



REPUBLIC OF KENYA



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**Kanyi v Republic (Criminal Appeal 91 of 2022)
[2022] KECA 1373 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1373 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL 91 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
DECEMBER 16, 2022**

BETWEEN

DAVID KANYI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa delivered by Njoki Mwangi, J. on 27th April 2022 in High Court Criminal Case No. 41 OF 2017)

JUDGMENT

1. The appellant was a police officer performing spiv duties at the Makupa Police Station in Mombasa. He was charged with the murder of his girlfriend contrary to section 203 as read with section 204 of the *Penal Code*. It is alleged that on the October 2, 2017 at the Makupa Police Lines in Mombasa City within Mombasa county murdered Judy Wangari Wanja. The appellant pleaded not guilty to the charge and was taken through a trial in which the prosecution called 12 witnesses.

The appellant on his part gave a sworn defence and called no witness.

2. After the trial, the learned trial judge, in a judgment delivered on the April 21, 2022, substituted the charge of murder and convicted the appellant for the offence of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*. Thereafter the learned trial judge, in a ruling delivered on the April 27, 2022, sentenced the appellant to 13 years imprisonment.
3. Being aggrieved by the judgment of the trial court, the appellant filed this appeal. He challenges both the conviction and the sentence. The memorandum of appeal raises five grounds of appeal, in which it contends that the learned trial judge erred for:
 - i. reaching a finding that the offence of manslaughter was proved despite
 - a. lack of eye witnesses account;



- b. absence of a fence around the police post;
 - c. the fact that appellant had been confirmed to have been asleep all along; and.
 - d. the fact the appellant was clearly shocked when he was informed of the death of the deceased;
- ii. in concluding there was an attempt to cover up and in proceeding to punish the appellant for it,
 - iii. for failing to consider the gaps in the prosecution case,
 - iv. in finding that the appellant having had a quarrel with the deceased, (sic) therefore killed herself
 - v. in imposing a sentence that is excessive.
4. We heard the appeal virtually on the July 27, 2022. When the appeal was called out, learned counsel Mr Magolo representing the appellant in this appeal was present, while Ms Valleria Ongeti learned prosecution counsel was present for the respondent.
 5. Mr Magolo relied on his filed written submissions which were dated July 8, 2022. He urged that witnesses were police officers who confirmed that as at the time the appellant sent away the deceased, he locked himself in the house and went to sleep, and that the body was discovered when the appellant was asleep; he was woken up when the body had been removed. Counsel urged that the trial court finding that this was a cover up was not supported by evidence and could not rebut the version given by the prosecution witnesses. It was confirmed that the appellant was asleep all along. Mr Magolo submitted that the trial judge's conclusions that the deceased did not commit suicide after analyzing the photographs and considering the height of the door and the position that the deceased was found, did not give room for the possibility of the body coming down slowly after death. He urged that the expert found suicide was the cause of death in the post mortem report; that there was nothing to exclusively implicate the appellant as the only one who could have caused the deceased death.
 6. Ms Ongeti relied on her filed submissions dated July 26, 2022. She stated that PW10 was a neutral witness who said that the curtain used by the deceased could not support the weight of a dead body. The deceased was found in a kneeling position that is inconsistent with suicide, that the curtain was not tied tightly hence this was a staged suicide.
 7. Mr Magolo in a rejoinder submitted that PW10 was not an eye witness, neither was he an expert on re-creation of a scene, and that his opinion alone could not form the basis of a conviction. He urged that his opinion did not point to any particular person as the murderer.
 8. On the sentence, while Mr Magolo urged that the sentence was excessive as the appellant was a young man. Ms Ongeti on her part urged it was lenient as the sentence for manslaughter was life imprisonment.
 9. This is a first appeal and as such this court is under obligation to reconsider the evidence adduced before the High Court and come to its own conclusions thereon, while bearing in mind that we had no opportunity to see or hear the witnesses and therefore make due allowance for that. In *Okeno v Republic* [1972] EA 32, the Court of Appeal for East Africa expressed this principle thus:

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 findings 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..."

