



**Republic v Sanya & another (Criminal Case 10 of 2019)
[2024] KEHC 14562 (KLR) (Crim) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 14562 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 10 OF 2019**

DO CHEPKWONY, J

OCTOBER 31, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

NAOMI NECHESA SANYA 1ST ACCUSED

FAITH KANANU 2ND ACCUSED

JUDGMENT

1. The accused persons, Naomi Nechesa Sanya and Faith Kananu, were charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The Particulars of the offence are that:-

“On the 14th day of January, 2019, at an unknown time, in Londiani, Kericho County, the accused persons jointly murdered Felix Ng’ang’a.”

2. The accused persons were arraigned in court on 14th March, 2019 whereby they were informed of the reason they were in court and remanded in custody to await assignment of Legal Representation. The accused persons took plea on 5th March, 2019 and each one of them pleaded “Not Guilty” to the charge of

Murder. The trial commenced on 23rd September, 2019.

3. The prosecution called a total of eighteen(18) witnesses in support of its case and they included PW1, Elizabeth Njeri Ng’ang’a, the deceased’s mother, PW2, Joel Kimathi Kamakia, the deceased’s father, PW3, Mary Wamaitha Macharia, a Children’s Officer, PW4, Daniel Cheserek Cheboi, a Clinical Officer in Londiani, PW5, Cheruiyot Robert, a Pastor in Londiani, PW6, Daniel Okute, a resident



of Londiani, PW7, Philip Mutai, another resident of Londiani, PW8, Anne Ikale, an eyewitness from Kawangware, PW9, James Waiga Ng'ang'a, the deceased's uncle, PW10, Edwin Kipruto Rotich, a hotel owner in Londiani, PW11, Sergeant Zablun Mukhola, from Londiani Police Station, PW12, Cynthia Ndinda, involved in the registration of Phone Numbers used in the case, PW13, PC Samuel Yunah, an Officer from the DCI Dagoretti, PW14, Dr. Joseph Maundu, a Psychiatrist, PW15, Stephen Mutinde Joel, a forensic toxicologist, PW16, Dr. George Bikaru, a Pathologist, PW17, PC Charles Macharia, the lead Investigator and PW18: PC Paul Ochieng, a Cybercrime Unit Investigator.

Summary of the Evidence Presented

4. PW1, Elizabeth Njeri (Mother of the Deceased) testified that she was residing in Kawangware at the time of the incident where she was running a salon. She told court that on the 12th January, 2019, a woman who was later identified as PW8, Anne Ikale, came to her salon with two children who were crying and appeared distressed. PW1 took pity on them and instructed her employee, the 2nd accused, Faith Kananu, to provide food and clothes for the children, as one of them had soiled their clothes. During this time, the 1st accused, Naomi Nechesa, arrived at the salon. She offered to assist PW8 by paying for her rent and shopping for her needs. PW1 stated that the accused persons left the salon together with PW8 and her children. PW1 went on to state that although she was initially reluctant to allow her son (the deceased) to leave with them, the 2nd accused, who was familiar with the child, assured her that they would not be gone for long. Later that day, the 2nd accused returned along and reported that the child had been left with the 1st accused. When the child did not return, PW1 and the 2nd accused began searching for him and subsequently reported the matter to Kabete Police Station.
5. PW1 confirmed that she did not know the 1st accused before that day but had employed the 2nd accused for five years. She also confirmed that she had no grudge against the accused persons and reiterated that the deceased was in good health when he left with them but found him dead a few days later.
6. On Cross-examination, PW1 reiterated that she had no grudge against the accused persons and emphasized that the deceased was in good health when he left with the two women. She mentioned that other individuals, including a woman named Purity Gakui or Jackline, who was married to the deceased's father, were also questioned and arrested in connection with the case due to prior altercations between them.
7. PW2 - Joel Kimathi (Father of the Deceased) testified that he received a call from PW1, who informed him that their son had left with the accused persons and had not returned. On the night of January 13, 2019, PW2 received a call from a private number. The caller, a woman, identified herself as having the child in her possession and demanded a ransom of Kshs.100,000 while threatening to harm the child if her demands were not met. The caller allowed PW2 to briefly speak to his child, who sounded scared but otherwise unharmed.
8. PW2 managed to negotiate and sent Kshs. 20,000.00 to a number registered under the name Cynthia Ndinda Wambua (PW12). Despite making this payment, the child was later found dead. He stated that he knew the 2nd accused as she worked for PW1 but had only seen the 1st accused in court.
9. During cross-examination, PW2 confirmed that the phone number provided to him was registered under PW12's name. He also acknowledged that he had separated from PW1 and was living with another woman by the name Purity Gakui, who was also questioned by the police due to her prior disagreements with PW1.
10. PW3, Mary Wamaitha Macharia, a Voluntary Children's Officer, testified that she was called to assist in the case of a missing child. She went to the police station, where she found two women, who included



the 2nd accused, in custody. However, she did not encounter the child's mother at that time, as PW1 was out searching for her missing son.

