



**Republic v DM (Criminal Case E139 of 2021)  
[2023] KEHC 24102 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 24102 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE E139 OF 2021  
PJO OTIENO, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**DM ..... ACCUSED**

**Nature of the doctrine of last seen with the deceased**

*The case was on the offence of murder. In finding the subject guilty of the offence of murder, the court highlighted the nature of the doctrine of last seen with the deceased and also explained the distinction between a confession and admission of guilt.*

Reported by Kakai Toili

**Criminal Law** - doctrine of last seen with the deceased - nature of the doctrine of last seen with the deceased - what was the nature of the doctrine of last seen with the deceased.

**Criminal Law** – murder - elements for the offence of murder - what were the elements for the offence of murder - Penal Code, Cap 63, section 203.

**Criminal Law** – confessions vis a vis admission of guilt - distinction between a confession and admission of guilt - what was the distinction between a confession and admission of guilt - Evidence Act, Cap 80, sections 24 and 25A.

**Brief facts**

The subject was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that on October 13, 2021 the subject murdered BS. The subject pleaded not guilty to the charge.

**Issues**

- i. What was the nature of the doctrine of last seen with the deceased?
- ii. What were the elements for the offence of murder?
- iii. What was the distinction between a confession and admission of guilt?



## Held

1. The offence of murder, as defined by section 203 of the Penal Code, was committed by any person who of malice aforethought caused death of another person by an unlawful act or omission was guilty of murder. Thus, for the prosecution to achieve a conviction, all the ingredients contained in section 203 of the Penal Code ought to be proved beyond reasonable doubt.
2. From the evidence of PW7, who conducted a post mortem on the body of the deceased and produced an autopsy report dated October 18, 2021, which captured the uncontroverted information that the deceased died between October 13-14, 2021, there was no contention that BS was deceased.
3. By the doctrine of last seen with the deceased, the law presumed that the person last seen with a deceased knew the cause of his death and bore full responsibility therefor. Once company with the deceased was established or admitted and no intervening event existed associated with the death, it fell upon the subject to offer an explanation on how the deceased died.
4. Where a subject was the last person to be seen in the company of the deceased and there was cogent circumstantial evidence leading to no other conclusion, there was no room for acquittal. In such situation, it became the onus of the subject to give an explanation relating to how the deceased met his death. In the absence of a satisfactory explanation, a trial court and an appellate court would be justified in drawing the inference that the subject killed the deceased.
5. The conduct of the subject before and after the death; his company with the deceased, communication with PW2 on the date the body was recovered, his precision on where the body was and ability to retrieve it, and what he told PW4 and 5 after retrieval, made the court to draw the inference, from the circumstance, that he was the author of the death and had been pricked in his mind to reveal the act. Based on the evidence on record, the subject having been last seen with the deceased failed to offer a plausible explanation and was presumed to have been the killer. In doing so, the circumstances proved by evidence was firm, cogent, unerringly pointing to the guilt of the subject and leaving no other explanation.
6. There was a cliff between the water level and the bank of the river. However, there was nothing to suggest that the deceased left the water level where he was bathing went up the cliff or that he fell from there. That hypothesis was the most improbable and evaluated it to be less than sufficient to controvert the prosecution's evidence. The evidence given in defence and denying knowledge was assessed to be less candid and lack in credibility.
7. The words allegedly spoken by the subject to the witnesses fell short of the provisions of section 25A of the Evidence Act, the evidence of PW4 and PW5 did not amount to a confession and could not be admitted as such as proof of the guilt of the subject.
8. Admission of guilt by the person accused must not always take the identity and character of confession alone to be credible evidence. Confession was different from an admission of guilt and the two must always be distinguished by the trial court. A confession was a direct acknowledgement of guilt on the part of the accused while an admission was only a statement by the accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tended to prove his guilt, but which, of itself, was insufficient to found a conviction. Statements tending to admit pertinent facts to the case were thus admissible as evidence and not the absolute guilt.
9. Under section 24 of the Evidence Act, an admission was, not *ipso facto*, the conclusive proof of the fact admitted, but may act as an additional evidence and a bar to the accused from denying what he had admitted in an unequivocal manner. Such admission was admissible as additional evidence or corroboration but never as confession.
10. The evidence led by PW4,5 and 6 were admissible as proving that the subject was in the company of the deceased immediately before his death and he knew where the body was hidden in the river. The evidence showed irresistibly and beyond reasonable doubt that the subject, out of malice aforethought, unlawfully caused the death of the deceased.