10. The facts of the case are not in dispute. They are that the appellant and the deceased were friends and were occasionally living together at Makupa Police Lines. On the material day the deceased went to her sister's house, PW7 in the case, at 6:30pm at Bamburi for a family meeting between the two of them, their brother who was PW1 in the case and the husband of PW7 who was PW2. She stayed with them until 11:00pm when PW1 and PW2 escorted her to Makupa Police Station in PW2's car. PW2 was left in the car as PW1 and the deceased walked together to the house of the appellant. According to PW1, when they knocked at the door the appellant opened the door and that he asked the deceased where she had been and why she had come very late. The deceased started pleading with the appellant to allow her to enter the house but he declined and threatened to lock her up in the cells. That eventually, the appellant took out the belongings of the deceased from his house and threw them outside. He then went back into the house and locked the door.
11. After half an hour PW2 called PW1 and asked him why it was taking so long. PW1 explained to him that the appellant and the deceased had disagreed and he asked PW2 to give him a little time. It is the evidence of PW1 that he persuaded his sister to return back with him to their sister's place for the night but she declined, saying that the appellant will eventually allow her back to the house. Fifteen minutes later, PW1 left the deceased outside the appellant's house and returned back with PW2 to his other sister's place.
12. PW4, PC Malova was living on the second house from that of the appellant. He said that he returned from night duty at 12.30am. He said that he was sleeping when he heard the appellant and the deceased quarreling, with the appellant telling the deceased to return where she had come from. He testified that at the same time there was a third person interjecting. He said he heard things being thrown out and the appellant's door being locked and then there was quiet.
13. At around 2:00a.m. PW3, PC Muriuki, returned to Makupa Police Station Lines from night duty at Makande road block where he had been with Sergeant Anakeya, PW8. When he reached the police lines he stepped on some object and upon flashing a light he saw a lady's moisturizer. As he flashed his light, he saw a woman hanging on a curtain that was fixed on the door of the appellant's house. He noted that the appellant's house was locked from inside. He immediately called PW8. PW8 immediately went to the scene from where he called the duty officer at the station that night, that is CPL Keziah, who was PW5.
14. PW12 CIP Kulicha, a crime scene officer was called to the scene where he went and took photographs of the deceased. The officer testified that he went to the scene at 2:30am. that night, and was shown a body of a female adult hanging on the door of one of the units at the police lines. The body was hanging from a curtain. He also saw scattered around the corridor close to the body some female belongings. He took photographs of the body from various views which he produced as exhibit No 4. He described photograph marked number 8 as showing that there was a curtain around the deceased's neck. He also described from photograph 6 and 7 the body kneeling on the ground. The body was eventually removed from the scene and taken to Coast Provincial General Hospital (hereafter CPGH).
15. On the October 4, 2017 a postmortem examination was carried out on the body of the deceased at the CPGH by Dr Abdulrahman. The postmortem report was exhibit 7. It was produced in court by Dr Navisa Seif who was a colleague of Dr Abdulrahman. The doctor found that the body had peripheral cyanosis which is discoloration of the whole-body showing lack of oxygen. He also saw ligature marks



around the anterior and lateral parts of the neck. There was no hemorrhage. He formed the opinion that the cause of the death was asphyxia secondary to hanging.

