



**Mungai v Republic (Criminal Appeal 49 of 2021)  
[2021] KECA 51 (KLR) (8 October 2021) (Judgment)**

Neutral citation: [2021] KECA 51 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 49 OF 2021  
RN NAMBUYE, W KARANJA & PO KIAGE, JJA  
OCTOBER 8, 2021**

**BETWEEN**

**JAMES KARIUKI MUNGAI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Nakuru  
(Wendoh, J.) dated 23rd November, 2012 in HCCR No. 41 OF 2010)*

**JUDGMENT**

1. When Harima Wanjiku (PW2) heard digging sounds coming out of one of her rental houses at Jumatatu Farm in Nakuru North District in the morning of 24th January 2010, she found it odd but was not overly alarmed. She was on her way to cut grass for her cows. On her way back at about 1pm, she asked the occupant of that single-room-wooden-walled-earth-floored house by the name Kariuki, the appellant herein, if he was okay as he had not emerged from the house all morning. He answered from within that he was ok, was planning on cooking *ugali*. The digging persisting into early evening, Harima went to the appellant's house and asked him what was being dug in the house. He cockily asked her if she wanted to see. She answered in the affirmative, and he let her into the house. There, she saw a heap of soil, a panga, a jembe, and a spade. Puzzled, she called out to another tenant, Njogu, but before he could get there, the appellant excused himself ostensibly to answer the call of nature.
2. Looking closely at the scene, Harima let out a terrified scream that had a crowd running over in response. She had seen a body half-buried under a mound of soil in the appellant's house. Among those who responded to Harima's screams were **Jane Alim** (PW5) her tenant, and her son **Daniel Njoroge Mwaniki** (PW1). Njoroge entered the appellant's house and also saw the mound of soil, the knife and panga as well as the shovel. When he confirmed the presence of the half-buried body he rushed to Kirengero Police Station where he reported the gory find. He returned to the scene with police officers who dug up the body of a woman which had been badly mutilated and dismembered. The legs had



been chopped off at the knees and laid on top of the torso. There were cuts to both arms and the neck. The body, in pieces, was collected and taken to Nakuru Municipal Mortuary by the police officers who included P.C.Kioko Ngubao (PW5). This was after Kithae Mutunga (PW8), an officer from the Scenes of Crimes unit, had taken photographs. The items we have referred to were also collected from the house. The panga was noted to have been blood-stained as was a pair of shoes and a shirt said to be belonging to the appellant. When these items were taken to the Government Chemist for forensic analysis, they were all found to be stained with blood group B, the same blood type of the deceased, going by the sample collected from the body, according to Albert Gathuri Mwaniki (PW7).

3. A post-mortem examination was conducted on the body by Dr. Omboga on 30th April 2020 after it was identified by Francis Mbugua and Mary Wangari Muhoro as belonging to Martha Wangeci, a 23-year-old female. In a report that was tendered in evidence on his behalf by Dr. Titus Ngulungu (PW6) a colleague familiar with Dr. Omboga's handwriting, the latter formed the opinion that the cause of death was severe haemorrhage due to deep cut wounds on the neck and chopped limbs. PW 6 also produced a medical report by Dr. Onchere dated 30th April 2010 in which the appellant was adjudged to be a 50-year-old male who was well-oriented in time, place and person with intact memory, thus mentally fit to stand trial. He had cut wounds on his 4 fingers, noted to be about 10 days old inflicted by a sharp object and requiring dressing.
4. The appellant had been detained at the Bahati Police Station where he presented himself in the early morning of 22nd April 2010 claiming to have murdered his wife according to \*\*PC Samwel Longoroko (PW4) who was at the report office alongside P.C. Chache. Later that morning he was collected by police officers from Kirengero police station including Inspector Philemon Sangao\*(PW9) and P.C. Kioko Ngumbao(PW5). He was then charged with the offence of murder at the High Court in Nakuru which he denied, leading to a trial.
5. What we have set out above is the prosecution evidence that was presented before Wendoh, J. She formed the opinion that a *prima facie* case had been made out and placed the appellant on his defence. In his sworn testimony, he stated that he went to his house on 21st April 2010 after some 3 months at Ndanai near Migori. On getting there, he went to PW1's house to ask for his keys to the house which he had left with PW1. PW1 said he would escort him to the house to show him what he, PW1, had done. On getting inside the house, PW1 tried to force him to sit on dug up soil, which he resisted. A struggle ensued and PW1 cut his hand with a knife he was carrying. The appellant managed to escape from the house and went to Bahati Police Station, arriving there between 5am and 6am, where he reported having been assaulted. The police officers there called Kirengero Police Station and officers from there came and collected him. He was beaten to admit the charge of having killed his wife but he denied it maintaining that he had no wife and did not know the deceased.
6. The learned judge considered the evidence, believed the prosecution version, dismissed the defence as an afterthought, and convicted the appellant. She then sentenced him to life in prison. The appellant is aggrieved by both conviction and sentence and appeals to this Court making complaint in his home grown grounds to the effect that the learned judge erred by convicting him without proof of *actus reus* and *mens rea*; on inconclusive medical evidence; in the absence of an inventory of items recovered from the house; with the prosecution having failed to call crucial witnesses; shifting the burden of proof; rejecting his sworn testimony; and, believing that he self-reported the killing of his wife.
7. As this is a first appeal that proceeds by way of re-hearing, we have re-evaluated the whole evidence on record in a fresh and exhaustive manner, so as to arrive at our own inferences of fact, but always making allowance for the fact that we have not had the advantage of hearing and observing live witnesses in testimony as the learned judge did. See Rule 29(1)(a) of the *Court of Appeal Rules; OKENO vs. REPUBLIC*.



