



REPUBLIC OF KENYA



**Republic v Nasieko (Criminal Case 1 of 2018)  
[2023] KEHC 24560 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 24560 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE 1 OF 2018**

**MN MWANGI, J**

**JUNE 30, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**PENINAH NASIEKO ..... ACCUSED**

**JUDGMENT**

1. The accused person, Peninah Nasieko, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the charge were that on an unknown date between 14<sup>th</sup> and 17<sup>th</sup> day of December, 2017, at Macknon Location in Kinango Sub-County within Kwale County, she murdered Fatuma Salim. The accused person pleaded not guilty to the charge. The prosecution called eight (8) witnesses in support of its case.
2. The 1<sup>st</sup> witness was Maureen Akinyi Mwanyika, a housewife who lived at Mackinon, in Taru. She stated that she knew the accused person as Peninah or Mama Fatuma. That she had known her for two (2) years as a tenant at her father's house and as her neighbour. PW1 also stated that the accused person used to live in a single room with her husband known as Salim and that they had a daughter, called Fatuma, who was nine (9) months old.
3. It was PW1's evidence that on 14<sup>th</sup> December, 2017, she saw the accused person at 5.00 p.m., when she went to PW1's house while carrying Fatuma, whom she had covered with a baby shawl. That PW1 asked the accused person where she had disappeared to with "their" Fatuma, and she tried to uncover the child but the accused person told her in a harsh voice that she should not uncover the child as she had come from the clinic, where she had taken her for vaccination.
4. PW1's evidence was that the accused person left immediately and went towards her house. That after 15 minutes, she heard someone calling out her name "Maureen, Maureen!", and she identified the voice to be that of the accused person. PW1 stated that she switched off her radio so that she could hear her



well, and went out of her house, where she met the accused person. PW1 explained that she saw that the accused person was carrying the white baby shawl which was folded, in her hands, which she requested PW1 to hold. PW1 stated that the accused person was not carrying her child and she inquired from her where the child was. PW1's evidence was that the accused person told her that the child's father, Salim, had gone with the child to "Kwa Mueni". That the accused person requested PW1 to give the baby shawl to Salim when he returned. PW1 indicated that she placed the baby shawl on a sack which was on some sand that was outside her house. PW1's testimony was that after 15 minutes, Salim went to her house and called out her name and asked if his wife was in the said house. She told him that the accused person had told her that he had gone to "Kwa Mueni" with the child and she showed him where the baby shawl was. That when he picked it up, two socks fell out of the shawl and Salim picked them and went home.

5. It was PW1's evidence that on 17<sup>th</sup> September, 2017, while at work she heard that a child had been recovered in a hole in her father's plot. She stated that on going home after work, she was informed that the child who had been recovered was Fatuma. She stated that she did not see Fatuma on that day. She also stated that the accused person used to carry her child on her back even when going to take alcohol. She did not know how the accused person's relationship was with Salim.
6. PW2 was Charles Mutia of Mackinon in Samburu Sub-County. He stated that he had known the accused person as a neighbour for 3 to 4 years and that she was married to Salim. His evidence was that on 17<sup>th</sup> December, 2017 at 8.00 a.m., while at his home, he heard some people calling him Mailu!, a name which he is commonly known by. That he went out of his house and found Richard Mwanyika, PW1's husband, outside his house. That he told him to go and see the clothes of the child who had disappeared. That he went to Richard Mwanyika's father's plot, where he saw a child's trouser and striped top that had been placed on the ground outside PW1's house. That PW1's husband informed PW2 that the clothes had been recovered in a hole that had been dug for use as a pit toilet but which was being used as a well, when water was discovered in it. PW2 stated that at that time the water from the well was not being used for household use, as he had dug a toilet nearby.
7. It was PW2's evidence that he went close to the well and found the wire mesh he had put on it had been uncovered. That Mwanyika told him that they had fixed a hook on a long stick which they had used to fish for things in the well and they had recovered the child's clothes therefrom. PW2 then went to Mackinon Police Station and reported that the missing child's clothes had been found in the well. He stated that when he was at the report office, the accused person was taken there and that there was a crowd carrying stones and sticks which was calling for her to be burnt. PW2 stated that when the accused person was asked why she had killed the child instead of giving her out, she said that she did not find anyone to give the child to.
8. PW2 stated that the police ordered them to go out of the Police Station as they wanted to interrogate the accused person. That when he went out, he went to the well where he found some members of the public had removed the child from the well and she had been placed on the wire mesh that had been on top of the well.
9. PW2's evidence was that the child's body was swollen and he saw as if she had an injury on the neck and her skin was peeling off. He stated that the child had a dress on and her body was put aboard a police motor vehicle and they took her to Moi General Hospital, Voi.
10. PW2 stated that he used to live close to the accused person's house and the latter would fetch water in the compound he was staying in, when there was no water at her homestead. He recounted of how he heard a disagreement one day at 9.00 p.m., between the accused person and her husband and when he went outside their house, he found them quarreling. That he advised them to get into their house



and resolve their issue. That he also told them not to listen to what people say about others as they can break up families.

