



REPUBLIC OF KENYA



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**Republic v Kairu (Criminal Case 5 of 2018)
[2023] KEHC 24478 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 5 OF 2018
MW MUIGAI, J
OCTOBER 31, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

IBRAHIM MUGO KAIRU ACCUSED

RULING

Background

1. The accused person was charged with the offence of Murder of Faith Muthio Ibrahim.
2. The information that led to the arraignment of the accused person before the Court was as follows:
Murder contrary to Section 203 as read with Section 204 of the Penal Code, Laws of Kenya.
Ibrahim Mugo Kairu: On the 1st day of February, 2018 at Kasina Township in Athi River Sub-County within Machakos County, murdered Faith Muthio Ibrahim

The Prosecution Case

3. The prosecution case was anchored on the evidence of eight [8] witnesses.
4. In this case, PW1 was Catherine Mwendu Mulinge. It was her testimony that the accused herein is her husband, the deceased herein was her child. She testified that she was cohabiting with the accused and that on 31/1/2018 she left for work around 11:00 and came back around 2pm and found the accused and the child. According to PW1, the accused claimed that he wanted them to discuss an issue. She claimed that the accused wanted them to resolve their frequent disagreements. They did not manage to discuss the issues. PW1 found that he was in a bad mood and he closed the door from inside and PW1 noticed that his temper had risen. Testifying that the accused kept the door keys in his pocket.



5. PW1 was ordered by the accused to wear a white dress and proceed to the bedroom. She complied with the order and proceeded to the bed where the accused held her on the chest and PW1 felt that the accused had pressed a knife on her left chest. PW1 saw the knife which was stuck on his wrist. According to PW1 the knife had a blue handle. PW1 tried to pursue him and even kissed him then the door was opened to allow their child who was from school to enter the house.
6. PW1 then prepared a meal of rice while the accused remained in the sitting room the accused declined to eat the meal while the deceased ate. PW1 then alerted the deceased of dire circumstances they were in at the time. The deceased alerted PW1 of the presence of a panga nearby. PW1 went about the Kitchen chores and there was no conversation. It was PW1's testimony that this went on up to around 3:00am, at around 4:00am she went to bed after persuading the accused that they make love which they did. PW1 organized for the deceased to sleep in the sitting room.
7. According to PW1, the accused removed his trouser which still contained the knife and made love. They did not sleep for long as she woke up at around 5:00am. Accused also woke up and headed to the sitting room. PW1 went to the kitchen to prepare breakfast for the deceased who was to go to school. However, that deceased could not go to school as accused refused to open the door. PW1 did not request him to open the door. PW1 did some washing up to 9:00am. As per PW1 all the while accused remained at the sitting room with the baby. She finished washing at around 1:00 am. PW1 testified that the accused agreed to open the door and she managed to put clothes on the drying lines. PW1 then went to the bed room to arrange clothes only for the deceased to get hold of her. PW1 then dashed outside but he pursued her there. PW1 managed to rush to Mlolongo police station which was about 1.5 Kilometer away. She lodged a report. PW1 told the police to assist her collect her items and child as accused had made threats to kill her and the baby.
8. PW1 claimed that there was a delay and she decided to get contact number for the village elder. That the village elder was one Mutuku whom PW1 called and informed that she needed to vacate her house due to threats from her husband. He agreed to assist her and they agreed to meet at a certain bar near to where PW1 lived. According to PW1 the clan elder arrived with another colleague of his and they proceeded to her residence. On arrival they found the accused had locked the house from inside with a padlock. PW1 peeped through the window and confirmed the same. PW1 saw the accused inside and he could see her as well. PW1 requested the accused to open the door but he held his head and then got hold of the baby by her chest and stabbed her with a knife five times.
9. According to PW1, the clan elder and his colleague were there and witnessed the incident. PW1 ran down the stairs as she was shocked beyond belief. The clan elder and the colleague managed to break the door but by then the baby had already passed on. PW1 entered the house and found the accused had placed the child on the bed. The accused lay on the floor having stabbed himself sustaining minor injuries. According to PW1 some police officers were called by the clan elder and arrived at the scene and collected the knife at the time PW1's mind was on her child. PW1 told court that the body of her child was removed by the police and that is when she saw the knife. That police officers took photographs of the scene. The body was taken to Shalom Hospital and the accused was taken there as well. On 5/2/2018 PW1 went to Shalom Hospital mortuary in Company of Benson Wambua to participate in the post mortem examination. They identified the body of the deceased. PW1 referred to post mortem form MFI 1- post mortem report dated 5/2/2018. PW1 told court that the body was later transferred to Machakos Hospital mortuary which mortuary's name PW1 could not recall. PW1 stated that the accused has never beaten up the deceased however he had beaten PW1 severally and that she had not made reports to the police or the chief or village elder but, she used to inform their respective relatives who warned the accused.