11. PW4, Daniel Cheserek Cheboi, a Clinical Officer at a Private Clinic in Londiani, testified that on January 14, 2019, a woman brought in an unconscious child who was foaming at the mouth. Upon examining the child, he found no heartbeat and declared the child dead. The woman, who had introduced herself as the mother of the child, claimed that he had been unwell for two days. She further stated that she was visiting Londiani because her husband had recently secured a job there, but she had been unable to reach him by phone. PW4 identified the 1st accused, Naomi Nechesa in court as the said woman.
12. PW4 went on to state that the following day, the woman returned to the clinic with a village elder and other people, claiming that money had been raised to transport the child's body for burial. When PW4 asked for her identification, she initially gave him an ID Card with the name Naomi but later claimed that her ID Card was lost. PW4 identified the 1st accused in court as this woman.
13. On cross-examination, PW4 clarified that foaming at the mouth is a normal occurrence in deceased persons and does not indicate a specific condition. He also confirmed that the child had no visible injuries and that the 1st accused showed him an identification card with the name Naomi, although she later claimed to have lost it.
14. PW5, Pastor Cheruiyot Robert, a Pastor at Africa Gospel Church, testified that he heard screams coming from the vicinity of the clinic and went to investigate. He found the 1st accused crying and holding a lifeless child. When asked, she claimed to be from Kakamega and was visiting Londiani with her husband. PW5 and other members of the community raised approximately Kshs.7,000.00 to help her transport the child's body back to Kakamega for burial. However, the woman disappeared before the arrangements could be made. He identified the 1st accused in court as the woman he had been referring to. He confirmed that he had not seen the 1st accused person before then and had not been called for an identification parade.
15. PW6, Daniel Okute, testified that he was informed about a child's death at the clinic and went there to assist. He met the 1st accused, who told him that she was in Londiani to visit her husband. He helped the 1st accused find a place to sleep for the night. The next morning, however, he found out that she had fled, leaving behind the deceased's body at the clinic. He clarified that he had not seen the accused person again until he saw her in court.
16. On cross-examination, he stated that he did not witness the 1st accused fleeing and held no personal grudge against her.
17. PW7, Philip Mutai (Resident of Londiani), testified that on January 15, 2019, the area Chief contacted him about a woman who had lost her child and was searching for her husband. He assisted her in printing a photo of her husband from her phone but could not help locate him. He identified the woman in court as the 1st accused and confirmed that he had no prior acquaintance with her.
18. On cross-examination, PW7 stated that he did not know either of the accused persons before the incident.
19. PW8, Anne Ikale (Eyewitness from Kawangware), testified that on the morning of January 12, 2019, she went to a salon in Kawangware with her two children. Her purpose for the visit was to seek assistance, as she was in a desperate situation and needed food for her children, who were visibly distressed and crying from hunger. Upon arrival, she met PW1, the owner of the salon, who instructed