11. PW3 was Shaban Mbovu Salim, a farmer at Mackinon in Kinango Sub-County. He stated that he knew the accused person as she was married to his neighbour by the name Salim. He stated that he had constructed a house about 300 metres from the area where Salim had rented a house. He had known them for 3 years and regarded them as his children as whenever they had a problem, they would go to him to resolve it. He stated that the two used to quarrel from time to time and they had gone to him thrice when they wanted him to resolve their disagreements. PW3 stated that both Salim and the accused person used to take alcohol and their problems would arise when they were drunk.
12. PW3 stated that on 3<sup>rd</sup> January, 2018 at 10.00 a.m., he accompanied Salim to Mackinon Police Post to request for a police vehicle so that they could collect the deceased's body from Moi Referral Hospital, Voi for burial. He stated that he identified the deceased's body to the Doctor before he did the post mortem.
13. Anastacia Kambua Pius testified as PW4. She stated that she was the next door neighbour of the accused person, who had lived in the said house with her husband known as Salim. She indicated that the accused person was a housewife and that she and Salim had a child known as Fatuma. She stated that the accused person used to go everywhere with her child, and that on 15<sup>th</sup> December, 2017 between 10.00 a.m and 11.00 a.m, she saw the accused person with her child. That she then lay on the ground in a place that had a shade, where she stayed until 5.30 p.m. PW4 testified that she went to the shops at around the said time and left the accused person still lying on the ground but when she returned to her house, she did not find the accused person at the same spot.
14. PW4 stated that Fatuma was 9 months old and she could not walk but she could stand on her own. She testified that two days before 15<sup>th</sup> December, 2017, the accused person had disagreed with her husband and she left her house for about two days and then returned. PW4 stated that the accused person had on three occasions taken her children's things to her house to keep for her, but she had declined to do so.
15. Pius Mativu Mailu gave evidence as PW5. He stated that in December 2017, he used to work as a hawker at Mackinon and that he knew the accused person and that her room was next to his in their neighborhood, where she used to live with her husband, Salim Abdallah and their child, Fatuma. PW5 stated that he had lived there for about 1 year.
16. It was PW5's evidence that on 14<sup>th</sup> December, 2017, at around 4.30 p.m., as he was escorting a visitor from his house, he saw the accused person seated outside the house holding her child whom she had covered with a lot of clothes up to the head. That at that time, she was talking to her friend. PW5 stated that he talked to the accused person and asked her why she did not want to greet him on that day. He explained that she always used to be the first one to greet him. He stated that he observed that she did not want to look at him straight in the eye as she shied off, but told him that she had no problem with him. That he noted that she did not want to talk to him and she continued to talk to her friend as PW5 escorted his friend.
17. He stated that he went to his room between 6.00p.m. and 6.30 p.m., and heard a knock at his door. On opening the door, he saw the accused person standing outside holding a baby shawl, a baby blanket and other baby clothes. That the accused person asked PW5 to take the baby clothing and keep them in his house as she did not have the key to their house. PW5 stated that the accused person had disagreed with her husband on the night of 12<sup>th</sup> December, 2017 and her husband took away the key to their room. PW5 stated that the accused person used to hang around the place but she was not sleeping in their room.



