appellant; and whether the sentence was lawful.
19. We will consider the first two issues together. It is old hat that the prosecution in a charge of murder has a singular task of proving the following three ingredients in order to secure a conviction: that the death occurred; that the death was caused by the unlawful act of commission or omission by the appellant; and that the appellant had malice aforethought as he committed the said act. See *Nyambura & Others vs. Republic* [2001] KLR 355.
20. As to the death of the deceased, we agree with the trial court's finding and the submission by the respondent that there is no dispute that the deceased was murdered. There was sufficient evidence to that effect. On the fateful morning the deceased, an 8-year-old girl was bubbling with life. She and her brother were picked by the appellant together with his younger brother N to accompany him to their house. Hours later, the body of the deceased was found near the home of the appellant. Save for who caused the death, all the witnesses agree that the deceased's body was recovered after a search that was conducted after she went missing. The death of the deceased was corroborated by the production of the post mortem report by PW12, Dr. Ndegwa Peter. The report confirmed the death, which in his opinion was caused by ligature strangulation neck injuries due to sharp force trauma and head injuries due to blunt force trauma. Indeed, the appellant himself confirmed the death of the deceased, only that he denied being responsible.
21. The elephant in the room is whether it was the appellant who was responsible for the death of the deceased. Alternatively, the big question is, did the prosecution prove beyond reasonable doubt that it was the appellant and nobody else who committed the unlawful act that led to the death of the deceased? From the evidence tendered before the trial court, it is common ground that none of the prosecution witnesses actually saw or witnessed the appellant or indeed any other person kill the deceased. Thus, there was no direct evidence linking the appellant to the death of the deceased. The prosecution's case on this aspect is hinged on circumstantial evidence. In the case of *Abmad Abolfathi Mohammed & another vs. Republic* [2018] eKLR, this court had this to say on circumstantial evidence:
- “However, it is altruism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence. Way back in 1928 Lord Heward, CJ, stated as follows on circumstantial evidence in *R v. Taylor, Weaver & Donovan* [1928] CR App R 21:
- “It has been said that the evidence against applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by intensified examination is capable of



proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that it is circumstantial.”

22. Further, the principles for reliance on circumstantial evidence to sustain a conviction in any criminal trial have been laid down in several authorities of this Court. In *Abanga Alias Onyango vs. Republic*, Cr Appeal No 32 of 1990 (UR), this Court held as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”

This court amplified the above position in the case of *Sawe vs. Republic* [2003] KLR 364 thus:

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

23. Bearing the said principles in mind, the question that begs for an answer is; what was the circumstantial evidence that linked the appellant to the offence? First, there is the evidence of PW5, the house help employed by PW1. On the material day, PW1, the mother of the deceased left for work in the morning, together with her husband. They left the deceased and his younger brother, T under the care of PW5. According to PW5, N, the appellant’s brother aged 3 years went to the house of PW1 that morning and the three children started playing together. She further testified that at about 9.30am, the appellant went to pick his brother N, but N started crying and the appellant requested PW5 to allow the deceased and his brother T, to accompany N to their house. After an hour, PW5 went to pick the deceased and T so that they could return home. On reaching the appellant’s home, the appellant opened the gate and immediately asked whether the deceased had returned home. PW5 testified that she was surprised by that question as it was the appellant who had picked the three children. The appellant then stated that the deceased and her brother T did not stay and that they had left saying that they were going to the home of a lady known as mama Keziah. It is significant to note that PW5 testified that this statement surprised her as the appellant was with N and the deceased’s brother, T. PW5 then picked T and they went to mama Keziah’s home but they were informed that the deceased had not been there. At this point, it is also significant to ask the question why the appellant stated that the deceased had left together with her brother T, yet he was together with T and N and he is the one who picked all three children?
24. What followed after the disappearance of the deceased was a fervent search for the deceased as narrated by the witnesses. One significant piece of evidence that points to the behaviour of the appellant on that