- the 2nd accused, Faith Kananu, to provide food and clothing for the children, especially after one of them soiled their clothes.
20. PW8 described how, as she was caring for her children, when the 1st accused, Naomi Nechesa, entered the salon and offered to assist her further. Naomi expressed her willingness to pay rent for her and promised to help her buy more shopping and essentials. According to PW8, this gesture seemed kind, and she felt relieved, believing that her problems were being addressed. However, Naomi did not fulfill these promises.
 21. PW8 testified that she and her two children left the salon in the company of both accused persons. She recalled that the 1st accused, Naomi, was holding the hand of the deceased child, who appeared to be in good health and happy at the time. They walked together through the streets of Kawangware. During the walk, one of PW8's own children experienced a sudden bout of diarrhoea, necessitating a change of clothes. The 2nd accused, Faith, as instructed by PW1 went to assist PW8 in finding new clothes for her child. At this moment, PW8 lost sight of the 1st accused and the deceased child.
 22. PW8 testified that after changing her child's clothes, she searched for the 1st accused and the deceased but could not find them. She asked Faith, the 2nd accused, if she had seen where Naomi had taken the child, but Faith appeared equally confused and claimed she had not seen them. Feeling worried and anxious, PW8 parted ways with Faith. Later, PW8 was arrested by the authorities and held briefly at the chief's office, where she was questioned about the incident. She was subsequently released, only to be rearrested again by the police. Upon entering the police vehicle, she found the 2nd accused, Faith, already in custody. In the course of her testimony, PW8 emphasized that she held no personal grudge against either of the accused persons.
 23. On cross-examination, she stated that Naomi arrived at the salon unexpectedly and she had never seen her before that day. PW8 maintained that she was merely seeking for help for her children and did not know how the 1st accused managed to leave with the deceased without her noticing. She also confirmed that Naomi did not follow through on her promise to pay for her rent or buy any shopping.
 24. On further cross-examination, PW8 reiterated that the 2nd accused was not holding the deceased's hand during the walk and it was the 1st accused who had direct contact with the child. She stressed that her sole intention at the salon was to seek help and she had no knowledge of the 1st accused's intentions or her background.
 25. PW9: James Waiga Ng'ang'a the deceased's uncle testified that PW1 is his sister. He stated that he was informed on January 12, 2019, a Sunday, that the deceased child had left with the 2nd accused, who was employed by PW1, and had not returned. PW1 further informed him that the 2nd accused had come back with a piece of paper bearing a phone number. PW9 decided to send a small amount of Kshs.50.00 via M-Pesa to trace the owner of the number, which showed the recipient's name as Cynthia Ndinda (PW12). PW1 confirmed that she did not know anyone by that name.
 26. PW9 further testified that he alerted the neighbors, who took the 2nd accused to the chief's office for questioning. She was then transferred to Muthangari Police Station for further interrogation. In an attempt to locate the child, PW9 uploaded the deceased's photo on social media platforms, including Facebook, and reached out to Kameme FM for assistance in the search.
 27. He stated that he later received a call from a different number, where the caller who was a woman claimed to have found his number through the Facebook post. PW9 reported this development to Muthangari Police Station. He told court that the called had demanded Kshs.200,000.00 as ransom for the child's release and also instructed him to delete the social media posts about the missing child while



- threatening to send photos of the deceased's body if the money was not sent by midnight. Despite the threats, PW9 did not send any money. The following day, the police at Kabete informed him that a child's body had been found in Londiani. PW9 went to Londiani with the police and confirmed that the body was indeed that of the deceased.
28. On cross-examination, PW9 stated that PW1 had separated from her husband, PW2. He mentioned that PW2 had remarried a woman named Jackline, who was also arrested and questioned by the police in connection with the case. He admitted that he could not recognize the voice of the caller but identified the 2nd accused as PW1's employee.
 29. PW10, Edwin Kipruto Rotich, the owner of a hotel in Londiani, testified that on January 14, 2019, the 1st accused came into his hotel with a child. She ordered tea and mandazi (snacks), which she shared with the child. After a while, the child appeared to fall asleep, and the 1st accused asked PW10 to check if the child was breathing. She explained that the child had been sick for two days and that she was in Londiani to look for her husband, whose phone was unreachable.
 30. PW10 stated that he carried the child to a nearby stage so he could get him medical attention at a clinic, with the 1st accused following him. Upon arrival at the clinic, the child began foaming at the mouth. PW10 handed the child over to the clinical officer (PW4) and returned to his hotel. Later, he heard the 1st accused scream and learned that the child had died. He identified the 1st accused, Naomi Nechesa, as the woman he was referring to.
 31. During cross-examination, PW10 stated that the 1st accused had left the child unattended briefly when she went to use the hotel's toilet. He told court that he did not observe any visible injuries on the child. He also mentioned that the child had a soda, but he did not know where the 1st accused had obtained it. On cross-examination by the 2nd accused's counsel, PW10 clarified that he did not see the 2nd accused on that day, but only saw the 1st accused.
 32. PW11, Sergeant Zablun Mukhola, a police sergeant stationed at Londiani, testified that on January 15, 2019, a man and a woman came to the station claiming that her child had died at Londiani Junction. The woman identified herself as Naomi Nechesa (the 1st accused). PW11 told court that the next morning, the man returned alone to report that the woman had disappeared. Later, PW11 identified the 1st accused after she was arrested in Kakamega and brought back to Londiani.
 33. In cross-examination, PW11 admitted that he did not make an official report in the Occurrence Book (OB) when the woman first came to the station. He confirmed that the identification parade for the 1st accused was conducted following standard procedures. On cross-examination by the 2nd accused's counsel, PW11 stated that he had never seen the 2nd accused before the court proceedings and could not confirm her presence in Londiani.
 34. PW12, Cynthia Ndinda, an M-Pesa Agent, testified that on October 20, 2015, she was travelling in a matatu when she lost her purse which contained her National Identity Card (ID), ATM Card, and personal documents. She reported the loss at Ongata Rongai Police Station and later received a replacement ID from Huduma Centre. PW12 went on to state that on 7th July, 2019, she was contacted by the DCIO of Dagoretti and informed that her identity card had been used to register multiple phone lines without her knowledge.
 35. During cross-examination, by counsel for the 1st accused, PW12 stated that she did not know any of the accused persons or the phone number used in the ransom demands. She reiterated that it was the police who informed her about the misuse of her ID. On being cross examined by the 2nd accused's Counsel. She stated that it was the police who gave her the name of the person who was using her ID Card to