18. PW5 stated that he refused to keep the clothes for the accused person because he did not see the child (Fatuma) and he thought that the clothes should be taken where the child was. He stated that when he refused to take the clothes, she said that she would take them to another neighbour known as Maureen Mwanyika (PW1). He indicated that was the last day for him to see the child.
19. It was his evidence that on the night of 12<sup>th</sup> December, 2017, he heard noises from the accused person's house. That he woke up and listened keenly to what was going on. He stated that at around 11.30 p.m., he heard the accused person saying that she was going to kill Fatuma. That he heard as if they were going to fight and PW5 and other neighbours went outside the house, and heard the accused person's husband (PW7) telling the accused person to give him the knife. PW5 stated that the accused person's husband got out of their room bleeding from beneath his nose and said that he had been cut with a knife and then left. PW5's evidence was that the accused person was left behind in their room with Fatuma. He stated that after that incident, the accused person was not sleeping in their room but would be seen in the neighborhood during the day. According to PW5, the accused and her husband loved each other very much and he had not heard of disagreements between them before.
20. Dr. Mliwa Christopher Mbogho, a Medical Officer practicing at Taveta Sub-County Hospital testified as PW6. His evidence was that he conducted a post mortem examination on the body of Fatuma Salim (deceased) on 3<sup>rd</sup> January, 2018 at 1230 hours at Moi County Referral Hospital in Voi. That the deceased was a child of approximately 9 months of age who was well nourished. He observed that the deceased's body had putrefaction and the skin was peeling off due to longstanding immersion in water. He stated that they did not do an internal examination. He formed the opinion that the cause of death was cardio pulmonary arrest due to inhalation of fluids consistent with drowning. He produced the postmortem report in support of his evidence.
21. PW7 was Salim Mohamed Abdallah, the accused person's former husband of 2 years. He was also the father of Fatuma Salim. He stated that in the year 2017 he used to live in Mackinon Road where he used to work as a mason but he had since moved to Kilungu, where he was selling merchandise. It was his evidence that he used to live with the accused person at Mackinon Road. He testified that on 14<sup>th</sup> December, 2017 at 6.30 p.m., he went home from work but did not find the accused person and Fatuma Salim. He stated that he asked their neighbours if they knew where they were and one of them by the name Maureen (PW1) took to him a baby shawl and socks. PW7 stated that he asked PW1 where Fatuma was and she told him that the accused person had told her that she had left Fatuma with him.
22. He stated that he took the shawl and socks and went to a club known as "Kwa Mueni", where he found the accused person. On calling her outside the club, he asked her where Fatuma was and she told him that she had employed a House Maid to take care of her. That he asked her the reason as to why she had employed a House Maid for Fatuma and told her that he could take care of his child. That on being told that, she pulled out a knife and threatened him with it. That he got scared and left her at the club, went home and slept. He stated that the accused person did not go to their home (room) that night.
23. PW7 stated that he went to work on the morning of 15<sup>th</sup> December, 2017. He later asked his neighbours if the accused person had been seen and PW1 told him that the accused person had spent the day lying under a tree and when asked where Fatuma was, she said that she had employed a House Maid for the child as she wanted to wean her off breast milk. He testified that he did not find the accused person on 16<sup>th</sup> December, 2017 despite looking for her the whole night. That he went to sleep and in the early morning of 17<sup>th</sup> December, 2017, when at home, a neighbour by the name Mwatau went to his house and told him that his wife had been found at Caffgem. That PW6 asked his neighbour where the child was but he did not respond. He then went to the place where the accused person was and saw her going towards a well which was behind their house in their neighbour's compound. He stated that there was



- a path behind the toilet which they used to use that led to the well. He further stated that the plot they used to live in had no fence and there was no fence between the plot they were living in and the neighbour's plot.
24. PW7 stated that the well was not in use although it had water and the owner of the well had placed logs on top and thorny twigs on top of the logs. That the logs had spaces in between as they were not arranged closely together and one could even peep into the well through the spaces between the logs. He indicated that the distance between the toilet and the well was 5 feet. It was his evidence that the child always used to be with her mother and that she never used to wander outside on her own. He stated that the accused person was very clean and would not allow the child to get dirty by wandering outside.
  25. It was the evidence of PW7 that when he reached the well, he saw the child floating on the water in the well. He further stated that the child was in the type of bags that are used for packaging cement. That members of the public used a metallic hook to remove the bag from the well and the child was then removed from the bag. He stated that the child had on a vest, a hat on her head, socks and a sweater and a long dress. He also stated that the child's body was swollen and the skin had started to peel off. He indicated that Police Officers from Mackinon Police Post were at the scene and members of the public took the body to the said Police Post. He stated that the accused person who had accompanied them was arrested. They then took the body to Moi Referral Hospital, Voi.
  26. PW7 testified that on 3<sup>rd</sup> January, 2018, he went to the mortuary of the said Hospital and identified the child's body to the Doctor who then carried out a postmortem. That upon asking the Doctor what could have caused the death of the child, he responded that he thought that the child was poisoned.
  27. PW7's evidence was that he used to quarrel from time to time with the accused person as he did not want her to consume alcohol. He stated that at the time the accused person went missing, he was being told that she had been seen in places where alcohol was being sold. He further stated that the accused person used to take care of their child and they did not have a House Maid when he left for work on the last day he saw the child. He stated that he had left the child with the accused person.
  28. PW8 was No. 49945 Corporal Erastus Mwarome. He stated that in the year 2017-2018, he was working at Mackinon Police Post. He further stated that he investigated the case herein with Chief Inspector Lazarus Kilango, who had since retired.
  29. It was PW8's evidence that on 17<sup>th</sup> December, 2017 at 1019hrs, when at the report office, he received a report from members of the public that a woman had killed her child and thrown her in a well. He stated that they told him to rush to the scene before the woman escaped. That they proceeded to Mackinon Centre where they found a crowd of people whom they asked to move aside so that they could retrieve the body. He stated that after the members of the public moved aside, he saw a hole and on looking inside he saw the child floating on water and they used a hook to remove the child from the hole.
  30. PW8 testified that the child's skin was peeling off and her body was swollen. That the child had a dress on and a hat on her head. He stated that they took the child's body to Mackinon Police Post and then to Moi Referral Hospital, Voi. That on going back to the Police Post, they found the accused person had been taken there by members of the public. He stated that they went back to the scene and saw where the accused person used to live and on interrogating her neighbours, he and Chief Inspector Kilango concluded that she was the one who had killed the deceased as she was the last person to be seen with the child.