- day was given by PW4, who was a next door neighbor. His evidence was that at about 11.30AM, he was standing outside their gate when the appellant came out of their gate. The appellant asked PW4 whether he had seen his brother N. PW4 pointed in the direction that N had taken, but he was startled to see the appellant walk in the opposite direction.
25. The events surrounding the death of the deceased would unfold further a few days later. A threatening note, pinned on the main door of the appellant's house was discovered by PW7 (the appellant's father). The note read as follows:
- “Hahaha what a surprising thing we did to that girl. Tumekula shida sana na mama yake. But surprising Tulimuona mtoi wa kwana. Na tukamuua, tukambeba na ngunia. Tukamtupa kwa shamba hiyo. So their problem is solved. Tulimpitia kwa boma ya mangurue. Now the problem ni nyinyi familia ya daktari. Tumekuwa na shida pia na nyinyi kwa muda. So if you do love your wife and your loved ones hameni Kawaida na murudi kwenu Banana ama muhame Kiambu County. Koseni by Friday and we will do to you what we did to the little girl or will burn you alive. Do not worry how we assessed your house fail to do so you will face the consequence. We killed her near Wakajuri's home.”
26. PW7, upon seeing the contents of the note, summoned the father of the deceased and PW6 and they all agreed to report the matter to the police. The threatening note was collected by PW11 the investigating officer, who also took specimen handwriting from the appellant and his mother. Upon examination, the handwriting expert PW8, formed an opinion that the handwriting on the note matched the handwriting of the appellant.
27. The burden of proof in a criminal case never shifts to an accused person. That said, it is important to also note that one of the grounds of appeal is that the trial judge rejected the plausible defence without any explanation. As noted by the trial court, the evidence of the appellant and the statements under inquiry kept mutating from one scenario to another. At first, the appellant denied recognizing the writing in the threatening message in the note (Exhibit No. 2) and stated he could only recognize the paper which he had given to PW5. However, upon cross-examination, he admitted writing the note. He stated that during the morning period, he had escorted three men who had attended prayers in the deceased's home and that he was taken to a public ground where he was forced to copy the note in his own handwriting. The question that immediately comes to mind is why the appellant never informed anyone, including his father, PW7 about this incident. This is more significant since he stated that the three men told him not to close the main door of their house that night.
28. His further defence was that it was PW5 who took the deceased and that later he went to pick up his charger from PW5 who he found crying saying that the deceased was missing. According to the appellant, he returned home at about 12 pm, and found 3 men who were strangers to him, who escorted him and showed him the body of raw. The men then forced him to smoke cannabis before warning him of serious consequences if he told anyone. According to the appellant, he went out of their compound and upon returning, he found a huge crowd behind his house where the body had been found.
29. It is also important to note that the appellant produced in evidence three statements that he recorded with the police. The first one is the statement under inquiry dated August 22, 2014, the second is dated August 29, 2014 and the third is dated October 6, 2014. The appellant stated that the statements were not tallying as he was confused when writing them and that he was afraid of saying anything that would make the murderers go after him.



30. We note that the admissions in the statements were not confessions for which sections 24 to 29 of the *Evidence Act* would come into play. Ultimately, the guilt or otherwise of the appellant would depend on whether the chain of events on the material day cogently and firmly established an inference of guilt against him and that the circumstances taken commutatively form a complete chain, such that there is no escape from the conclusion that the appellant committed the murder and no one else.
31. Having analyzed the evidence above, we are in agreement that indeed, it was the appellant who caused the death of the deceased and that the trial court properly applied the doctrine of ‘last seen’. The doctrine of ‘last seen alive’ is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before their death was responsible for his or her death and the accused is expected to provide an explanation as to what happened. In the instant case, the appellant picked the deceased and her brother, together with his own brother on the material day. He was the last person to be seen with the deceased. The body was recovered in their compound hours later. There is no break in the chain as PW5 went to the home of the appellant 30 minutes after he picked up the three children. Two of the children were in the appellant’s home, despite his allegation that even the other child, T was not there when indeed PW5 could see T in the compound. He also did not justify why he lied to PW5 about the deceased and her brother, having gone to mama Wanja’s place because this turned out not to be true. Concomitantly, he did not explain away the reason why, when he asked PW4 about the whereabouts of his brother and PW4 pointed in the direction of his brother, he took the opposite direction. Whereas the burden to prove the case rests entirely on the prosecution, the explanation given by the appellant as to what happened after he took the deceased is full of gaps and contradictions and being the last person seen with her he had a duty to give a proper explanation, in the terms spelt out by section 111 of the *Evidence Act*.
32. The chain of events that points to the guilt of the appellant is strengthened by the recovery of the threatening note in their family house. Though he initially denied writing the note, he later changed the story and stated that he was threatened by three strange men. It is not in doubt that he wrote the threatening note boasting about the murder of the deceased and this was confirmed by the PW8 the handwriting expert.
33. In the Nigerian case of *Achie vs State* (1993), the court relied on the case of *Ismeni vs State* (2011) Kuktan JSC on the doctrine of ‘last seen’ and expressed itself as follows:
- “In a case of culpable homicide as in the present one where the doctrine of last seen has been applied, the law presumes that the person last seen with the deceased before the death was responsible for his death and the accused is expected to provide an explanation of what happened.”
- In the absence of any explanation by the defendant as to how the deceased met his death, the court can allow an inference that the defendant killed the deceased.”
34. In light of these facts and in the absence of a satisfactory explanation by the appellant, the trial court was justified in drawing the inference that it was the appellant who killed the deceased. The deceased’s mutating statements that he was shown the dead body by three strange men who threatened him; that he was forced to smoke cannabis sativa; that strange men gave him the threatening note to copy, and told him to ensure that the main door of their house was not locked on the material night; and that he never told anyone about them due to fear cannot, by any stretch of argument, be deemed to be a proper explanation. Contrary to the submissions by the appellant, the circumstantial evidence relied on by the prosecution met the threshold, and therefore, the trial court was right to convict the appellant on the evidence.