- register phone lines. She stated that the bag that she lost had her personal documents, which included an ID Card, money, ATM Card and personal items but the bank account did not have any money.
36. PW13, PC Samuel Yunah, testified that he was attached to the Directorate of Criminal Investigations (DCI) at Dagoretti Police Station during the material time when he was informed by Officers about a reported case of child abduction from Muthangari Police Station, whereby two women had already been detained. The suspects were identified as the 2nd accused, Faith Kananu, and an eyewitness, Anne Ikale (PW8). Investigations revealed that the child was the son of PW1 and was aged three and a half years.
 37. PW13 narrated the initial stages of the investigation, where he, alongside other officers, conducted interviews with the two detained women. He explained that the 2nd accused had allegedly taken the child from PW1's salon on January 12, 2019, accompanied by a woman initially identified as Cynthia, who was later revealed to be the 1st accused, Naomi Nechesa. He stated that the 2nd accused returned to the salon without the child, prompting concern and a search by PW1 and other salon employees.
 38. PC Yunah detailed how the investigation tracked a phone number used to contact the child's father, PW2, while demanding ransom. The phone Number identified as 0717 890204 was registered under the name of Cynthia Wambua, as verified through Safaricom's database. The detective explained that they traced the signal of the phone, which initially led them to Nakuru. They then obtained custodial orders from Kibera Law Courts to detain the suspects for further questioning. The phone was later tracked to Kakamega, and the following day, they were informed by the OCPD of Londiani about a dead child who had been found at Londiani Police Station.
 39. PC Yunah further testified that the phone number 0758 021350 was registered under Samuel Sanya Sindikha, the 1st accused's brother. This led the police team to Kakamega, where they arrested the 1st accused. During interrogation, Naomi Nechesa admitted that she had taken the deceased child and led the Officers to the location where the child's body was recovered in Londiani.
 40. On being cross-examined by 1st accused person's counsel, PC Yunah was asked about the connection between the 1st and 2nd accused. He admitted that there was no direct evidence, such as call logs, linking the two accused persons. He further explained that while the phones were confiscated, they were off most of the time, limiting their ability to track any communication. He also acknowledged that he did not follow up with the person who withdrew the ransom money from M-Pesa, as the withdrawal was done using different agents.
 41. PC Yunah conceded that he was not present during the identification parade and relied on statements from other officers. He also admitted that he could not read the doctor's report on the cause of death during his testimony, when referred to the Pathologist's findings.
 42. PW13, was stood down but later recalled whereby he testified that he did not interrogate PW2 the father of the deceased although it was indicated that he had two wives, one being PW1 and the other known by the name Purity Gakii who had also been arrested. He denied that he was paid money to release the said Purity. He further denied the allegation that the accused persons were tortured while in custody and was not aware of whether the 2nd accused person had complained to the OCS about him. On re-examination, PW13 stated that the accused persons were separated with one being at Muthangari and the other one at Riruta Police Station. He stated that the cause of deceased's death was head injury.
 43. PW14, Dr. Joseph Maundu, a licensed psychiatrist, testified that he examined the accused persons and found both of them fit to stand trial and he produced their reports in court. On cross examination, he