*Subject found guilty of the offence of murder contrary to section 203 as read with 204 and convicted as charged.*

### Citations

#### Cases

1. Chiragu & another v Republic (Criminal Appeal 104 of 2018; [2021] KECA 342 (KLR)) — Followed
2. Republic v Ahmad Abolfathi Mohammed & Sayed Mansour Mousavi (Petition 39 of 2018; [2019] KESC 48 (KLR); [2019] eKLR) — Followed
3. State v Lucas Onyango Walo (Criminal Case E005 of 2021; [2022] KEHC 747 (KLR); [2022] eKLR) — Mentioned

#### Statutes

1. Evidence Act (cap 80) — section 24; 25A; 107(1); 124 — Interpreted
2. Penal Code (cap 63) — section 203; 204 — Interpreted

#### Advocates

*Ms. Chala* for Prosecution

*Mr. Iddi* for Accused

## JUDGMENT

1. The subject, D M, is 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 13<sup>th</sup> day of October, 2021 at Sidikho Location within Navakholo Sub-County of Kakamega County, the subject murdered BS.
2. The subject pleaded not guilty to the charge and in an endeavour to discharge the burden of proof under section 107(1) of the *Evidence Act*, the prosecution tendered evidence from a total eight witnesses.

#### The Evidence

3. The first witness was a minor hence the court conducted *voire dire* examination on him. He was DM, a Grade 4 pupil at [Particulars Withheld] Primary School. Upon the court being satisfied of the minor's ability to tell the truth, he gave unsworn statement to the effect that while herding cows with the deceased, the subject came and requested the deceased that they go to the stream to take a bath. Both left him and he did not see either of them until the next day when the subject asked him if he had seen the deceased to which he responded he had not. He stated that to date he has never seen the deceased and he does not know where he went to.
4. On being cross-examined he told the court that on the material day he and the deceased had come from school and where they were herding the cattle they could see the river.
5. Even PW2, CW, a class 7 pupil at [Particulars Withheld] Primary School, was a minor on whom *voire dire* examination was also conducted. He gave evidence that on 14/20/2021 while in school the subject informed him that he had found the body of the deceased in the river. He then informed the Deputy Head teacher who in the company of one EWM went to the river and discovered the body of the deceased. The police then came and arrested the accused.
6. On cross-examination he stated that on 13/10/2021 he was in school with the subject and that they left at 4pm. He also stated that his home was a distance from the home of the subject and the deceased.
7. *Voire dire* examination was again conducted on PW3, JW, a grade 4 pupil at [Particulars Withheld] Primary School. Upon satisfying the court of his ability to tell the truth he unsworn evidence and stated