10. In cross-examination by Mr. Ojiambo, PW1 testified that she left the baby with the accused as PW1 went to town to work. The child did not go to school that day from work PW1 found the baby at home. according to PW1 on 31/1/2018 she reported to work and left the child with the accused at home and that she recalls on 31/1/2018 the baby had attended school after she prepared her. The baby had alerted PW1 of the presence of a panga in the house and the baby had informed PW1 that the accused had earlier threatened to cut her with the panga. PW1 did not record the issue of a panga in her statement. The accused seized PW1's mobile phone and her child later managed to retrieve it from him and handed it to PW1. According to PW1 the deceased was close with the accused and that she used the phone to make calls around that time. PW1 stated that her number is 0720466623 but also had a celtel line and that she made calls to various persons. PW1 could not recall the airtel line off head. That the other line is 0729633066 which was being used by her late daughter. They had three mobile phone handsets one was for her daughter but each of them could use to make calls. PW1 met the clan elder at the chief's office and then they went to the house. As per PW1, she briefed the chief about the incident and it is true she met the clan elder at a nearby bar. PW1 claimed that she made call using her Safaricom line. According to PW1 the accused had kept the knife tightly between his trouser and his body and that the accused removed his long trouser before they slept and wore it the following morning. PW1 testified that accused hand worn a pair of shorts when she went outside to hang clothes and that she could not escape at night as it was risky.
11. In re-examination, PW1 testified that on 31/1/2018 the baby was in school when she left for mlolongo town. PW1 on 1/2/2018 she made several calls to her friend Loki Kituku and her mother and that she cannot recall the sim card numbers off head. PW1 was using Safaricom line. PW1 met the clan elder outside Highrise building where her house was and then proceeded to the chief's camp for authority to proceed to her house. PW1 walked from the police station for some distance before picking up a motorbike. On 1/2/2018 PW1 woke at around 5:00am.
12. Mr. Machogu sought to have PW1 recalled for the purposes of identifying the knife and photographs. Court gave directions that PW1 to be recalled.
13. PW1 upon being recalled testified that she had seen the photographs and knife. PW1 was aware of the knife which was in the kitchen and she was certain it is the murder weapon. She identified the knife MFI -2 one bloodstained kitchen knife with a blue handle. PW1 identified the first photograph showing the house they lived in fifth floor Sunbrook apartments, the second photograph shows the body of her daughter lying on the bed and is covered with blood. PW1 identified the third photograph MFI-3 A, B & C – photographs. She testified that on the material date her mobile line was 0720464423 but she also had a celtel line but was missing at the time and that she does not recall celtel line though she might have used it to communicate.
14. In cross-examination, PW1 testified that she was standing outside the house when the photographs were taken by police officers. PW1 witnessed the incident and saw the accused stabbing the deceased since he started doing so in the sitting room and then moved the deceased to the bedroom where he continued stabbing her. PW1 did not see the accused stabbing himself although she later saw his injuries. PW1 had a small mobile phone which she used to communicate with people as she headed to the police station.
15. PW2 was Titus Simiyu Wanjala. It was his testimony that he currently resides in Bungoma. In 2018 he used to reside in Mlolongo. PW2 is an estate agent and he recalls on 1/2/2018 he was at phase 3 Mlolongo around 1pm and while on his way in company of a colleague David Mutuku as community policing, his colleague received a call from a certain lady who claimed to be in distress. They agreed to go see the lady at Gossip Hotel and who informed them that her husband had refused to releases