- stated that the 1st accused had some blunt injuries on the body during the examination which appeared to be whip marks.
44. PW15, Stephen Muibe, the head of Forensic Toxicology, testified that he received biological samples from the deceased which included blood and liver tissue, for toxicological analysis. He conducted standard tests to detect the presence of any toxic substances or chemicals that could have contributed to the child's death. The results showed no detectable levels of toxic substances, including common poisons or narcotics. He concluded that there was no chemical cause of death based on the toxicology findings. He produced his report as PExhibit 12.
 45. PW16, Dr. George Biketi, a Pathologist, conducted the post-mortem examination on the deceased child. He testified that the body exhibited two deep cuts on the neck, measuring 4x2 cm and 2x1 cm, multiple facial bruises and multiple scalp bruises with irregular cut wounds on the back of the head (occipital scalp).
 46. Dr. Biketi, noticed significant bleeding on the eyes, nose and the head had a massive clot under the scalp which had intracerebral bleeding and contusion. He and made a conclusion that the child had died from severe head injury and asphyxia due to strangulation. He then filled and signed a post mortem report was submitted as Exhibit 13.
 47. On cross-examination, Dr. Baiketi, stated that the cause of death was haemolagic shock which is caused by bleeding due to low blood pressure. He added that the injuries were visible and they must have happened before death. He also said that as at the time of post-mortem examination, there was no foaming from the deceased's mouth. When cross examined by the 2nd accused person's Counsel, PW16 stated that the injuries were caused by a blunt object and they were approximately a week old.
 48. PW17, PC Charles Macharia, testified that he was the lead investigator in the case. He explained how he took over the investigation on January 13, 2019, following reports of a missing child, Felix Nganga. Initial information linked the child to two women identified as Naomi Nechesa (the 1st accused) and Faith Kananu (the 2nd accused). During the investigations, PC Macharia traced a phone number that had been used to demand a ransom of KShs.100,000.00 from the deceased's father (PW2). The number was registered under the name Cynthia Wambua Ndinda (PW12). Using the Safaricom's tracking data, the investigator initially traced the phone signal to Nakuru, but due to intermittent connectivity, further tracking led them to Kakamega, where the 1st accused was apprehended.
 49. PC Macharia recounted that the 1st accused, Naomi, did not resist arrest and admitted to having taken the child but claimed that she had no intention of harm. That she guided the Officers to Londiani, where the body of the deceased was found with visible injuries. The body was then transported to Nakuru for a post-mortem examination where she confirmed the identity of the child. PW17 added that a further search at the 1st accused's residence revealed mobile phones and a stolen national identity card belonging to PW12, thus linking the 1st Accused Person, Naomi to the crime. The recovered mobile phones were taken for forensic analysis.
 50. During cross-examination, PC Macharia faced questions about the thoroughness of his investigation. Defense Counsel questioned why he did not obtain a search warrant to track the phone numbers and why he failed to identify the individuals who withdrew the ransom money sent via M-Pesa. PC Macharia explained that, in the instant case, obtaining a search warrant was not feasible. He also admitted that the M-Pesa withdrawal details were incomplete, and the identity of the person who collected the money could not be verified.
 51. The defense also challenged the lack of concrete evidence linking the two accused persons. PC Macharia conceded that, there were no call records or text messages confirming coordination between



