



**MMM v Republic (Criminal Appeal 61 of 2016)  
[2022] KECA 1055 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1055 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 61 OF 2016  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
OCTOBER 7, 2022**

**BETWEEN**

**MMM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Malindi (Meoli J.)  
delivered on 11th September 2014 in Malindi High Court Criminal Case No. 29 of 2012)*

**JUDGMENT**

1. MMM, the appellant herein, was charged with the murder of SW(hereinafter “the deceased”) on November 7, 2012 at Kauthara Hindi Division of Lamu County. Upon an age assessment report received by the High Court on February 15, 2013 that showed that the Appellant was 16 years of age at the time, a trial was conducted by the said Court after he pleaded not guilty to the charge. The Appellant was subsequently convicted for the offence of murder and sentenced to be detained at Presidential pleasure under section 25 of the *Penal Code*.
2. Being dissatisfied with the said conviction and sentence, the appellant proffered this appeal by way of an undated notice of appeal and a memorandum of appeal dated January 26, 2022. The appellant faults the trial judge for failing to consider that the circumstantial evidence did not point to the Appellant only or prove his guilt beyond reasonable doubt; for failing to consider the contradictions in the prosecution’s evidence and apply them in favour of the appellant and finally, by sentencing the appellant on presidential pleasure, which was unconstitutional, and did not give the Appellant time to reform.
3. The appeal was canvassed during a virtual hearing held on May 30, 2022 in which the Appellant was present. Learned counsel, Ms. Nzamba, appeared for the Appellant, and relied on her written submissions filed and dated February 1, 2022, while learned prosecution counsel, Mr. Jami Yamina



appeared for the Respondent, and likewise relied on his written submissions dated January 20, 2022. As this is a first appeal, the duties of this Court are set out in the case of *Okeno v 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 v 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 v 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 v Sunday Post* [1958] E.A 424.”

4. The key elements of the offence of murder as set out in section 203 of the *Penal Code* are the causing of death of another person by an unlawful act or omission, and with malice aforethought. The prosecution in this regard called eleven witnesses who adduced evidence in the High Court in proof of its case. On the fact of the deceased’s death, Francis Mbugua Ndungu (PW2), Peter Gitau Ngure (PW4), Virginia Nyambura (PW5), Esther Wambui Ngure (PW6), Theresia Muthoni (PW 7) and PC Henry Mwenda (PW 9), a police officer based at Mokowe police post, West Lamu, testified that they joined in the search for the deceased on 7<sup>th</sup> November 2012, after receiving reports that she was missing from her home; that they were informed that the deceased’s body had been found in the shamba (garden) of a neighbour known as Thuo; and that they went to the scene, where they saw the deceased’s naked body on the ground. They also testified that the deceased’s dress was a short distance away from the body, and that some strings from the dress were tied around the deceased’s neck.
5. The cause of death was revealed by the evidence of Dr. Stephen Masaku Chirea, a doctor based in Malindi District Hospital, who testified as PW 10. He confirmed that he was familiar with the handwriting and signature of Dr. Abdul Aziz who prepared the post mortem report of the deceased on November 18, 2012, which PW10 produced as an exhibit. The findings of the post-mortem were that the deceased’s neck was disarticulated from the body, the body had cyanosis showing lack of blood, on the left side there was a big gush from the cheek to the mandibular bone, the body had a piece of cloth tied on the neck, there was faecal matter on the anal area while milky matter was oozing out, there was a tear on the vagina and the hymen was broken, there was a tear between the anus and the vagina, and the right lung had collapsed. The cause of death was found to be asphyxiation secondary to cervical spine injury.
6. The evidence on the person who caused the death of the deceased was that of two minors, Josephat Gichuki (PW1) aged 11 years, and PM (PW 3) aged 7 years, who were brothers, and who both testified after a voir dire examination that on 17<sup>th</sup> November 2012 at 2pm, they went to the house of Thuo to fetch water, and on knocking the door, the Appellant opened the door and he was with the deceased, Sharon who also came out. That the Appellant told them he did not know where the keys of the water tap were, and the minors then headed back home without the water, leaving the deceased with the Appellant. That they heard the next day that Sharon was missing, and reiterated that they left the Appellant with the deceased, and denied that the deceased followed them to go and play.
7. Esther Wambui Ngure (PW 6), Theresia Muthoni (PW7) and Jane Wangari Wambui (PW8), testified that they questioned PW1 and PW3 who reiterated that they had seen the deceased with the Appellant, and stated that they did not thereafter play with the deceased. PW 8 further testified that when she