- that he was neighbors to both the deceased and the subject and that on 13/10/2021 he saw the deceased going towards the home of the subject at about 1pm and that he never saw him return.
8. On cross-examination he stated that he did not go to the same school with the deceased and on the day the body was recovered he was taken by the Headmaster to Navakholo Police Station. He further stated he hardly went to the river since they had a borehole.
  9. PW4, FMN testified that he was the Head teacher at [Particulars Withheld] Primary School and that on 14/10/2021 he was in school and after lunch he was seated with his Deputy, EWM, when PW2 approached EWM and informed him that the subject had told him about a dead pupil at the river. DM, the accused, was called and together with two other teachers they walked towards the river with the subject leading them to the scene. At the river, they could not clearly see the body which was immersed in water and the subject then removed a stone, dipped his hand into the water and removed the body which he claimed belonged to one "B". The body was placed on the river banks. The Deputy Headteacher then called to inform the Chief of the incident. He then called the subject on the side asking him if he had met the deceased to which question the Subject claimed that the previous day he had gone with the deceased to the river to bath when a stone hit and injured the deceased but he did not assist him because he had eaten his lunch of ugali and kunde. He claimed that the body of the deceased had a swelling at the back of the head and bruises on the buttocks to which the subject claimed he canned him.
  10. On cross-examination he stated that it was protocol for students to mark a school attendance register and the deceased being an early childhood pupil had not reported to school. He further stated that the subject told him that the next day, he, the accused, went to the river to find out if the body was still there and when he confirmed so, he decided to hide it in water between stones.
  11. PW5, EWM, testified that he was the Deputy Headteacher at [Particulars Withheld] Primary School and that on 14/10/2021, while on lunch break he was approached by PW2 who told him that the subject had informed him that there was a dead student at the river. He summoned the subject who led them to the river where they retrieved the body of the deceased whom the subject had identified as "B" before they left. The body had a swelling at the back of the head and bruises on the buttocks. He then called the Assistant Chief and decided to escort the subject back to school. On their way back to school, he questioned the subject how he discovered the body considering there was no road there to which he responded by saying that the deceased used to steal and eat his food evidencing that a grudge existed between them. He remembered having recovered clothes of the deceased about five meters away from where the body was recovered and marked them for identification.
  12. On cross-examination he stated that the school maintained a student's register and that the subject was expected to be in school on 13/10/2021 for an afternoon lesson and that while back in school the subject was accommodated in the computer lab where he interrogated him in the absence of the parents.
  13. PW6, JW, the father to the deceased, testified that on 14/10/2021 he was at home when at about 3pm the clan elder came to his home inquiring if anything was amiss and he informed him that all was well. He then saw people moving from their home towards the river and some children told him that "B" had been killed. He headed to the scene and found the body of his child naked and lying next to the river with several injuries at the back of the head and the back of the torso. He identified the clothes MFI 1A and 1B as the clothes which the deceased had worn before his death. He further stated that he had not seen the deceased on 14/10/2022 adding that the subject was his neighbor's child.
  14. On cross examination, he stated that the deceased was his eldest child and that he had last seen him on 12/10/21 but had taken no steps to look for him.