35. How about malice aforethought? The answer to this issue lies in section 206 of the *Penal Code* which provides in the relevant part:

“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.”

This court has construed this provision in numerous cases including *Ekaita v Republic* [1994] eKLR 225, where it was held that:

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

36. Having considered the entire record and examined the evidence as a whole minutely and exhaustively, we have come to the conclusion that the appellant was aware that the assault to the deceased could result in grievous harm or lead to death. The postmortem report that was produced by PW8 noted ligature impressions around the neck; a thorough penetrating stab wound from the left to right side of the neck; the body was soiled and there were bruises behind the left ear; there was blood oozing from the left ear; internally there were severe blood vessels; there were subterraneous contusions on the left temporal scalp; depressed feature of left temporal bone; and fractured base of the skull with intracranial hemorrhage.
37. Considering the horrendous injuries that were inflicted on an 8½-year-old girl, there is no doubt that the appellant knew or ought to have known that such injuries would cause death or grievous harm to the deceased and the argument that malice aforethought was not proved is nothing but a desperate attempt to clutch at straws. We are satisfied that in the eyes of the law, the appellant assaulted the deceased with malice aforethought.
38. On the question on sentence, we note that the only ground that was adduced was that the trial judge erred by failing to consider the mitigating factors that were addressed by the defence. The appellant submitted that the sentence was unlawful as the case was not proved beyond reasonable doubt and cited the case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR. The appellant also relied on the often quoted case of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR that held that in sentencing, a trial court has discretion to consider the mitigating circumstances and impose the appropriate sentence. In response to this ground on sentence, Mr. Kimanhi for the State agreed with the appellant. He submitted the sentence passed under section 25(2) and 25(3) of the *Penal Code* is unconstitutional as it takes away the discretion of the court. He argued that sentencing is part of the judicial function and it should not be ceded to the executive.



39. We have considered the parties' submissions on this issue. As already noted, the only ground on sentence was framed as follows;

“The learned judge erred both in law and in fact in failing to consider the mitigating factors tabled by the defence.”

40. It is clear that this ground of the unconstitutionality of the sentence has been raised for the first time in the submissions. We have perused the record and note that even in the High Court, save for relying on the *Muruatetu case* (*supra*), the appellant did not challenge the unconstitutionality of sections 25(2) and 25(3) of the *Penal Code*.

41. The question of whether an appellant can raise an issue of constitutionality of a section of the law has been the subject of decisions in this court; in *Katana & another vs. Republic* (Criminal Appeal 8 of 2019) [2022] KECA 1160 (KLR), this Court differently constituted held that the appellant having failed to raise the issue in the High Court, the issue could not be addressed by this court on appeal. Similarly, in the case of *Onzere vs. Republic* (Criminal Appeal No. 166 of 2016) [2023] KECA 643 (KLR), this court stated as follows:

“32. Though we have gone into this jurisprudential terrain to clarify what we believe is the correct jurisprudential posture and impact of *Muruatetu 1* and *Muruatetu 2*, we must, without relish, find that the appeal in the present case does not come within our remit in order to determine if *Muruatetu 1* can analogously apply to it. This is because the appellant did not raise the constitutional issue in the High Court in order to preserve it for determination before us. We are, therefore, precluded from latching on to this constitutional issue on second appeal. To do otherwise will be to assume jurisdiction we do not have. In an appropriate case where the constitutional issue is preserved and appropriately raised, this court would be entitled to analogously apply *Muruatetu 1* to the facts of the case.”

