



Republic v JM (Criminal Case 41 of 2015) [2023] KEHC 1269 (KLR) (23 February 2023) (Ruling)

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 41 OF 2015
EM MURIITHI, J
FEBRUARY 23, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

JM ACCUSED

RULING

1. The accused JM is charged with murder c/s 203 as read with 204 of the Prosecution of his daughter of the accused. The Prosecution’s case appeared to be that the accused had strangled and sexually defiled his said daughter aged about 1 ½ years following a matrimonial disagreement with his wife the mother of the deceased. The Prosecution called 6 witnesses to prove the charge and their evidence is set out in full below.

Evidence

2. PW 1 JM testified that

‘ I recall May 9, 2015 a Sunday at about 10:30 am; I was in my house. I heard screams from people from people. They were coming towards my house. They were one AK the wife of JM the accused she told me she wanted me to give her my phone to call her mother. She was carrying a child. Before she could tell me more, the accused pushed her away. She then told me that M (accused) had taken the child from the house they were staying and took her to an abandoned house. They arose a scuffle between them. They were the two of them alone. During the scuffle, the Kitambaa with which the child was covered fell down and I saw that the child was still. There were no signs of life on her. When I asked why the child was still, they told me that the child was to be taken to hospital. I told them since the child seemed dead, I was not ready to hear them. The accused told the wife to go to her home. She left with the lifeless child and the accused went to her way. I the called the Assistant Chief and informed him what I had seen. He told me to rush and stop the wife of the accused so



that she does not dump the body. I went and called the accused's wife and took her to the accused's home where we found the Assistant Chief. The Assistant Chief called the police. They came and took the body away. The accused is my nephew. He is a son to my brother. M is the accused in court (points at accused).'

3. On Cross Examination he said:

' The distance between M's house and mine is about 300 metres apart. He was living with the wife and the child. M had chased away the wife and had left the child with the accused. I do not know when who had the child on the May 9, 2015. The two came to me together. The wife did not tell me if the child was dead. She told me that she had collected the child from their abandoned house which was about 500 metres from their house they were living in. I know the child was dead because the eyes were open as well as the mouth. It was not blinking. A deemed not to know the child was dead. She told me that the accused had damped the child in that house and the child was suffering from hunger and cold.'

4. PW2 SKM, the Assistant Chief xxxx sub-location, testified that:

On May 10, 2015 at 12:00 noon. I received a telephone call from KM Chairman of Nyumba Kumi who informed me that there was a disagreement in the family of JM between JM and his wife called AK.

They had disagreement over their child who was. It was a female child of about 1 year. I decided to go to the scene. I went to [particulars withheld] village at the home of JM. When I arrived I found M and his wife. They were members of M. The child had been held in the arm by her mother, AM is the accused before the court (points). I knew M as an area resident for more than 10 years when I checked the child I found that she had died. M and his wife started arguing. We called Suguita Police station. The child's mother was tired for holding the child and I asked her to place the child down.

Later a vehicle came from Subuiga Police Station and the police took pictures and they arrested M's and his wife and took the body of the child to Meru General hospital Mortuary.

I recorded my statement at Suguita Police Station.

5. On cross-examination he said:

I got to know that it was a matrimonial dispute. I did not get the nature of the dispute. I established the child had died as the child was not breathing. I also saw the eyes were fixed. I did not see any injuries. M appeared to be in shock. The wife was also in shock and she was crying. They both looked disturbed by the incident.

6. PW3 No xxxx Sgt Festus Musya Musyimi the investigating Officer testified that:

'On May 13, 2015 while at the office I was called by my superior DCIO at Timau, It was about 10:00 am. I went to his office and he structured the Subuiga Police Station to meet the OCS and Chief Inspector Luka Toroitich was at the others. I recall that when we arrived, I found Inspector Toroitich, CPL Njoki, and we went to the scene, I drew a sketch map. Later we took statements and then charged the accused.

I have the sketch map. The sketch map shown marked A where the body was found. B is the house of the suspect who is the father to the deceased. C is the path for the father's house to where the body was found. D is the house of the suspect's mother. E is the house of the



brother of the suspect. F is house of the accused other brother. I drew the sketch on May 13, 2015 at 1.20pm.

I wish to produce the sketch map as exhibit. PEx No 1.

According to my sketch for the place where the deceased was to the suspects' house is a distance of 1 km. The suspect is the accused before the court. (points at the accused).

Accused was arrested before I went to Subuiga Police Station. I found him at the cell . I think he was arrested a day earlier. I found him in the cells of Subuiga Police Station.

7. On cross-examination he said

'When I went to the scene I did not get body at the scene. It had already been received by the officers for that police station.

How did you establish that the body was in the house?

It is the officers who guided me as to where the body was found.

I cant recall whose statement I recorded.

[witness is called upon to refers records]

I recorded the statement by one FMJ, MMS

JKM.

What linked the accused to the deceased?