31. PW8 testified that they went to a bar in the neighbourhood of the place where the accused and her husband used to live and they were informed that there was a scuffle at the bar between the two. PW8 stated that he found out that the two used to have disagreements from time to time.
32. He stated that he filled a post mortem form and a postmortem was done on the child. The accused person was then charged with the offence of murder.
33. On being put on her defence, the accused person stated that she was married to Salim Abdallah (PW7) since the year 2010 and they used to live in Mackinon Road area. She stated that she used to be a housewife and she and PW7 had a child who was 9 months old at the time of her death.
34. She stated that on 11<sup>th</sup> December, 2017, PW7 who was a mason went home and found her with the child. That he asked her to put for him water for bathing and she did so, after which he told her that he was going to meet his two friends so that they could go to hunt for wild animals. That she told him not to go to hunt for wild animals as she feared he would be arrested as it is illegal to poach wild animals. The accused person stated that PW7 started quarreling her and started beating her for telling him to stop hunting wild animals. She stated that he beat her with his fist until one of her upper incisor tooth came out. She stated that she took the child and went out from 6.00 p.m to 7.00 p.m., when she went back to the house but found that PW7 had locked her and the child out. That she was accommodated overnight by her friend.
35. Her defence was that the following morning on 12<sup>th</sup> December, 2017 at 8.00 a.m., she went to their house but she did not find PW7. She stated that at that time the child was crying because she had flu and a fever and she went to look for PW7 so that he could give her money to take the child to hospital. She stated that as she was going to her husband's work place, she met him on the way and she asked him for money to take the child to hospital but he said he would not give her money as he would take the child to hospital. That he ordered her in a harsh voice to hand over the child to him, which she did. She stated that from that day, she never saw her child again. She stated that on that day she looked for her husband but she did not see him and she kept on looking for him but never saw him. She stated that the child was recovered on 17<sup>th</sup> December, 2017.
36. She also stated that when she did not get her husband on 12<sup>th</sup> December, 2017, she would call him on his mobile number but he never took her calls. It was her evidence that she went to the Village Elder to whom she explained what had happened in that her husband took their child on 12<sup>th</sup> December, 2017 to take her to the hospital but she had not seen them up to 17<sup>th</sup> December, 2017. That the Village Elder tried to call her husband but he did not manage to get him. He then told her to stay at his house as he went to look for her husband at their house. She stated that he returned to his house very fast and told her that on reaching her house, he saw very many people there and he was told that a child had been found dead.
37. The accused person explained that she got shocked and told him that they should go to the plot where they used to live, and on reaching there, they found many people gathered. She indicated that when they saw her, they started saying "mama ameua mtoto wake" as they referred to her and she told the Village Elder that they should go the Police Station and that when they reached there, they found her husband making a report and he told the police that she was his wife. That she was locked in the cells and never got an opportunity to see if the dead child was hers.
38. The accused person denied knowing PW1 whom she had seen in Court and also denied having told PW7 that she would kill the child. She denied any involvement in the death of the child and said that she did not kill her.



39. The prosecution through Ms Keya Ombele, Principal Prosecution Counsel, filed written submissions on 12<sup>th</sup> November, 2021. Ms Keya summarized both the evidence adduce in the prosecution and defence case. She stated that Section 203 of the Penal Code gives the elements that a Court should take into account in a charge of murder, being the death of the deceased and the cause of death. Other factors being that the accused person committed the unlawful act which caused the death of the deceased; and that the accused harboured malice aforethought at the time of committing the offence.
40. Ms Keya relied on the case of as *Anthony Ndegwa Ngari v Republic* [2014] eKLR, where the Court of Appeal outlined the three elements that the prosecution must prove beyond reasonable doubt, in order to secure a conviction in accordance with Section 203 of the *Penal Code*.
41. She submitted that the fact of death was proved by the deceased's father, PW7, who went to the scene and confirmed that his child was dead. Ms Keya stated that PW7's evidence as to the fact that his child was dead was corroborated by PW3 and PW8 who also went to the scene where the deceased's body was recovered. She also stated that PW6 established the cause of death as cardio pulmonary arrest due to inhalation of fluids which was consistent with drowning.
42. On the issue of whether the deceased's death was caused by an unlawful act on the part of the accused person, Ms Keya submitted that the prosecution's case was based purely on circumstantial evidence as there were no eyewitnesses who saw the accused person drowning the deceased in the well. She relied on the case of *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR, to expound on what constitutes circumstantial evidence.
43. She cited the case of *Abang'a alias Onyango v Republic* Criminal Appeal No. 32 of 1990, which outlined the three tests to be applied in determining whether circumstantial evidence can form the basis of a conviction.
44. In regard to the case herein, Ms Keya submitted that the circumstantial evidence on record irresistibly points at the accused person's guilt as she was the last person to be seen with the deceased when she was alive as per the evidence of PW1, PW4, PW5 and PW7. She stated that PW7 had left the deceased with the accused person when he went to work on 14<sup>th</sup> December, 2017. Ms Keya stated that when PW7 returned to his house in the evening, he found the accused person and the child missing. That he inquired from their neighbours on the whereabouts of the accused person and the child and the neighbours confirmed that the accused person had been seen during the day with the child.
45. The Prosecution Counsel also stated that PW7 was the primary caregiver and was always with the child since she was a housewife and being the last person to be seen with the child when she was alive, the accused person was under an obligation to offer an explanation as to how the deceased met her death but she failed to discharge the burden when put on her defence. Ms Keya regarded the defence raised by the accused person as an afterthought as PW7 was not cross-examined on the claim that the accused person had left PW7 with the child so that he could take her to hospital.
46. She stated that the nameless Chairman (sic) was not called as a witness or any person who saw the accused person handing over the child to PW7.
47. On the issue of whether or not the accused person had malice aforethought when she committed the offence, Ms Keya submitted that PW5 testified that he heard the accused person telling PW7 that she would kill their child. She further submitted that the act of throwing the child into the well was without a doubt meant to cause the death of the child.
48. Ms Keya concluded her submissions by stating that the act of the accused person giving the neighbours the deceased person's clothes and trying to implicate PW7 by covering the whereabouts of the child