16. PW10, Senior Superintendent Kanake was in charge of the CID Urban Division Mombasa, and In-charge of Investigations and General Administration at the Division. He was among the last senior officers to visit the scene. By the time he went to the scene, the body of the deceased had already been removed and was lying at the Coast Provincial General Hospital. He took over the investigation that afternoon. He testified that after he viewed the body at the mortuary and noted that it had no injuries on the neck, and that after he examined the scene where the body had been found, he was of the view that the deceased had not hang herself but that she had been murdered.
17. After the investigations were completed, PW10 recommended that the appellant should be charged with murder of the deceased. PW10 testified that his opinion was that the body of the deceased had no bruises or injuries around the neck and that therefore, he concluded that the appellant must have been strangled then hang on the door. He was also of the opinion after looking at the photographs that the deceased having been found in a kneeling position, could not have hanged herself. His conclusion was that there was foul play and some cover up by the appellant and his colleagues at the police station to make it appear as if the deceased had committed suicide.
18. The appellant gave a sworn statement in defence. He said that he had been on spiv duties that night as the police driver. That they had been on duty around Majengo area. He testified that at around 9:00pm. that night the deceased called him and told him that she was in a family meeting. She called again at 10:00pm. asking him to pick her from her sister's place which he declined because he was on duty. He testified that he went back to Makupa Police Lines at 12:45am and that he took a shower after which he heard a knock at the door. He said he actually opened the door and found the deceased standing with a gentleman that she introduced as her younger brother. That was PW1.
19. He said that the deceased started complaining because he had not picked her. The appellant said that he started packing her things and told her that he was tired after a long day's work. He said that he threw out her belongings and threw her out of the house because she had not said that she would go to her sister's place and also because she was drunk. He said that he heard PW1 persuading the deceased that they should go to the sister's place which she declined and insisted that she will wait outside the door until he let her back in. The appellant said that he actually locked the door and went to sleep and that he slept until 3:30a.m. when he was woken up by one Sergeant Anakeya and PC Kinyua, who was PW9, and one PC Kosgei. He said that he was told that there was a woman complaining that he threw her out of his house and he was required to surrender his pistol which he gave to Sergeant Anakeya. He said that he went back to sleep.
20. The appellant stated that at 5:45a.m he was visited by PW6, the OCS of Makupa Police Station and Sergeant Anakeya. PW6 told him to accompany him to his office and that as they were going there he noted the deceased's belongings were scattered outside his door. He also noted that the curtain of his door was cut. When they reached the OCS office, he was asked whether he had a misunderstanding with his girlfriend, to which he answered that it was a small problem and insisted that she should be called so that she could confirm his story. He testified that that is when the news were broken to him that the deceased had committed suicide. The appellant stated that he lost his consciousness. He said that he noted that thereafter PC Malubo and PC Letio were mandated to watch him. He denied that he murdered the deceased, saying that they had been friends for 7 months prior to her death and would visit him and spend a night and in some instances a week in his house.



21. The learned trial judge after considering the evidence identified the issue for determination as whether the appellant killed the deceased with malice, aforethought or if the lesser charge of man slaughter or any other cognate offense has been proved. After analyzing the evidence, she found as follows:
- “This court having keenly looked at the photographs produced has no good reason to depart from the findings of the investigation officer who resolved the puzzle of the deceased’s death. He was of the view that there was an attempt to cover up the cause of the deceased’s death. The scenes of crime officer collaborated (sic) PW10s evidence that based on the length of the door and deceased’s height she could not have hanged herself.”
22. The learned trial judge made reference to *Britannica the Editors Encyclopedia 2020* and based on some theory derived from that encyclopedia, as well as the evidence of the investigating officer PW10 and the evidence of crime of scene PW12 concluded that the deceased could not have committed suicide. The Judge delivered herself thus:
- “Britannica, The Editors Encyclopedia 2011 describes displacement as the distance moved by a particular or body in a specific direction... Therefore, for substantial positive work to have been done by gravity pulling the deceased body downwards from the point at which both curtain and fabric had been tied around the neck, the displacement between the top of the deceased head to the ground should have been greater than the deceased height of 166 cm, meaning that her feet should have been off the ground or slightly off the ground for her weight to pull the manila string holding the curtains in place downwards. That in turn would have led (sic) to the curtain materials around the neck strangulating her...”
23. The learned trial judge then concluded:
- “It is therefore the finding of this court that logically and scientifically, there was no positive work that would have exerted pressure on the deceased’s neck through the force of gravity to lead to asphyxia. The theory of suicide which as advanced by some of the accused person’s colleagues at Makupa Police Station such as PW5 and PW6 falls by the way side. The concurs with the submissions made by the prosecution counsel, Mr Muthomi that there was some cover up done by the accused person and some of his colleagues at Makupa Police Station to make the deceased’s death appear to be suicide. This court believes that after PW1 left Makupa Police Lines and after the deceased had consistently knocked at the accused person’s door, she must have incensed him to the extent that he strangled her leading to asphyxia...”
24. The court found that it was the appellant who caused the death of the deceased. The court concluded that it is only the appellant who had the opportunity to kill the deceased. That, due to disagreement that took place before the deceased met her death, the court found that the appellant unlawfully killed the deceased, and found him guilty of man slaughter.
25. We need not say much about the complaint raised by Mr Magolo for the appellant in regard to the conclusions reached by the learned judge, the excerpts we have included from the judgment of the learned trial judge clearly demonstrates that the learned trial judge’s conclusions were based on the observations and conclusions reached by the investigating officer (PW10). These were based on the observations of the scene as derived from the photographs taken by PW12, and his examination of the locus in quo of the deceased death and the body of the deceased. PW10 stated that based on the height of the deceased in relation to the door of the appellant’s house, and based on the fact the body had no injuries on the neck area, the deceased could not have committed suicide.