From the statement of one FM, she started that on May 9, 2015 my sister S was brought by the mum. One of the witnesses said that the is the one who took him from the house where the child was staying.

Other suspects?

The 3 others suspects were not implicated in the killings.

8. PW4 No xxxx CI Luka Toroitich, testified that:

I was on May 10, 2015, OCS Subuiga Police Station. I got a Police call from one SK Chief xxxx Sub-location . He said that there was information that a child had been killed in his area. I went with the officers and went to the scene. I went with 2 officers Cpl and have forgotten their names. At the scene, we found the Chief with village elders who directed has to the house where there was a small girl about 1 ½ months old. There were suspicions that she had been defiled. She was found in a house that was not being utilized at the time. It belonged to the grandmother of the child, the mother to the child's mother. We found a body which was fresh and not long died. We interviewed the mother AK. She said she had come to visit her husband JM with whom he had disagreement. The brothers chased her away and she took the child in the estranged husband's house JM, and she had ran away. She said the incident happened on May 9, 2015.

She said she left the child on her husband's bed about 2-4pm. She said she ran away and latter came back in the evening and she was chased away for the second time. She went and stayed in a nearby forest. She had cries of the child in the night and in the morning when she went to see the child, she found the child in the house dead.



She said she did not know the child had died. She had carried the child for a short distance and she tried to call her mother by telephone. She realized her child was dead. When she found the child had died she was advised to take the child back in the place where the child had been found. The lady AK placed back the child to the house. We interviewed witnesses MM, JK and the child's father JM.

After interrogating them, we concluded that one of them must be involved. I arrested all the 3 and took them to Subuiga Police Station and latter handed over the matter to DCIO Buuri.

The suspect is one JM before the court, the child's father.

The body of the child was taken to Meru Level 5 Hospital mortuary.

9. On cross-examination he said:

The accused is the father of the deceased child. The child was about 1 ½ -2 years.

What was the cause of death?

I cant tell. I handed over the case to the DCI. It would appear she was defiled and could have died from the defilement.

At the scene we saw the private part of the deceased had been defiled.

AK had taken the child. A is the mother of the child. AK said the accused is her husband. A said that they had disagreement with the accused.

It was Chief who said that the child was found in the house. It was the Chief and village elders.

A said she went and took the child and went out with the child. Thinking she was arrive. It could be that it A who told the Chief that she found the child in the house.

The child was in the house. I do not have other evidence. I arrested the three brothers thinking one of them must have been involved in the incident. I then handed over to the DCI.

According to the 2 witness, they were pointing the finger to the child's father. They are the one who said the child had been with the father in the night.

10. PW5 Doctor Kinani Scholastica, a General Pathologist testified as follows:

I did postmortem SN at Meru Teaching and Referral hospital on May 12, 2015 at 10:30 am. The general observation in the body clothing:

She had one sock on left leg. The socks had red and white stripes.

Sex: Female.

Race: African

Approximate age of 1 ½ years.

Nutrition was fair.

Her physique was small, Height was 70 cm.

Postmortem charges and assessment of time of death. The was no nigor mortis. Time of death was approximate 72 hours.



External Appearance

Thighs abdomen buttocks and labia are soiled the stool.

The mons pubis labia and buttocks are bruised.

The left labia majora has a laceration measuring 1cm.

Internal Appearance

The main finding were in genital urinary system and in nervous system. The genital urinary system and anus and rectum are bruised. The canal opening was small lacertian vagina, uterus and fallopian tube are normal.

The nervous system. The brain shows features of raised inter-cranial pressure (uncal grooving) – pressure due to bone prominence on brain tissue when theswelled.

There was narrow sulci spaces between the lobes of the brain. Flattened Gyri the prominences of the brain.

As the result of the execution, I found the opinion that the cause of death was-

1. Raised inter-crannial pressure probably due to Asyphyxia (lack of oxygen) and
2. Sexual assault it attributed to the death as it is a small child.

11. On Cross-examination she said:

The circumstances of death matter.

The first page of the report indicates that circumstances of death were that the body was found lying dead in an abandoned house and upon further investigation on her body it was suspected that the body had been sexually assaulted.

I used the probability as I was not certain that Ashphyxia was the cause of death.

The assault was at Canal opening. The pattern of injury indicated sexual assault.

I said its probably Ashphysia.

I was certain about internal pressure.'

12. PW6 Susan Wanjiru Ngugi Government Chemist officer testified as follows:

I have an Analytical Report authored by myself and I present before the court.

Accompanied by an exhibit Memo form on May 19, 2015 by Police Office No xxxx PC Phares Maina for CID Buuri presented in following exhibits to the laboratory.

1. 2 Blood sample marked A1-A2 of JM.
2. A3 –A4 all blood sample belonged to JM.
3. A5-A6 blood sample belonged to MM.
4. Finger –Nails chippings packed in clear plastic
B1 –JM
B2 –JM
B3- MM



5. Vagina swab CI- cotton wool swab packed in clean plastic belong to SN.
6. C2-Analysis swab belonging to SN.

We received additional exhibits on May 22, 2015 from Police Officer No xxxx CPC Joshua Mola for CID Buuri.