- asked the Appellant where the deceased was, he stated that he saw her playing with PW1 and PW3. PC Henry Mwenda (PW9) also testified that, after collecting the body of the deceased and her dress, he visited the home of the Appellant where he found and took a mattress that had blood stains. Further, that he took the deceased to Lamu district hospital where samples of vaginal swabs and saliva swabs of the Appellant were taken, which he escorted to the government chemist on November 19, 2012. That he also took the Appellant's blood sample and a swab of the Appellant's mouth, the blood sample and rectal swab of the deceased, and a piece of the mattress with blood stains.
8. George Nzai Kiragi (PW10), the analyst at the Government Chemist in Mombasa testified that they did not have a DNA analyser in the Mombasa office, and the samples were sent to Nairobi, while PW 11, Paul Waweru Kang'ethe, an analyst in the Government Chemist in Nairobi confirmed receiving the samples, and testified that the DNA analysis showed that DNA generated from the vagina and the rectal swab matched the DNA profile from the blood sample of the deceased. However, that the blood stains on the mattress did not generate any DNA profile as the DNA was degraded due to microbial activity due to exposure.
  9. When placed on his defense, the Appellant gave unsworn testimony and did not call any witnesses. He testified that on 8th November 2012, the area councillor asked him about the whereabouts of the minor and he confirmed that he had seen the minor the previous day and continued with his chores. That the mother of the deceased later came in search of the child and he was taken to station to explain about the matter. The trial Judge found that the prosecution had proved its case, and after considering the mitigation offered by the Appellant that he was a first time offender, sentenced him to be detained at the President's pleasure under section 25 of the *Penal Code*.
  10. The two issues arising from the grounds set out in the Appellant's Memorandum of Appeal dated 26<sup>th</sup> January 2022 are firstly, whether the conviction was based on circumstantial and contradictory evidence, and secondly, whether the sentence meted on the Appellant of detention during the President's pleasure was illegal. On the first issue, the Appellant's counsel submitted that the trial Court erred in basing its conviction entirely or substantially upon circumstantial evidence; there was no direct evidence putting the Appellant at the place of the incident; there were contradictions in the evidence tendered by PW1 – PW11 who on the one hand alleged that the deceased died as a result of suffocation whereas on the other it was alleged that the deceased died as a result sexual assault; that before drawing the inference of the accused's guilt from circumstantial evidence the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference, and the Investigating Officer was in this regard unable to directly link the appellant to the death of the deceased, nor did the DNA test link the appellant to the deceased death or sexual assault.. Reliance was placed on the cases of *Simon Musoke v R* [1958] EA 71 and *PON v R* [2019] eKLR.
  11. The prosecution counsel on his part urged that the findings of the trial court and inferences of the guilt of the Appellant were drawn in light of his conduct. Counsel pointed out that the Appellant was last seen with the deceased and did not challenge the prosecution witnesses' version of events of the day. It was also pointed out that the appellant deceived PW6 that he was unaware of the whereabouts of the deceased; and that the blood on his mattress had no explanation other than an inference that it was as a result of the injuries meted on the deceased.
  12. The fact of the death of the deceased is not disputed, and produced a post- mortem report on the deceased, which clearly identified the cause of death. It is notable that the evidence of the Appellant's participation in the said death was in this respect circumstantial, and particularly the evidence of PW2 and PW3, as corroborated by PW 6, PW 7, and PW 8. The threshold as stated in *R v Kipkering Arap Koske* [1949] 16 EACA 135 and *Sawe v Rep* [2003] KLR 364 is that such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt.



13. In *Abanga alias Onyango v Republic* Cr. Appeal No. 32 of 1990 (UR) the Court of Appeal set out three tests to be applied to determine whether the circumstantial evidence relied on by the prosecution can lead to a conclusion that it is the accused who committed the offence under consideration. The said tests are:
- (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.”
14. The totality of the evidence adduced by the prosecution in the trial Court, and particularly PW1 and PW3, was that the Appellant was at the scene of the offence together with the deceased, and was the last person to be seen with the deceased before her death. Coupled with the evidence of PW6 and PW8 on the Appellant’s conduct after the deceased went missing, his denials as regards being with the deceased, and the presence of blood on the mattress in his house for which he proffered no explanation pursuant to section 111 of the *Evidence Act*, we find that the legal threshold to sustain a conviction against the Appellant based on circumstantial evidence was met. Lastly, the intention to cause the death was also established by and inferred from the multiple grave injuries sustained by the deceased, as held by this Court in *John Mutuma Gatobu v Republic* [2015] eKLR.
15. The trial Judge in our view correctly analyzed and evaluated the evidence as follows:
- “Despite being questioned twice by three women, PW 6, PW 7 and PW 8, at no time did the Accused state that the deceased was in the home at any time. Even then, there was two bits of evidence that do not sit properly with the statement, that the deceased was last seen in the company of PW 1 and PW 3, and not in the home of the accused. The said bits of evidence do actually provide corroboration to the evidence of the two minors. The first is that the body of the deceased was found within the shamba in the homestead of the Accused. It is most unlikely that the deceased therefore left that home, and the discovery of appears to confirm that whoever murdered her did so on that compound. Secondly, there was found to be blood stains on the mattress used by the accused in his room.
- It is true that the blood thereon could not be compares with the accused samples as the stains degenerated. The accused said nothing about the state of the mattress in his room.
- ”
16. On the inconsistencies alleged by the Appellant in the evidence adduced by the prosecution, we agree with the observations made by this Court in *Phillip Nzaka Watu v Republic* [2016] eKLR as follows :-
- “...when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”



