**Ndunguri v Republic**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 13 October 2000

**Case Number:** 25/92

**Before:** Omolo, Shah and Bosire JJA

**Sourced by:** LawAfrica

**Summarised by:** H K Mutai

*[1] Criminal law – Murder – Evidence – Circumstantial evidence – Appellant last person seen with*

*deceased – Body of deceased found in Appellant’s latrine – Failure of Appellant to provide an*

*explanation regarding the circumstances in which he parted company with deceased – Rebuttable*

*presumption of fact raised – Whether there was sufficient evidence to convict the Appellant – Evidence*

*Act Chapter 80 section 111.*

**Editor’s Summary**

The deceased wished to purchase a motor vehicle. He learned that the Appellant could assist him to get one so, on 17 July 1990, he went to see the Appellant in order to arrange for a time when the latter would take him to see the vehicle. They agreed to go the next day so the deceased went back to his wife who gave him some money to assist in the purchase of the vehicle. On 18 July 1990 the Appellant was observed in the deceased’s company walking towards the bus stage. That was the last time the deceased was seen alive. The following day when the deceased’s wife asked the Appellant about her husband he denied knowing his whereabouts or even having been with him on the 18 July 1990. It was on that basis, and after telling the police that he had left the deceased at a bar on 18 July 1990, a story that the police did not believe, that the Appellant was arrested on 20 July 1990. When his house was searched five days later various brand new articles were recovered. The deceased’s body was also found covered with some soil inside a latrine within the homestead together with a crowbar having human hair on its tip. The Appellant was formally charged with murder on 2 August 1990 and a charge and caution statement, which he later retracted, was recorded from him. At his trial evidence was adduced and testimony heard regarding the circumstances in which the deceased had gone missing and the manner in which his body had later been discovered. In his defence, the Appellant denied seeing the deceased on either 17 or 18 July 1990 and also denied the fact that any body was recovered from inside his latrine. The trial court found him guilty of murder as charged and sentenced him to the mandatory death sentence. The Appellant appealed on the grounds that the case against him was purely circumstantial and had not been proved beyond reasonable doubt. Counsel for the Respondent submitted that the chain of events, taken together with the Appellant’s conduct before and after the deceased’s disappearance, clearly showed that he had killed the deceased.

**Held** – A first appellate court was under a duty to assess the evidence adduced at trial, critically evaluate it, and draw its own conclusions thereon, bearing in mind that it did not have the advantage of seeing and hearing witnesses; *Okeno v R* [1972] EA 32 followed. In order for circumstantial evidence to form the basis of a conviction, it had to point irresistibly to the guilt of the accused, exclude any other reasonable hypothesis than that of guilt as well as exclude co-existing circumstances which would tend to weaken or destroy such an inference; *Musoke v R* [1958] EA followed. In this instance, there was sufficient evidence to justify the trial court’s findings that the Appellant was seen with the deceased on 18 July 1990 and that the deceased’s body was indeed recovered from the Appellant’s latrine. The Appellant’s denial of that fact was an attempt to mislead the court and avoid the onus of explaining the circumstances under which he and the deceased had parted. Since this knowledge was peculiarly within his knowledge, the court was entitled to make a rebuttable presumption of fact that he knew the circumstances under which the deceased died. There was therefore no doubt regarding the Appellant’s guilt and the appeal would be dismissed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Musoke v R* 1958 EA *–* **F**

*Okeno v Republic* [1972] EA 32 *–* **F**