1. Finger nail clipping in clear plastic marked D for SN.

It was desired to ascertain the presence/original of any biological evidence material.

I am the one who marked the exhibits. I started immediately and this were my findings.

Vaginal swab C1 and anal swab C2 were not stained with semen.

I went further and generated DNA profile for the canal and vaginal swab but no DNA profile was found. There were no cells which could generate genetic material. I called the Investigating Officer to find out whether we could find other exhibits... of the deceased. The Investigating Officer said they could not recover anything else.

The chipping were to provide a reference material on S. We also suspected that she could have defended herself in the attack and that we could see exogerus (.....) DNA. Unfortunately, the chippings only gave the DNA for an XX –Female.

Epithetical cells refer to surface cells on the skin which could have been observed from the contact not the attack. Principle that every contact leaves a trace. Locus principle.

I facilitated the DNA profile of the deceased attached to the Report the finding of the examination of the DNA had nothing to correlate the accused person and the deceased. There was also nothing to cross-match the deceased to the person named as JM.

I signed the report on February 17, 2020. The examination was started in 2015.

The high vaginal swabs are worked immediately on submission because the semen is sensitive and it disappears very fast making it impossible or difficult to generate DNA profile. We were hopeful the officer would recover something else.'

The witness was not Cross Examined.

13. The case was marked with perennial unavailability of witnesses and the court had on occasions to make orders for last adjournment to grant prosecution opportunity to bring its witnesses culminating in the issuance on request of the prosecution of Warrant of Arrest to issue for the named witnesses JM, MM, and FM. These witnesses were never secured.

Whether there is a case to answer

14. The question arising at the Close of case for the prosecution, is whether, on the evidence presented before the court, there is established a prima facie case to warrant the calling of the accused to make his



defence for the charge of murder contrary to section 203 as read with 204 of the [Penal Code](#). Section 306 of the [Criminal Procedure Code](#) provides therefor as follows:

306. Close of case for prosecution

- (1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.
- (2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.
- (3) If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence.

[Act No 33 of 1963, First Sch, Act No 20 of 1965, s 33, Act No 5 of 2003, s 86.]

Submissions

15. The Counsel for the accused and for the Prosecution, when invited by the court to make submissions, urged the court to make a ruling on the basis of the evidence presented before the court without making any submissions.

Verdict

16. The Court must consider in terms of section 306 whether there is evidence that an offence has been committed, having regard to the elements of the offence which require to be proved beyond reasonable doubt. In the case of murder, the elements of the death and cause thereof; the unlawful act of the accused which causes the death; and the existence of malice aforethought must be proved. See [Anthony Ndegwa Ngari v Republic \[2014\] eKLR](#).
17. On the evidence adduced by the Prosecution, apart from the fact of disagreement between the accused and his wife, and the death of the child which is testified to by the witnesses PW1 and PW2 and confirmed by medical evidence of PW5, the date May 9, 2015 according to PW1 and May 10, 2015 according to PW2] and cause of death is uncertain between asphyxia and sexual defilement, and the assailant(s) is clearly not identified. It was not clear whether the child was killed by the mother, the father, or both, or any other person. The discovery of the killing was done by the Village elder PW1 was visited by the mother and the father of the child sought his help to contact the child's grandmother, and who were arguing between themselves and, in the ensuing scuffle, he discovered that the child that the



mother was carrying in her arms was dead. As testified by the Government Chemist official PW6, the samples presented for DNA analysis did not produced genetic profile that could identify the accused as the assailant, and the Government Chemist's call for further evidence did not yield fruit.

18. Moreover, there was a case of interference with evidence as the dead child was allegedly moved from the scene by the mother who did not know that the child was dead and the body returned to the alleged scene of crime, upon suggestion by the village elder PW1 and the Assistant Chief (PW2) on discovery that the child was dead. It is not safe to convict on such evidence because of the obvious danger of its being stage managed, wittingly or unwittingly.
19. There was clearly no evidence upon which the court could find that the accused had committed the offence charged as required under section 306 of the Criminal Procedure Code.

Order

20. Consequently, the Court, in terms of section 306 (1) of the Criminal Procedure Code, finds that the prosecution has not presented evidence that the accused committed the offence and the court enters a finding of not guilty for the offence of murder c/s 203 as read with 204 of the Penal Code. The accused is entitled to an acquittal at this stage of case to answer in accordance with the law.
21. The accused is acquitted of murder contrary to sections 203 as read with 204 of the Penal Code, and there shall be an order directing his immediate release unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED ON THIS 23RD DAY OF FEBRUARY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Igweta with Ms. Nelima for the Accused.

Ms. Nandwa, Prosecution Counsel for the DPP.