her child. According to PW2 the lady had disagreed with her husband and she led them to the house. PW1 testified that on arrival she tried to open the door but found it closed from inside. That a young girl called out to the lady. As per PW2 minutes later he heard the girl pleading with the father not to kill her. The father then dragged the girl towards the bedroom. PW2 tried to persuade the man not to harm the child. PW2 saw him heading to the kitchen and picked up a knife suddenly PW2 saw blood splattered all over. PW2 enquired from him as to why he had killed the child he did not respond but suddenly stabbed himself and fell down. PW2 then alerted the OCS who sent an officer SGT Kanyi to rush to the scene. They later broke into the house and found the man who is presently the accused herein lying on the floor while the deceased lay on the bed. PW2 identified the knife the accused used to kill the deceased (MFI 1) PW2 claimed that the accused was before court (pointing at him in the dock). According to PW2 the same was used by the Accused to injure himself. PW2 identified the three photographs showing the body of the deceased and that there was blood all over the bed. PW2 was certain that the accused is the one who killed the deceased.

16. In cross-examination by Mr. Ojiambo, PW2 testified that they received the call at 1pm and they took the motorbike and that he had not known the mother of the deceased before. According to PW2 the lady wanted to pick up her daughter; that the lady claimed that the accused had been staying with the deceased while she slept outside as the husband locked her out. PW2 was not aware that the incident was splashed in the newspapers. PW2 did not know the chief named in the report but he used to work with the area chief Peter Ndunda. That the lady had been claimed to have slept outside after disagreeing with the accused. PW2 pushed the window curtain and saw everything that happened and that the deceased was not stabbed while at the sitting room and that whoever claims that the stabbing started at the sitting room would be lying. According to PW2 the knife was picked by accused from the kitchen. PW2 saw the accused stabbing himself and he fell down while the knife flew towards the sitting room. As per PW2 the blood on the floor emanated from the accused and that the photographs were taken by police officers. PW2 claimed that the accused took the action upon seeing them; that the accused slit the throat of the deceased and then stabbed himself and that he had not seen the medical report he had seen the photographs and again PW2 confirmed that the accused stabbed the deceased on the neck.
17. In re-examination, PW2 testified that the accused stabbed deceased with a knife.
18. PW3 was Sylvester Kioko Peter. He gave a sworn testimony that in 2018 he was a caretaker at Son Brook Apartments having been employed in December 2017. PW3 recalls on 1/2/2018 around 2pm when he received a call from one of the tenant Christine who ran a shop within the building and who alerted him that a child of Mwende had been killed by the father and who in turn killed himself. PW3 found a large crowd near the gate and visited the fifth floor of the flat and entered the house where he saw a kitchen knife, blood on the floor and the accused herein lying on the floor while the body of deceased on the bed. PW3 then rushed downstairs and met the police officers whom he led to the scene. PW3 testified that the police picked up the man on the floor plus the child on the bed. PW3 had seen the knife (MFI 1) but could not tell if it was the one he had seen on the floor. PW3 identified the photographs of the scene and could easily recognize the body of the deceased and the blood. PW3 testified that on 29/4/2017 Mwende and her mother visited him and he gave them the tenancy agreement and the said Catherine Mwende was in company of her daughter. According to PW3 later on the husband joined the said tenant and that later the accused and Catherine Mwende kept on quarreling and fighting and PW3 used to intervene and warn them. PW3 testified that the violence persisted and he was forced to report to mlolongo police station; that they used to quarrel a lot. PW3 had known the accused herein as husband of Catherine Mwende. PW3 saw him lying on the floor of the room with a lot of blood.
19. In cross-examination, it was PW3's testimony that the quarrels were so bad that times the mother of the deceased would sleep outside. As per PW3 squabbles were too much as they used to chase each