15. On being questioned by the court on when he last saw the deceased he stated that on Wednesday he asked his wife where the deceased was and she told her that he was at the home of Emoro and she could not go for him in the night. He further detailed that there was no path where the body was discovered as it was bushy and not used by people.
16. PW7, Dr Dickson Mchana a Consultant Pathologist at the Kakamega County General Hospital testified that he conducted an autopsy on the body of the deceased on 18/10/202 and determined that the body was of a 9-year-old. Externally, the body had widespread bruises on the head, both shoulders, both sides of the chest and in front of the knees. Internally, the lungs were ballooned with a mild swelling of the brain. He formed the opinion that the deceased died due to failure to breath secondary to drowning even though the body had evidence of blunt trauma which to him was not the cause of death. He produced the postmortem report as PEXH 3.
17. On cross-examination he stated that he did not get the impression that the injuries were out of the deceased defending himself.
18. On being questioned by the court it was his opinion that ballooned lungs occur when a person gets into water alive and breathes in the water into the lungs.
19. PW8, No 64273 Sergeant Julius Lagat, attached at DCI Navakholo Sub County gave evidence that on 13/10/2021 he was requested by the OCS to accompany him to [particulars withheld] Village where the body of a pupil had been recovered in a stream. They headed to the scene and found the body of the deceased covered in a green bedsheet, PEXH 4, and there was a stripped sweater, PEXH 2 and a blue short, PEXH 1 nearby.
20. He then conducted investigation which revealed that it was the Subject who led witnesses to the stream and that the head teacher further told them that the deceased had eaten the accused's food and the subject was on a revenge mission. They then conducted age assessment on the Subject which assessment report was produced as PEXH 5(b) and it depicted that the Subject was under the age of 18years. His mother also availed his Birth Certificate produced and marked as PEXH 5(a) which showed that the subject was born on 18/9/2009 and was thus aged 13 years. On cross-examination he stated that from the stream's water level to the cliff was about 2-3 meters.
21. That evidence of PW8 marked the close of the prosecution case after which the court determined that a prima facie case had been established against the subject and he was thus placed on defence.
22. In his defence the subject opted to give sworn statement in which he denied the charges and testified that on the material day he woke up and went to school at [Particulars Withheld] Primary School where he was a class six pupil. At 1 pm he left for lunch at her mother's hotel and then later took soap and went to bath at the river. As he started to leave the river after bathing, the deceased came and they greeted each other and he told him that he had also come to take a bath. He went home, oiled his body and then went back to school. On the day the body was recovered, it was his evidence that he went to school and during lunch hour he went to his mother's hotel, ate and then went to the river to bath. While bathing he saw a human leg protruding from the river. He ran home and then to school where he informed a fellow student by the name of CW what he had seen and asked him to go and tell the teachers. The teachers then asked him to take them to the river where teacher FMN forced him to remove the body which he recognized. He was taken to school and later to the police station.
23. On cross-examination he stated that he was a neighbor with the deceased and refuted claims that he had met with PW1 on the day he met the deceased. He further stated that when he saw the leg protruding from the river he did not know who it was and did not tell neither C nor the teachers who it was.



24. On being questioned by the court he stated that he never asked C to report since he intended to report himself. The defence thus closed its case after which the parties filed their respective Submissions on the directions by the court.

### **Submissions by the State**

25. It is the submission by the prosecution that all the elements for the offence of murder have been proved against the subject in that PW7 confirmed that he conducted an autopsy on the body of the deceased which was duly identified to him and confirmed him dead.
26. On whether the death of the deceased was occasioned by an unlawful act, it is submitted that it was the evidence of Dr. Dixon Mchana that the cause of death of the deceased was asphyxia secondary to drowning and that the deceased had blunt force trauma wounds inconsistent with defensive wounds. On the identification of the subject as the person who caused the death of the deceased, it is the submission that PW1 and PW3 stated that they last saw the deceased with the Subject heading to the stream and that it was the subject who took the teachers to the spot where the deceased body was hidden. The prosecution then relies on the doctrine of last seen with the deceased then argues that in such circumstances, the onus of proof lay with the Subject to offer an explanation on how the deceased met his death. They place reliance on the case of *State v Lucas Onyango Walo* [2022] eKLR where the court held:-

“Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of *Moses Jua v The State* (2007) LPELR-CA/IL/42/2006. That court, while considering the ‘last seen alive with’ doctrine held:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

27. On the last limb of proof of malice aforethought in the actions of the Accused, the prosecution submits that motivation for the crime has been established to be that the subject was angry with the deceased who had the habit of eating his food. They further submit that the act of drowning the deceased is itself a malicious act.

### **Submissions by the Subject**

28. It is submitted on behalf of the subject that the evidence by PW1 and PW3 who were minors on the doctrine of last seen with the deceased was not corroborated in line with section 124 of the *Evidence Act*. It is their argument that on the material day, the teachers confirmed that the subject was in school and that the interrogation of the subject by his teachers did not meet the threshold on a confession as set out in section 25A of the *Evidence Act*. It is then added that the nature of injuries sustained by the deceased prior to his death show that he fell on the rock at the scene and three meters down into the river where he could have hit his head on a rock and this caused the blunt force trauma on his head making him unable to get out of the water and leading to his demise. They contend that the injuries on the body of the deceased do not show if they were human inflicted and it being that the subject was a minor, they claim that there is doubt if he can orchestrate such an incident.