- and drowning the child in an abandoned well brings one to the logical conclusion that the accused person had malice aforethought when she committed the offence. She submitted that the evidence by the prosecution proved beyond reasonable doubt the charge of murder against the accused person. She urged this Court to convict her for the said offence.
49. Ms Mwashushe, learned Counsel for the accused person filed written submissions on 14<sup>th</sup> December, 2021. She contended that there was no positive identification of the body that was recovered in the well as being that of the deceased. She stated that PW1 was not present when the body was recovered from the well and that PW6's evidence was that the skin was peeling off and there was no indication by him that the body could be identified in a decomposing state.
  50. She stated that there were inconsistencies in the evidence of PW6 and that of PW2 and PW8 on the clothes on the body recovered from the well. That PW6 stated that no further examination such as DNA was done for positive identification of the body.
  51. Ms Mwashushe submitted that the cause of death was not established by the prosecution as according to PW6, the cause of death was due to inhalation of fluids consistent with drowning but PW6 did not do an internal examination of the deceased's body. She contended that the cause of death was not conclusive because PW6 only observed the body before concluding that death was by drowning.
  52. The defence Counsel contended that PW7 confirmed that the cause of death was poisoning because he asked the Doctor what could have caused the deceased's death and he informed him that he thought that the child had been poisoned. He also stated that although PW2 said that there were marks on the deceased's neck, PW6 did not make any mention of the said marks. Counsel relied on the case of *Kitsao Kaingu Kazee & another v Republic* [2007] eKLR, to show that PW6 did a superficial postmortem on the body recovered from the well.
  53. Ms Mwashushe submitted that the prosecution's case rests entirely on circumstantial evidence and cited decisions in *Neema Mwandoro Ndurya v Republic* [2008] eKLR and *Pon v Republic* [2019] eKLR. She stated that the circumstantial evidence in this case does not meet the legal threshold because none of the prosecution witnesses could state with certainty that they last saw the child with the accused person, as PW1 stated in cross-examination that she never got an opportunity to establish if the accused person was carrying Fatuma on her back. That PW4's evidence was that he last saw the accused person with the child on 15<sup>th</sup> December, 2017, which was contradicted by PW7's evidence that PW1 had told him that the accused person had been seen around the area on 15<sup>th</sup> December, 2017, lying under a tree without the child. Ms Mwashushe wondered why PW7 was looking for the accused person and the child from 14<sup>th</sup> December, 2017 to the morning of 17<sup>th</sup> December, 2017, yet on the other hand, PW4 and PW5 had testified that the accused person had been seen around their neighbourhood during the said period. She contended that it beats logic as to why PW7 would be looking for the accused person, yet she was not in hiding or missing.
  54. The defence Counsel stated that Richard Mwanyika was not called to testify as a prosecution witness, yet he was the one who informed PW2 about a missing child and the recovered clothes on 17<sup>th</sup> December, 2017.
  55. Ms Mwashushe raised the issue that PW6 stated that he filled the post mortem report on 3<sup>rd</sup> January, 2018, yet the post mortem report produced was filled on 29<sup>th</sup> December, 2017.
  56. She submitted that no evidence of malice aforethought was established and relied on the case of *Bonaya Tutu Ipu & another v Republic* [2015] eKLR.



## Determination

57. The issues for determination are-
- i. If the accused person killed the deceased; and
  - ii. If the answer to issue No. 1 above is in the positive, if she killed the deceased with malice afterthought.