42. This being a first appeal, both points of law and fact fall for our consideration. The appellant in this appeal raises an issue on the legality of the sentence that was meted, which is a point of law. Therefore, without delving into the constitutionality or otherwise of section 25(2) and 25(3) of the *Penal Code*, we shall only confine ourselves onto the legality of the sentence that was imposed.

43. On the legality of the sentence, the court has had occasion to consider the appropriate sentence for a child convicted of murder. In *DOO vs. Republic* [2019] eKLR, the court placing reliance on the holding in *Richard Mwaura Njuguna & another vs. Republic* [2019] eKLR observed thus:

“It is worth mentioning that this court as well as the High Court have come across similar situations as the case before us, where the offender in question was a minor during the commission of the offence in issue but later attained the age of majority during sentencing. A case in point is the High Court case of *Daniel Langat Kiprotich vs. State* [2018] eKLR wherein the petitioner therein had challenged the death penalty meted out to him on account of the offence of robbery with violence on the ground that during the commission of the offence he was a minor. Ngugi, J. expressed the dilemma faced by courts in such situations. He expressed:

“This often creates a dilemma for trial courts which may be faced with a juvenile who is only slightly below eighteen years old but who committed a serious offence



such as (depraved heart) murder or rape or particularly vicious armed robbery. Since the statutory scheme provides that such a child cannot be sent to prison and since the law further provides that such a child can only be sent to a borstal institution for no more than three years, the options are limited to trial courts even where on analysis and evidence such a court might be persuaded that the almost-adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or her errors.

A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particularly vicious or serious one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn.”

44. This court in the case of *JMK v Republic* [2015] eKLR had observed as follows:

“...A critical issue in this appeal relates to the appropriate sentence for a minor who has been convicted of murder. At the time of the offence, the appellant was a minor 16 years of age. The offence of murder attracts a mandatory death sentence. In of Nyeri Criminal Appeal No. 118 2011 (*JKK - v- R*, (2013) eKLR, this court had an opportunity to consider the appropriate punishment for a minor offender. The Court stated that the offence of murder committed by the minor appellant was serious and an innocent life was lost. The appellant though a minor at the time of the offence was to serve a custodial sentence so that he could be brought to bear the weight and responsibility of his omission or lack of judgment. The court expressed that the appellant who was now of age of majority could not be released to society before being helped to understand the consequences of his mistakes. (See also *Republic - v- SAO, (a minor)* [2004] eKLR and Nyeri Criminal Appeal No 184 of 2009, *Dennis Kirui Cheruiyot v R*).

The court went further and held that:

“The appellant in this case was not found to be of unsound mind to be detained at the pleasure of the President. No legal provision was cited to us to support the order that if a minor offender is found guilty of murder he should be detained at the pleasure of the President. Due to the gravity of the offence and the current age of the appellant, he cannot be released to society. The *Children Act* prohibits a death sentence to a child offender, life sentence is also not provided for; we, therefore, allow the appeal to the extent that we substitute the order directing the appellant to be detained at the pleasure of the President with a custodial term of imprisonment for 10 years from the date of conviction by the trial court on May 5, 2011. We have considered this custodial sentence as appropriate to give time to the prison authorities and perhaps the probation department to take the appellant through the rigours of coming into terms with his mistake and poor judgment which have consequences such a loss of liberty.”

45. The appellant was a minor at the inception of the case and the court has to bear this in mind when it comes to sentencing. However, it does not take away the gravity of offence and the repercussions of his actions to the family of the deceased and to society at large, which still linger on.



- 46. Guided by the authorities above, we are inclined to impose a sentence of 20 years' imprisonment which we think is commensurate with the appellant's culpability.
- 47. In conclusion, save for interfering with the sentence, we find that this appeal has no merit and we dismiss it save that the sentence to serve at the president's pleasure is substituted with a sentence of 20 years that shall run from the date of conviction.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

Deputy Registrar