- the 1st and 2nd Accused Persons. He also clarified that while both accused persons were in police custody during the investigations, they were kept in separate locations to avoid any collusion.
52. On re-examination, PC Macharia reiterated that the case against the 1st accused was supported by multiple pieces of evidence, including her admission of taking the child, the recovery of the Identity Card registered under PW12's name, and the discovery of the deceased's body based on her directions. He emphasized that the 1st accused's actions, including the ransom demands and subsequent flight from Londiani, demonstrated a clear attempt to evade capture.
 53. He concluded his testimony by stating that, in his professional assessment, the evidence against the 1st accused was compelling and pointed to her involvement in the unlawful act that led to the death of the deceased. However, the evidence against the 2nd accused was circumstantial and did not conclusively prove her direct participation in the crime.
 54. PW18, PC Paul Ochieng, a Detective Constable attached to the Cyber Crime Investigation Unit at the Directorate of Criminal Investigations (DCI), testified before court, detailing his role in the forensic analysis of digital evidence related to this case. He explained that he was tasked with examining various electronic exhibits, including mobile phones and SIM cards, which he received from the lead Investigator, PW17 which he also confirmed had been recovered from both the 1st and 2nd accused persons during the police search operations.
 55. PC Ochieng also elaborated on the specifics of his findings. He mentioned that one of the primary exhibits was labeled Exhibit A2, a mobile phone paired with a Safaricom SIM card registered in the name of the 1st accused, Naomi Nechesa. The forensic extraction from this phone revealed several images, including photos of a woman (believed to be the 1st accused) sitting in a vehicle with a child. The child in the image was noted to appear either unconscious or deceased, with visible foam around the mouth, consistent with the condition described by other witnesses who had seen the deceased's body. This phone also contained M-Pesa messages showing transactions related to the ransom payments made by PW2.
 56. PC Ochieng also analyzed another phone marked Exhibit C2, identified as belonging to the 2nd accused, Faith Kananu. Upon examining this device, he extracted multiple images and messages. Notably, the images included photos of a child that resembled the deceased. The messages extracted did not indicate any direct communication between the 1st and 2nd accused persons regarding the abduction.
 57. During his analysis, PC Ochieng also examined other SIM cards presented as Exhibits C3, C4, and C5, which were associated with various Safaricom numbers. He explained that while these SIM cards were recovered and paired with phones linked to the accused persons, the data extracted did not provide substantial additional information directly related to the crime.
 58. On cross-examination, Defense Counsel questioned the integrity of the forensic process, particularly the chain of custody for the mobile phones and SIM cards. PW18 responded that the exhibits were handled in strict accordance with standard operating procedures, and he maintained that the data extraction was conducted using certified forensic tools.
 59. The Defense further questioned the absence of any evidence of direct communication between the 1st and 2nd accused persons on their respective phones. PW18 acknowledged this gap but clarified that the lack of direct communication did not rule out the possibility of coordination, given the circumstantial evidence presented by other witnesses and the actions observed. He reiterated that his role was limited to the extraction and presentation of digital data, not the interpretation of the suspects' intentions or the broader implications of the evidence.



60. On re-examination, PC Ochieng was asked to clarify his findings regarding the extracted images and their relevance to the case. He confirmed that the most significant image showed a child in a compromised state, which aligned with the testimony provided by witnesses who had seen the child before his death.
61. PC Ochieng concluded his testimony by affirming that the forensic analysis provided crucial corroborative evidence linking the 1st accused to the crime, especially given the M-Pesa transactions and images found on her phone.
62. At the close of the prosecution's case, the Prosecution rested its case after presenting the testimonies of 18 witnesses. The court then proceeded to determine whether the accused persons had a case to answer, pursuant to Section 306(2) of the Criminal Procedure Code. The court then found that the Prosecution had established a prima facie case, warranting a defense from both accused persons and ruled that the accused persons had a case to answer and placed them on their defense.

Defense of the 1st Accused

63. The 1st Accused, Naomi Nechesa, exercised her constitutional right to remain silent and did not offer any defense. This right is enshrined under Article 50(2)(i) of *the Constitution* of Kenya, which protects an accused person from being compelled to give self-incriminating evidence. In the case of Republic –vs- Josephat Karanja Njenga [2020] eKLR, the court reiterated that the choice of an accused person to remain silent cannot be construed as an admission of guilt; rather, the burden remains on the Prosecution to prove its case beyond a reasonable doubt.

Defense of the 2nd Accused

64. The court then proceeded to hear the defense of the 2nd accused person, Faith Kananu, who opted to give sworn statement. She testified that she was a salonist working in Kawangware and had known PW1 (the deceased's mother) as her customer for many years. She narrated that on January 12, 2019, she had temporarily closed her business due to ongoing construction and had gone to assist at PW1's salon. According to her, a woman named Anne Ikali (PW8) arrived at the salon with two children and asked for food. At the request of PW1, the 2nd accused provided food and clothes for the children.
65. The 2nd accused recounted that, later in the day, only one of the children returned to eat, while the younger child, who was the deceased, did not return. A search was initiated, and PW1 contacted the deceased's father, PW2, who confirmed that he had not seen the child. The 2nd accused was subsequently arrested and taken to various Police Stations, including Muthangari, Kabete, and Lang'ata. She claimed that several other individuals were arrested in connection with the case but were later released without being charged. She also learned that the child was found dead but denied that she could have been involved while stating that she was with the deceased's mother at her salon.
66. When cross-examined, the 2nd accused stated that she had only one Mobile Number, 0727 856 236, which she had used for several years. She denied taking the deceased from the salon and maintained that she only saw PW1's older child on the material day. She alleged that PW1 fabricated the story against her, possibly due to personal grudges. The 2nd accused insisted that she was innocent and had no involvement in the disappearance or death of the deceased.
67. Further, the 2nd accused testified that she was mistreated while in police custody, alleged that she was physically assaulted and strangled with a wire by police officers who coerced her to admit knowing a person named Purity Gakoi, whom she had never met. She stated that the police forced her to make false



admissions, and she was subjected to beatings. She named Eric Musembi Kimulu, another individual who was also arrested in connection with the case but was also released without being charged.