### If the accused person killed the deceased.

58. The evidence adduced by PW1 was that she last saw the accused person with the deceased on 14<sup>th</sup> December, 2017, at around 5.00 p.m., and when she tried to uncover the baby shawl that the accused person was carrying, she told her in a harsh voice not to uncover the child as she had come from the clinic where she had taken the child for vaccination. Her evidence was that after 15 minutes, she heard the accused person calling out her name and on going out of her house, she saw the accused person who was by then carrying a folded baby shawl in her hands but she was not carrying her child. On being asked by PW1 where the child was, she told her that Salim had gone with the child to “Kwa Mueni” and asked PW1 to hold the baby shawl and give it to the child’s father when he returned. After about 15 minutes, Salim (PW7) went to PW1’s house and asked if his wife (the accused person) was in that house. She told him that the accused person had told her that he had gone with the child to “Kwa Mueni”. PW1 gave him the baby shawl and two socks fell from the folded shawl. It was her evidence that the accused person used to go with her child everywhere, even when going to take alcohol.
59. PW4 was the next door neighbour of the accused person. Her evidence was that she saw the accused with her child between 10.00 a.m and 11.00 a.m., on the 15<sup>th</sup> December, 2017 and they lay down outside on the ground under a shade until 5.30 p.m. She stated that the child was 9 months old. That the child could not walk but she could stand on her own. It was PW4’s evidence that the accused person had disagreed with her husband two days before the 15<sup>th</sup> of December, 2017 and she had left her house for 2 days and then she returned. PW4 stated that the accused person had on 3 occasions taken her child’s things to her house for PW4 to keep for her but she had declined to do so.
60. PW2 was informed by PW1’s husband that the clothes for the child who had disappeared had been recovered in a well. He saw the clothes outside PW1’s house and on going to a well nearby, he saw that a wire mesh that used to cover the said well had been uncovered. He reported to Mackinon Police Station and while there, the accused person was taken by members of the public. PW2’s evidence was that after the accused person was asked why she had killed the child instead of giving her out, she said she had no one to give the child to. PW2 then went to the well and found that the child had been recovered from the said well.
61. PW5, Pius Mativu Mailu testified that the accused person’s room was next to his in the plot they used to live in. He testified that on 14<sup>th</sup> December, 2017 at around 4.30 p.m., he was in his house with a visitor. That as he was escorting the said visitor, he saw the accused person seated outside the house holding her child whom she had covered with a lot of clothes up to the head. That he talked to the accused person and asked her why she did not want to greet him on that day. He explained that she was always the first one to greet him. PW5 stated that he noted that the accused person did not want to look at him straight in the eye as she shied off. She told him that she had no problem with him but PW5 noted that she did not want to talk to him. It was PW5’s evidence that sometime between 6.00pm and 6.30 p.m., he heard a knock on the door and on opening it, he saw the accused person holding a baby shawl, a baby blanket and other baby clothes and she asked him to keep them in his house as she did not have the key to her house, but he refused to keep the clothes as he did not see the child and he



- thought that the clothes ought to be where the child was. The accused person told him that she would take them to their neighbour, PW1.
62. From the evidence adduced by PW5, the accused person had disagreed with her husband on the night of 12<sup>th</sup> December, 2017 and her husband took away the key to their room. PW5's evidence was that the accused person used to hang around the place where they used to live, but she was not sleeping in their room.
  63. His evidence was that on the night of 12<sup>th</sup> December, 2017 at 11.30p.m., he heard noises from their house and on waking up, he listened keenly to what was going on and he heard the accused person saying that she was going to kill Fatuma. He stated that he heard as if the accused person and her husband were going to fight as he heard her husband (PW7) telling her to give him the knife and when PW7 went out of his house, he was bleeding beneath his nose and said that he had been cut with a knife. Then PW7 went away while the accused person was left behind in their room with Fatuma. He stated that after that incident, the accused person was not sleeping in their room but she would be seen around in their neighbourhood during the day.
  64. The accused person's husband, Salim Mohamed Abdallah, testified as PW7. His evidence was that on 14<sup>th</sup> December, 2017, he went home but he did not find the accused person or their child (Fatuma) at home. That after making inquiries about them from his neighbours, PW1 took to him a baby shawl and socks and on asking her where Fatuma and the accused person were, she responded that the accused person had told her that he had left him with Fatuma. PW7 then proceeded to a club known as "Kwa Mueni" and found the accused person there. On calling her outside and asking her where Fatuma was, she told him that she had employed a House Maid to take care of Fatuma. When he told her that he could take care of Fatuma, she pulled out a knife and threatened him with it. He got scared and left for their house where he slept but the accused person did not go home that night. He stated that the following morning he went to work and later asked neighbours if they had seen the accused person and PW1 told him that she had been seen the whole day lying under a tree outside and when asked where the child was, she said that she had employed a House Maid for her, as she wanted to wean her off breast milk. He stated that he looked for the accused person on the night of 15<sup>th</sup> December, 2017 but he did not find her. He also looked for her on 16<sup>th</sup> December, 2017 during the day and night up to the morning of 17<sup>th</sup> December, 2017, but did not find her.
  65. On the morning of 17<sup>th</sup> December, 2017, a neighbour by the name Mwau told PW7 that the accused person had been found at Caffgem and on going there, he asked her where the child was but she did not respond. He saw the accused person going towards a well and on going there, he peered inside and saw the child floating on the water in the well. He stated that her body was swollen and she was inside the type of bags that are used in packaging cement. That members of the public used a metallic hook to pull out the bag from the well and the child was removed from the bag.
  66. PW7's evidence was that the disagreements between them were due to the fact that the accused person used to consume alcohol but he did not want her to do so, and that on the days he was looking for her, he would be told that she had been seen consuming alcohol.
  67. PW3 gave evidence of how he used to resolve disputes between the accused person and PW7 from time to time.