26. The pathologist was the expert in determining nature and extent of the injuries the body of the deceased had, as well as in determining how the injuries could have been caused, and what actually led to the deceased death. The pathologists report was exhibit 7 and it clearly shows that the cause of death was asphyxia due to hanging. It also shows that the deceased had ligature marks on the anterior and lateral parts of the neck, which are the front and the side of the neck. And Dr Seif, PW11 who produced the report opined that that death occurs in three minutes once there is tightening of the ligature on the neck causing asphyxia.
27. With respect to the learned trial judge, the evidence of PW10 contradicted the pathologist's findings, including the ligature marks on the neck and the cause of death. The evidence of PW4, the neighbor of the appellant, clearly testified to the appellant having thrown out the deceased belongings before he locked the door to his house, a fact that was witnessed live by PW1 the brother of the deceased. In addition, the evidence of PW3 who found the body described it as hanging on a curtain fixed on the door.
28. PW10 did not find the body of the deceased at the locus in quo. He came into the case at 4pm. The body was at CPGH which is where he went to examine it. He was not fit to describe how the body was found, it is PW3 who was best suited to do so, and according to him, it was suspended on the curtain when he saw it. Even an examination of the photographs of the deceased body shows the body suspended on the curtain, with the legs bent sideways barely touching the ground. Secondly, the doctor ruled out any other cause of death except hanging. The two theories advanced by PW10, of strangulation of the deceased and cover up, was not supported by the evidence he presented to court.
29. In the persuasive case of *K M v Republic* [2018] eKLR the learned judge of the High Court sitting on first appeal observed:
- “I should respectfully agree with Sir Udo Udoma, CJ In *Bukenya v Uganda* (1967) EA 341, 345, that
- “As a general rule of law a magistrate can only decide a case on the evidence before him. He is not entitled to import into the case his personal knowledge or extraneous matter.”
30. The Court of Appeal in *Julius Mwita Range v Republic* [2003] eKLR cited with approval the old case of *Okethi Okale Republic* (1965) EA 555, 557 that-
- “[I]n every criminal trial a conviction can only be based on the weight of the actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial judge to put forward a theory ... not canvassed during the evidence or in counsel's speeches.”
31. We find that the learned trial judge put forward a theory based on some scientific formula from a book, and from observations of one who was not an expert on issues of injuries and cause of death, and reached an erroneous conclusion that death was by strangulation.
32. We have come to the conclusion that the deceased died of asphyxia due to hanging. There was no evidence, direct or circumstantial that could lead to a conclusion that the appellant had any role to play in the deceased death. In the result, we find that the appellant's appeal has merit. Accordingly, we quash the appellant's conviction for the offence of manslaughter and set aside the sentence imposed on him of thirteen (13) years imprisonment. The appellant should be set free unless he is otherwise lawfully withheld.

Dated and delivered at Mombasa this 16th day of December 2022.



S. GATEMBU KAIRU (FCI Arb)

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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.

Signed

DEPUTY REGISTRAR