29. On the proposition by the prosecution that the subject was actuated by malice in killing the deceased since he used to eat his food, the subject contends that the post mortem report showed that the deceased had minimal solid food in his digestive system to mean that he had not eaten prior to his demise. He terms the idea that that the subject killed the deceased because of food as unfathomable.

### **Issues, Analysis and Determination**

30. The offence of murder, as defined by section 203 of the *Penal Code*, is committed by any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. Thus, for the prosecution to achieve a conviction, all the ingredients contained in section 203 of the *Penal Code* ought to be proved beyond reasonable doubt.
31. Flowing from the evidence led and the law applicable, the issues that arise for determination by this court remain whether BS is deceased, if his death was as a result of unlawful acts or omission by the Subject and if the subject was accentuated with malice aforethought in causing the death of the deceased.

### **Is BS dead?**

32. From the evidence of PW7, Dr Dixon Mchana, who conducted a post mortem on the body of the deceased and produced an autopsy report dated 18/10/2021, which captures the uncontroverted information that the deceased died between 13-14<sup>th</sup> October, 2021, there is no contention that BS is deceased. The first question is thus answered in the affirmative.

### **Whether his death was caused by unlawful acts of commission or omission by accused?**

33. The totality of the oral evidence, including that of the subject and capped by the contents of the autopsy report converge on the fact that the deceased died due to asphyxia secondary to drowning, as the proximate cause of death, even though there were other visible and extensive injuries upon the body of the deceased, which the Pathologist discounted as the cause of death. The other irresistible conclusion from the evidence of the three minors and the two teachers is that the Subject was the last person to be seen with the deceased. That invites the application of the doctrine of last seen with.
34. In his testimony, the subject admits that he saw and was with the deceased on October 13, 2021 at the river where it was their routine to bath during lunch hour but left him bathing as the subject went home. He then claimed that the next day while taking a bath he noticed a leg protruding from the river and he went back to school and told one CW what he had seen. In his examination in chief the subject stated that he asked CW to report to teachers but in cross examination, he stated that he did not. That discrepancy in the testimony does not negate the testimony on how he met up with the deceased at the river the day the deceased was seen alive last.
35. The prosecution has placed reliance on the doctrine of last seen with the deceased placing reliance on the evidence of PW1 and PW3 that the subject was last to be seen with the deceased. By this doctrine, the law presumes that the person last seen with a deceased knows the cause of his death and bears full responsibility therefor. Once company with the deceased is established or admitted and no intervening event exist associated with the death, it falls upon the Subject to offer an explanation on how the deceased died. Thus, where a subject was the last person to be seen in the company of the deceased and there be cogent circumstantial evidence leading to no other conclusion, there is no room for acquittal. In such situation, it becomes the onus of the subject to give an explanation relating to how the deceased met his death. In the absence of a satisfactory explanation, a trial court and an appellate court will be



justified in drawing the inference that the Subject killed the deceased. See Chiragu & another v Republic (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR) (17 December 2021).