68. From the evidence adduced, this case rests entirely on circumstantial evidence as no one witnessed the accused person killing the deceased. One of the decisions on what constitutes circumstantial evidence is *Abang'a alias Onyango v Republic* (supra), where the then East Africa Court of Appeal held that –

- “(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.
- (ii) Those circumstances should be of a definite tendency pointing towards guilt of an accused.
- iii. The circumstances taken cumulatively should form a chain to complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and no one else.
- iv. The circumstances and facts must be absolutely incompatible upon reasonable hypothesis of the accused and incapable of explanation other than that of guilt of the accused.”

69. In the case of *Sawe v Republic* (supra) the Court of Appeal stated as follows regarding circumstantial evidence –

“In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused.”

70. It is evident that the marriage between the accused person and PW7 was not rosy because of the accused person's conduct of consumption of alcohol despite her husband's plea that she should stop partaking of the same.

71. From the evidence adduced by the prosecution witnesses, there is no doubt in my mind that the accused person was the last person to be seen with the deceased on 15<sup>th</sup> December, 2017 as per the evidence of PW4, who was the next door neighbour to the accused person, her husband and their child, Fatuma. In her defence, she denied having killed the deceased and cast blame on her husband Salim by saying that she handed over the child to him to take her to hospital. She blamed him for the death of the deceased. Material witnesses for the prosecution such as PW1 and PW5 saw the accused person with the child on 14<sup>th</sup> December, 2017 and 15<sup>th</sup> December, 2017, respectively. Both of them however stated that the accused person had covered the child up to the head and when PW1 tried to uncover the shawl that was covering the child on 14<sup>th</sup> December, 2017, the accused person told her in a harsh voice not to do so. As per the evidence of PW7, on that night and the days and nights that followed, the accused person and the child did not go back to the room that they and PW7 used to live in. At no time did any witness say that they saw PW7 with the child.

72. It is also evident that following the disagreement between the accused person and PW7 on 12<sup>th</sup> December, 2017, the accused person was exiled outside their room by PW7 as he took away the key to their room after the disagreement. That was an act of inhumanity on the part of PW7. The accused person and PW7 had a 9 month old child to take care of, yet PW7 locked both of them out of the room which the accused person and the child were supposed to shelter in, from vagaries of the weather.



73. Evidence adduced by the prosecution shows that the accused person and the child spent the whole day of 15<sup>th</sup> December, 2017, under the shade of a tree as they had no access to their room. It is then no wonder that she took to alcohol like a fish to the water as she was thereafter being seen moving from bar to bar consuming alcohol. There however reached a time when the child was nowhere to be seen. According to PW4, the child was learning to walk. As such, the child could not have walked all the way to the well and uncovered the wire mesh covering it, leading her to fall into the well. When the child was recovered, she was floating on the water in the well and she was inside a bag. This leads to the conclusion that she was dropped in the well. As was stated in the case of *Republic vs. Taylor Weaver and Donovan* (1928) 21 Cr. App. R. 20-

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial.”

74. The evidence adduced by the prosecution also leads to the inevitable conclusion that it is the accused person who dropped the deceased in the said well. She tried to incriminate her husband by stating that since the child was found inside the type of bags used for packaging cement, he must have killed the child and put her in the bag as he used to work as a mason and he would have easily had access to such bags. It is however common knowledge that such bags can be found lying anywhere. The post mortem report showed that death was due to drowning. It is my finding that the circumstantial evidence on record points to the deceased as the perpetrator of the offence. On the night of 12<sup>th</sup> December, 2017 as she quarreled with PW7, PW5 who was their neighbour heard her tell PW7 that she was going to kill their child, Fatuma. On the said night, she was violent and injured PW7 with a knife beneath his nose.

75. Ms Mwashushe contended that there was no positive identification of the body that was recovered from the well. The 1<sup>st</sup> page of the post mortem report shows that the body of the deceased, Fatuma Salim was identified by Salim Mohamed (PW7) and Shaban Mbovu Salim (PW3). PW7 was the father of the deceased. It is thus erroneous for Ms Mwashushe to raise doubt as to the identification of the body that was recovered from the well. Even if the deceased’s skin was peeling off, it was not alleged that the body was decomposed beyond recognition. Secondly, there is nothing to suggest that PW7 could have been mistaken in identifying his daughter’s body. Thirdly, there was no other child who was said to have gone missing in the neighbourhood for an inference to be drawn that the body recovered from the well could have been of any other child and not that of the deceased, Fatuma.