8. We have borne in mind the submissions made before us by learned counsel, Mr. Mongeri for the appellant. He argued that as the appellant was not present when the weapons, clothes, shoes and other items were collected from his house, they might well have come from anywhere. He also took issue with the fact that no witness testified to having identified the body as belonging to the deceased. He castigated the police for alleging that the appellant reported having committed the crime yet they did not produce the Occurrences Book. He asserted that the appellant was arrested when he had gone to report an assault committed against him by PW1 and also that the circumstantial evidence relied on by the prosecution was inadequate to form a basis for his conviction. He lambasted the police for not taking the appellant's blood sample to establish whether the blood stains on the items collected may have come from his cut fingers. He contended that the appellant gave a cogent *alibi* defence and criticized the learned judge for rejecting it.
9. Opposing the appeal, learned Prosecution Counsel Ms. Mercy Cheleng'at submitted that the ingredients of the offence of murder were established by the evidence. She discounted the complaint about the non-taking of an inventory, contending instead that the omission could not override the physical existence of the exhibits, which were confirmed by the witnesses who saw them in the house. Even though the relatives who identified the deceased's body did not testify, it was learned counsel's view that it was indisputable that her body was found half-buried in the appellant's house where he had been holed up from the night before, and from which digging sounds were heard for most of the material day. He even called PW2 to come and see what he had done as if he was taunting her. She dismissed the appellant's suggestion that PW1 may have been the culprit, pointing out that PW1 was not at the scene of the crime, arriving there only in response to PW2's screams, and he was not even the first to get there.
10. Counsel asserted that the appellant's conduct before and after the discovery of the body spoke to the *mens rea* and it was not in doubt he killed the deceased and mutilated her body. The act was cold-blooded and savage with stabs, cuts and cutting off of the deceased's legs. The crime was heinous and the circumstantial evidence proved the case beyond reasonable doubt. In the circumstances, there exists no reason for interfering with the life sentence meted out by the trial court.
11. Mr. Mongeri's brief reply was that the prosecution case had errors and missteps which should be resolved to the appellant's benefit, and that as no nexus was proved between the appellant and the deceased, we should acquit him.
12. There is no doubt that in the absence of direct evidence linking the appellant to the commission of the offence, the case against him was purely circumstantial. The learned judge adverted to this when she stated as follows in her judgment;

“Nobody saw the accused murder the deceased. In fact PW1, PW2, and PW3 did not know who the deceased was. PW3, a resident on the same plot, said that she had never seen accused with a visitor in that plot. However, I am satisfied that PW2 found the accused in his rented house with the body freshly buried in the room. It is upon the accused to explain how the deceased's body came to be in his house, cut up in pieces and buried therein.”

*Blacks Law Dictionary* 11th Edn. defines circumstantial evidence as'

1. Evidence based on inference and not on personal knowledge or observation;
2. All evidence that is not given by the eye-witness testimony.”

The authors proceed to cite a number of sources on this, including;



“Indirect evidence (called by the civilians, oblique, and more commonly known as circumstantial evidence) is that which is applied to the principal fact, indirectly, or through the medium of others facts, by establishing certain circumstances or minor facts, already described as evidentiary, from which the principal fact is extracted and gathered by a process of special inference ....” Alexander M.

Burrill, A Treatise on the Nature of Principles and Rules of Circumstantial Evidence 4(1968).