68. On re-examination, the 2nd accused reiterated that she was assaulted by the police and had reported the mistreatment. She maintained that the children were playing near the salon, and it was normal for them to respond when called. She concluded by denying any involvement in the crime and stated that she was in police custody when the child disappeared and was later found dead.

Analysis and Determination

69. In a criminal trial, the prosecution carries the burden of proving its case beyond reasonable doubt, particularly in serious charges such as murder. This standard was emphasized in the case of *Woolmington –vs- DPP [1935] AC 462*, where the court established that it is the duty of the Prosecution to prove the case against the accused.

70. The charge against the accused persons is that of ‘Murder’ and is defined under Section 203 of the Penal Code, as:-

“ Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

71. The punishment for Murder is prescribed for under Section 204 of the Penal Code, which mandates:-

“ Any person who is convicted of murder shall be sentenced to death.”

72. It then follows that, to secure a conviction for murder, the Prosecution must establish three essential elements beyond reasonable doubt, being that:-

- a. The death of the deceased and its occurrence.
- b. The accused committed the unlawful act that caused the death.
- c. The accused acted with malice aforethought.

73. This position was well articulated in *Anthony Ndegwa Ngarivs –vs- Republic [2014] eKLR*, where the court emphasized the necessity of proving these elements to establish the offence of murder.

74. The Prosecution’s case was built on the testimonies of its 18 witnesses, whose evidence has carefully been scrutinized to determine whether it meets the legal threshold. The Court will now embark on each element necessary for proof of the offence of murder to see whether the evidence presented before this court establishes those elements beyond reasonable doubt.

Proof of Death of the Deceased

75. The first element to consider is whether the Prosecution has proved that the deceased, Felix Nganga, is indeed dead. The evidence of PW4 (Clinical Officer Daniel Cheserek) and PW16 (Pathologist Dr. George Bikaru) was pivotal. PW4 testified that the child was brought to the clinic in an unconscious state and was foaming at the mouth. That upon examination, he was declared dead. PW16 conducted a post-mortem examination and determined the cause of the deceased’s death to be a severe head injury, with evidence of deep cuts and bruising consistent with blunt force trauma.

76. This evidence was unchallenged, and the court finds it conclusive that the death of the deceased occurred.



Whether the accused committed the Unlawful Act leading to Death

77. The second element involves assessing whether the accused persons committed an unlawful act or omission that caused the death of the deceased. This analysis focuses on the roles of both the 1st and 2nd accused persons.

Evidence Against the 1st Accused (Naomi Nechesa Sanya)

78. The Prosecution presented compelling evidence linking the 1st accused to the abduction and subsequent death of the child. The Testimony of PW1 (Elizabeth Njeri - Deceased's Mother), placed the deceased in the company of the 1st accused shortly before his disappearance. PW1 testified that the 1st accused offered to assist a woman (PW8) who had come begging at her salon. PW1 further stated that the 1st accused took the child with her, and he was last seen alive in her company.
79. PW8 corroborated PW1's account, stating that the 1st accused volunteered to help her and took the deceased away, promising to return shortly. This evidence was unchallenged and demonstrated that the 1st accused was the last person to be seen with the child.
80. In his testimony, PW17, the Investigator critically linked the 1st Accused to the abduction and subsequent death of the child. PW17 explained how the phone number used to demand ransom from PW2 (the deceased's father) was traced back to the 1st accused. The possession of the stolen identity card of PW12 (Cynthia Ndinda) and the recovery of the deceased's body based on directions provided by the 1st accused further implicated her.
81. Similarly, the evidence of PW10 (Hotel Owner Edwin Kipruto Rotich) and PW4 (Clinical Officer) corroborated the movements of the 1st Accused in Londiani, where she was last seen with the child. This aligns with the principles outlined in the case of Republic-vs- Ernest Gachanja & Another [2018] eKLR, where the chain of events and circumstantial evidence were used to prove the accused's culpability. Hence, this court is persuaded that the circumstantial evidence provided in this case as reproduced above, points irresistibly to the guilt of the 1st Accused and exclude any reasonable hypothesis of her innocence.
82. Hence, the Court finds that the second element on proving the commission of an unlawful act was committed by the 1st accused, has been established beyond reasonable doubt. For avoidance of doubt, this court finds that the Prosecution has established beyond reasonable doubt that the 1st Accused committed the unlawful acts that directly caused the death of the deceased