36. In his evidence, the subject told the court that he was with the deceased and left him bathing only to find his body in the water the next day. At the place the body was found, there was no road nor path according to the evidence of PW4 and 6. The body had other injuries on several parts of the body suggesting assault. That evidence when coupled with what PW4 and 5 reported to have been told to them by the subject that the deceased had been eating his food, irresistibly point to a grudge against the deceased which propelled revenge.
37. In addition, it is telling that the subject was not comfortable to directly report the presence of the body of the deceased to the teachers, preferring to send PW1 then directly leading the said teachers to the scene and while at the scene, when the body could not be seen by the rest, he was able to retrieve it from under the water. The conduct of the subject before and after the death; his company with the deceased, communication with the PW2 on the date the body was recovered, his precision on where the body was and ability to retrieve it, and what he told PW4 and 5 after retrieval, makes the court to draw the inference, from the circumstance, that he was the author of the death and had been pricked in his mind to reveal the act. The court, based on the evidence on record, finds that the subject having been last seen with the deceased failed to offer a plausible explanation and is presumed to have been the killer. In doing so, it is the finding by the court that the circumstances proved by evidence was firm, cogent, unerringly pointing to the guilt of the subject and leaving no other explanation.
38. In the submissions filed by the subject and in the cross-examination of PW 4, 5 & 6, it was underscored that there was a cliff between the water level and the bank of the river. In that effort, however, there was never anything to suggest that the deceased left the water level where he was bathing went up the cliff or that he fell from there. I find that hypothesis to be most improbable and evaluate it to be less than sufficient to controvert the prosecution's evidence. In the same way the evidence given in defence and denying knowledge is assessed to be less candid and lack in credibility.
39. The last issue is the weight to be given to the evidence by PW4 and PW5 on what the subject allegedly told him. Both were teachers of the deceased and the subject and their testimonies were anchored on their interrogation of the accused. The Subject view the evidence of these witnesses, as confession and contend that the same do not meet the threshold set by section 25A of the Evidence Act which stipulates that a confession is not admissible unless it is made in court before a Judge, a Magistrate or before a Police Officer (other than the Investigating Officer) being an officer not below the rank of Inspector of police, and a third party of the person's choice.
40. It being indubitable that the words allegedly spoken by the subject to the witnesses fall short of the provisions of section 25A of the Evidence Act, the court finds that the evidence of PW4 and PW5 do not amount to a confession and cannot be admitted as such as proof of the guilt of the subject.
41. However, admission of guilt by the person accused must not always take the identity and character of of confession alone to be credible evidence. Confession is different from an admission of guilt and the two must always be distinguished by the trial court. A confession is a direct acknowledgement of guilt on the part of the accused while an admission is only a statement by the Accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tends to prove his guilt, but which, of itself, is insufficient to found a conviction. Statements tending to admit pertinent facts to the case are thus admissible as evidence and not the absolute guilt. Under section 24 of the Evidence Act, an admission is, not *ipso facto*, the conclusive proof of the fact admitted, but may act as an additional evidence and a bar to the accused from denying what he has admitted in an unequivocal manner.



42. Such admission is admissible as additional evidence or corroboration but never as confession. Thus, the Supreme Court said on why such is admissible and in reversing the decision of the Court of Appeal which declared same in admissible. In Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR the court said: -

“We also agree with that interviewing suspects is a standard operating procedure in criminal investigations. In such interviews, Police are entitled to confront suspects with any report they may have received about the suspects’ commission or involvement in the commission of a crime and demand an explanation. In response, a suspect may offer an explanation. If it happens that the explanation the suspect gives is an admission of a material, ideally the Police are required to invoke the provisions of section 25A of the Evidence Act. If they do not, bearing in mind the distinction between an admission and a confession as stated above, such admission is admissible in evidence but, unlike a confession, it cannot on its own found a conviction. It will require corroboration to found a conviction. It would be absurd if admissions made in such circumstances were to be held inadmissible in evidence. It follows therefore that admissions, though not meeting the criteria set out in section 25A(1) of the Evidence Act, are admissible.” (Emphasis added)

43. In the context and circumstances of this case, the court finds that the evidence led by PW4,5 & 6 were admissible as proving that the subject was in the company of the deceased immediately before his death and that he knew where the body was hidden in the river.

44. In conclusion, the evidence shows irresistibly and beyond reasonable doubt that the subject, out of malice aforethought, unlawfully caused the death of the deceased. He is thus found guilty of the offence of murder contrary to section 203 as read with 204 and convicted as charged.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of: -**

Ms. Chala for the Prosecution

Mr. Iddi for the Subject

Court Assistant: Polycap