‘Some circumstantial evidence is very strong, as when you find a trout in the milk.’ Henry David Thoreau, Journal, 11 Nov. 1850 in 2 Journal of Henry D. Thoreau 94 (Bradford Torrey & Francis H. Alee eds., 1962).

‘Evidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence, is termed circumstantial evidence.’ William P. Richardson, The Law of Evidence Par 111, at 68 (3rd Edn. 1928).

‘Testimonial evidence readily defines itself by its name; it is any assertion by a human being, offered to evidence the truth of the matter asserted. Circumstantial evidence is any and all other evidence. Scientifically the term circumstantial is indefensible, for it does not correlate with testimonial’; a more correct equivalent would be\*\* nontestimonial. But no one has yet invented an acceptable substitute for circumstantial.’” John H. Wigmore, A Students’ Textbook of the Law of Evidence 38 (1935).”

13. Now, if trout in the milk is seen as evidence that the dairy farmer or the milkman must have dipped the milk pail in the stream to increase its volume by watering it, is a classical, if quaint, example of the nature and application of the circumstantial evidence, we would think that the evidence of a butchered body of a woman in a shallow grave in the appellant’s house in which he had been present must lead to the conclusion that he was the killer or had something to do with it
14. The presence of a dead woman half buried in a house, with a shovel, a panga and a knife with the sharp items stained with the blood of the blood group of the deceased, are facts which the law of evidence recognizes as being especially within the knowledge of the appellant as the owner of the house who was present at the material time and was obligated to explain. Falling in the same category are the bloodstains that were found on the appellant’s shoes and shirt. Only he could explain the ghoulish find of the body and the damning presence of the deceased’s blood on his personal apparel.
15. Once a person so situated fails to offer a plausible explanation for such accusative evidence linking him to the commission of the crime, section 119 of the *Evidence Act* permits the court to presume the existence of any fact which is likely to have happened, regarding being had to the common course of natural events and human conduct.
16. The law on circumstantial evidence is quite settled that all the inculpatory facts must lead irresistibly to the conclusion of the guilt of the person accused and that there should be no co-existing facts or circumstances that weaken that inference or that are capable of explanation on any reasonable hypothesis consistent with his innocence. See *REX vs. KIPKERING ARAP KOSKE & ANOR [1949] 16 EACA, 135*, *SIMON MUSOKE vs. REPUBLIC* and *JOHN CHEBII SAWE vs. REPUBLIC*.
17. In the present case, the fact that the appellant was incontestably in his house, from which digging sounds emanated for hours and it turned out that there was a hole dug in the house and inside it a chopped-up body of a woman and nearby a knife and panga, both bloodstained, and the appellant’s skirt and shoes bore the blood type of the deceased who was established to have died from profuse



bleeding from the stab wounds and severing of her limbs, lead irresistibly and unerringly to the conclusion that it was the appellant, and not another, who killed her in that macabre a manner.

18. It has been stated and is worth repeating that calling evidence circumstantial does not lessen its value or lower its probative force. The co-existence of relevant facts can form a chain so strong and so complete as to leave no doubt whatsoever as to the perpetrators guilt. With respect, this in one such case.
19. We are satisfied that the appellant's presence at the house before he ran off after his landlady screamed raising alarm', pretending to have gone to answer a call of nature, together with the presence of bloodstains on his shoes and shirt, wholly displace the appellant's weak *alibi* that he was elsewhere on the material day, as well as his attempt to point an accusing finger at PW1.
20. We are satisfied, as was the learned judge, that the evidence against the appellant was overwhelming. We think, from our own evaluation of the record, that the case was iron clad. The appellant's conviction was sound and his appeal against it is accordingly dismissed.
21. Regarding sentence, we note that even though the ultimate that could have been imposed is the death sentence, the learned judge, taking cognizance that there have not been actual executions for many years, sentenced the appellant to serve life in prison. We, on our part, agree with Ms. Chelang'at that the manner in which the crime was committed leaves no room for leniency. The appellant stabbed a young woman to death and also chopped off her legs. He literally butchered and quartered her as one would an animal at a slaughterhouse. He had no qualms digging a shallow grave in broad daylight and dumping or half-burying the deceased's body parts in total indignity. It was a crime of exceptional depravity, cruel and heartless. And there was not the slightest indication of remorse on the appellant's part.
22. We are satisfied that the appellant is a danger to society and we uphold the sentence imposed so that he may be permanently kept behind bars, far away from the happy and the free. What was meted on him is a proper punishment.
23. In the result, the appeal fails in entirety and is dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF OCTOBER, 2021.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