Evidence Against the 2nd Accused (Faith Kananu)

83. The case against the 2nd accused, however, was largely circumstantial. The Prosecution relied on the testimony of PW1, who stated that the 2nd accused was an employee at her salon and was last seen with the deceased before he went missing. PW8 confirmed that the 2nd Accused provided food and clothes to her children but did not directly implicate her in the abduction of the deceased.
84. During cross-examination, PW17, admitted that there was no direct evidence, such as call logs or messages, showing communication between the 1st and 2nd Accused prior to or during the commission of the crime. The forensic analysis of the 2nd Accused's phone (conducted by PW18 - Cybercrime Investigator PC Paul Ochieng) did not reveal any incriminating photographs or messages linking her to the ransom demands or the abduction.



85. The Court is guided by the principle in *Sawe –vs- Republic* [2003] eKLR, where it was held that suspicion, however strong, cannot form the basis of a conviction unless supported by concrete evidence.
86. The evidence against the 2nd accused is purely circumstantial and fails to meet the standard of proof beyond reasonable doubt. Thus, in this case, the Prosecution has failed to provide concrete evidence beyond suspicion as against the 2nd Accused.

Malice Aforethought

87. The third element of murder is malice aforethought, as defined under Section 206 of the Penal Code, which includes the intention to cause death or grievous harm. The section outlines the actions which constitute malice aforethought to include; the intention to cause death or grievous harm; the Knowledge that the act causing death would probably result in death or grievous harm; the intention to commit a felony; or the intention to facilitate escape from custody after committing a felony.
88. In this case, the conduct of the 1st accused demonstrates clear intent and knowledge that her actions would likely result in the death of the child. The factors indicating malice aforethought include: the kidnapping of the child and the demand for ransom, showing premeditation and an intention to commit a felony. The severe head injuries inflicted on the deceased, as described by PW16, showed an intention to cause grievous harm or death, and lastly, the 1st Accused's actions in evading capture, including fleeing from Londiani, further demonstrated knowledge of her guilt and malice aforethought.
89. In the case of *Morris Aluoch –vs- Republic* [2018] eKLR, the court emphasized that malice aforethought would be inferred from the nature of the injuries and the conduct of the accused.
90. Having evaluated the facts above, the conduct of the 1st accused is consistent with the principles outlined in the case of *Nzuki –vs- Republic* [1993] KLR 171, where the Court of Appeal held that malice aforethought can be inferred from the actions and circumstances surrounding the offence.
91. Consequently, the Court finds that the Prosecution has successfully established malice aforethought beyond reasonable doubt as against the 1st Accused Person. Therefore, the 1st accused, Naomi Nechesa Sanya, is guilty of Murder as charged.
92. In contrast, there was no evidence presented to show that the 2nd accused acted with malice aforethought. The Prosecution did not demonstrate any intent or knowledge on her part indicating involvement in the murder. The conduct of the 2nd accused was consistent with an innocent employee who had no role in the criminal activities of the 1st accused.
93. The Court therefore, finds that the Prosecution has failed to prove the case against the 2nd accused beyond reasonable doubt.

Conclusion

94. Based on the analysis of the evidence, the court makes the following findings: that, the evidence against the 1st Accused is overwhelming hence the Prosecution has proved beyond reasonable doubt that she committed the unlawful acts leading to the death of the deceased, with malice aforethought. She is hereby convicted for the offence of murder under Section 203 of the Penal Code.



95. On the other hand, the evidence against the 2nd accused is insufficient and fails to meet the standard required for a conviction. She is hereby acquitted under Section 215 of the Criminal Procedure Code and to be released forthwith unless otherwise lawfully held.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 31ST DAY OF OCTOBER , 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Ndeda counsel for the State

M/S Muthoni counsel holding brief for Mr. Michuki counsel for 1st accused person

Mr. Ondieki counsel for 2nd accused person

Court Assistant - Kinyua