17. We note that the alleged inconsistencies as regards the cause of death were in fact different accounts of the injuries noted on the deceased, and not on the cause of death, which was definitively identified in the post-mortem report. The other inconsistency alleged by the Appellant was on the date of death of the deceased, which he alleged PW1 and PW3 stated it to be 17<sup>th</sup> November 2012, with other witnesses stating that it was 7<sup>th</sup> November 2012.

We find the inconsistencies in the date to be minor and not fatal, given that PW1 and PW3 were minors and their recollection of dates would not be as accurate as that of adult witnesses.

18. On the second issue of whether the sentence was illegal, the Appellant's counsel submitted that detention during the President's pleasure was unconstitutional, as the Appellant was under the age of 18, and a non-custodial sentence would have helped him reform as he was a young man at the time. Reliance was placed on the judgments in *Francis Kariuki Muruatetu & another v R & 5 Others*, Petition Nos 15 and 16 of 2015; and *Isaac Ndegwa Kimaru and others v A. G. & Office of the Director of Public Prosecution*, Petition 226 of 2020 which mandated sentences to be for a period of time that was specific.

19. The prosecution counsel, while placing reliance on section 25 of the Penal Code, submitted that the Appellant was a minor and therefore deserving of detention at the president's pleasure; and that a lawful sentence was therefore meted on the Appellant. The counsel submitted that the challenge to the constitutionality of the mentioned section was considered in the year 2017 in the case of *AOO & 6 Others v A.G. & Another* [2017] eKLR, yet the Appellant was sentenced in the year 2014. While noting the decision of this Court in the case of *Bruce Ochieng Shaban v R* [2019] eKLR that interfered with a similar sentence against a minor who had been convicted of murder, the counsel urged that if the court is minded to disagree with the sentence passed on the Appellant, then a determinate sentence ought to be considered in the interests of justice and in view of the inapplicability of sections 190 and 191 of the *Children's Act*.

20. It is our view that the decision by the Supreme Court of Kenya in *Francis Karioko Muruatetu & Another v Republic*, [2016] e KLR that the mandatory sentence of death in section 203 and 204 of the *Penal Code* deprive courts of their unfettered jurisdiction to exercise discretion and impose appropriate sentence on a case-to-case basis can be extrapolated to and is applicable where a minor convicted of murder is sentenced to detention during the President's pleasure under section 25 of the *Penal Code*, as the said sentence also mandatory and in lieu of the sentence of death. It is also notable that the said section has since been declared unconstitutional by the High Court in *AOO & 6 Others v A.G. & Another* [2017] eKLR. This Court is thus clothed with the duty to consider whether or not the Appellant herein was deserving of a lesser sentence in light of his mitigation and the circumstances of the case.

21. The High Court in this regard acknowledged the Appellant's mitigation that he was a first offender, but noted that the Appellant was underserving of leniency in light of the circumstances and nature of the deceased's death. We have considered the said circumstances, and the change in the law that now gives us discretion to impose determinate sentences in murder cases. We are particularly mindful of the aggravating factors arising from the horrific injuries suffered by the deceased, who was a child of tender years.

22. We consequently find that the Appellant's conviction for the offence of murder was safe, and uphold the said conviction. We however allow the appeal against the sentence and set aside the sentence of detention at the President's pleasure imposed upon the Appellant, and substitute therefor a sentence of twenty-five (25) years' imprisonment from the date of the Appellant's conviction by the High Court.

23. It is so ordered.



DATED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF OCTOBER, 2022.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

**DEPUTY REGISTRAR**