76. Ms Mwashushe also raised the issue of the date when the post mortem report was filled. It is apparent that the 1<sup>st</sup> page was filled on 29<sup>th</sup> December, 2017. Notably, that is the page that was filled by the police at Taru Police Station. It is also evident that the pages 2 and 3 of the said report were filled on 3<sup>rd</sup> January, 2018, as reflected on the said report. The Doctor, PW6 in his examination-in-chief stated that the postmortem was done on 3<sup>rd</sup> January, 2018 and he signed the report on the same day and the hospital stamp was affixed on the said report. It is therefore not true as submitted by the defence Counsel that the post mortem report was filled by the Doctor on 29<sup>th</sup> December, 2017.

77. Ms Mwashushe contended that the cause of death was not conclusive as the Doctor informed PW7 that he thought that the deceased had been poisoned. She also pointed out that the Doctor did not dissect the body for an internal examination of the same but arrived at the cause of death by doing an external observation of the body. The response to the concern raised by the defence Counsel was well addressed by the Doctor when he was re-examined by Mr. Muthomi, Prosecution Counsel. The Doctor stated that he did not do an internal examination of the body as when the deceased’s body was taken to him for examination, he observed that it had stayed in the water for a long time and it had



started decomposing. That he formed the opinion that even if he opened up the body, he would not have made any other findings apart from what he found. He then concluded that the cause of death was cardio-pulmonary arrest due to inhalation of fluids. He also stated that as a medical practitioner, he took into account the history of the body having been picked from a well. He also stated that the body had the peeling of skin and putrefaction which happens when a body has been immersed in water for a long time.

78. Ms Mwashushe also raised the issue of inconsistencies in the evidence of some of the prosecution witnesses. In this Court's view, it would be very unusual for witnesses to recollect with clock-work precision things such as each and every item of clothing that the deceased had on her body, when she was recovered from the well. Recovery of the body of a deceased person is in itself a distressing moment for any onlooker, other than the person who could have caused the death of the deceased. I would be very slow to conclude that since some of the witnesses gave an inconsistent account of the items of clothing found on the deceased's body, that such witnesses were lying. In the case of *Philip Nzaka Watu vs. Republic* [2016] eKLR, the Court of Appeal discussed the issue of discrepancies in the evidence of witnesses and stated as follows-

“It must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

79. The final thing to address on the submissions by the defence Counsel is the issue that was raised of the failure by the prosecution to call one Robert Mwanyika, PW1's husband, who informed PW2 of the clothing of the child who had disappeared having been found. Although PW2 had no information about a missing child, he went to the plot owned by Richard Mwanyika's father and found a child's top which was striped and a child's trouser which had been placed outside PW1's house. PW2's evidence was that the said Richard Mwanyika informed him that they had recovered the clothes in a hole which PW2 had dug for a pit toilet but which was turned into a well when water was discovered in it. PW2 explained that at that time, the water in the well was not being used for household use as he had dug a toilet nearby. PW2 also testified that Mwanyika told him that they had used a long stick with a hook and fished for things in the well and that is when they recovered the clothes. I do agree with Ms Mwashushe that the prosecution ought to have called Robert Mwanyika to adduce evidence for the prosecution, but having considered the nature of the evidence that PW2 adduced in regard to the information that he received from Mwanyika, it is my finding that failure to call the latter was not fatal to the prosecution's case. See the provisions of Section 143 of the *Evidence Act* and the case of *Keter v Republic* [2007] 1 EA 135, where the Court held inter alia that:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

80. It is my finding and I hold that the defence case has no truth in it whatsoever as it was displaced by the circumstantial evidence on record. The accused person's claim that her husband Salim was the last person to be with the deceased was farfetched. I therefore dismiss the defence raised as being pure lies. Had it not been the circumstances leading to the disagreement between the accused person and PW7 and the fact that she and the child were locked out of the room that they used to live in, leading her



to state of desperation and despair, I would have found her guilty of the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. I however find the accused person guilty of the lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code due to the circumstances preceding the deceased's death.

81. I convict the accused person accordingly for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**Sentence**

82. The Court has considered the mitigation made by the accused person. It is noted that she is remorseful and regrets having committed the offence.
83. It is also noted that she has reformed by being in prison remand and she prays for a non-custodial sentence.
84. The accused person has been convicted for unlawfully having killed the deceased a child of 9 months who was defenceless. Since a life was lost, I decline to give a non-custodial sentence.
85. I sentence the accused person to 13 (thirteen) years imprisonment. The sentence will be computed from 11.1.2018 when she was 1<sup>st</sup> arraigned in Court.

**DELIVERED, DATED, SIGNED AT MOMBASA IN OPEN COURT ON THIS 30TH DAY OF JUNE, 2023.**

**NJOKI MWANGI**

**JUDGE**