- other from the fifth floor to the ground floor thereby disturbing other tenants. According to PW3 the apartment is surrounded by several businesses and there are several movements within the area and if an incident took place then those nearby could have noticed. PW3 testified that as a caretaker he was to receive all reports or problems affecting tenants for his attention and that one cannot see the bedroom from the sitting room window unless the bedroom door is open. PW3 only came in after the incident and found the door already broken and that it takes time for one to break the metal door. PW3 found the door ajar and saw the accused lying on the floor while the deceased lay on the bed. PW3 saw the photographs showing that the accused had been moved.
20. In re-examination, PW3 testified that he knows the lay out of the rooms within the apartment and one can see the bedroom from the sitting room window if the bedroom door is open.
 21. PW4 was No. 76404 PC (D) Muthoni Christopher. He testified that he is attached at Mlolongo police station, PW4 has been in service for twenty-five years. On 1/2/2018 members of the community policing called them over an incident of murder. They rushed to the scene around Kasina area of Mlolongo. They found a large crowd which directed them to the house where incident had taken place. According to PW4 they found a young girl lying on the bed with a lot of blood around the body. The door had been broken by members of the public. As per PW4 there was a man lying on the floor with injuries and there was a lot of blood on the floor. The had stabbed himself on the chest. They picked the two into their vehicle and rushed them to the hospital. PW4 gave his testimony that the deceased was booked in the morgue while the injured man was admitted and placed under police guard. They cleared the scene after it had been secured by the community policing members. PW4 testified that photographs were taken before the body of the deceased and the man were picked up and that there was a kitchen knife beside the man. PW4 identified the Knife (MFI 3) he also identified the photographs taken of the scene (MFI 3 A, B & C).
 22. In cross-examination, PW4 testified that the man admitted in the hospital after discharge was escorted to the police station. PW4's role was only to transport the victims. PW4's duty is to drive police vehicles. According to PW4 he cannot recall where he was when they received the call from the police station directing them to rush to the scene and check. He visited the scene and the mother of the deceased was then outside the room. PW4 did not witness the incident and did not see the man stab himself. PW4 did not confirm whether the girl had died. Testifying that the man was admitted and guarded by police and that no one was arrested from the scene. PW4 claimed further that he was present when the photographs were taken which was done before the bodies were removed. According to PW4 he did not see photographs containing the man lying on the ground as no photos were taken of the man. PW4 could see the knife on the photograph which had be roved and placed near the door step where it was photographed. As per PW4 he could not determine the source of the bloodstains on the knife. Both victims had bled.
 23. In re-examination, it was PW4's testimony that they were the first people to join the community policing members at the scene. PW4 was not present when the incident took place and that they rescued the man who was bleeding from a stab wound. According to PW4, photographs could not be taken on the man as scenes of crime officers were far away and they needed to save him by rushing him to the hospital.
 24. PW5 was Benedict Wambua Matoloka. In his testimony, he used to work with Dusit 2 Hotel in Nairobi. PW5 while in Nairobi received a report that a child had been killed in Mlolongo. He leant that the killer had attempted to kill himself. PW5 rushed home and established that his cousin's child had been killed. He visited Mlolongo police station and then to shalom mortuary for the post mortem. According to PW5 this was on 5/2/2018. He positively identified the deceased body. He claimed that



- the body had three stabbed wounds on the back. Pw5 had not known the accused before until the incident and came to know that he was cohabiting with his cousin.
25. In cross-examination, it was PW5's evidence that the accused visited them at home after the incident when he went with his family to engage them on compensation under Kamba Customs but they did not agree. PW5 testified further that he learnt the accused and his niece were staying as husband and wife. PW5 had not learnt of squabbles between the couple and the issue of compensation has not been pursued as case was lodged in court. PW5 testified that he saw the stab wound on the body even though he did not touch it. PW5 did not witness the incident and the doctor informed him that a knife had been used as a weapon. It was PW5's evidence that his common sense is that a knife was used as the weapon and that he did not see a stab wound on the neck and further that he did not see the accused stabbing the deceased.
 26. PW6 was David Mutuku Kaloki. He testified that he lives in Mlolongo Phase 3 and was in community policing in 2012-2018 at the Chief's Office at Mlolongo. As per PW6 on 1/2/2018, that morning and they about business with Titus Simiyu and they were called by the chief. They stayed there until 1pm. According to PW6 they were standing outside and they saw a lady come screaming and she said that Officer at the chief's office were to help her as her husband wanted to kill her with her child. She said she could not get to the police station as she left the child at home. They followed the lady to help and she showed them to their home. They went up the stairs up to the fifth floor on the left side House/room.
 27. PW6 testified that Titus knocked the door and found it locked with a padlock. PW6 checked through the window and saw the child was held by the neck and squeezed on the seat and PW6 heard the child plead/ cry "dad I love you Daddy usinimalize" "Dad usiniue sitaambiya mum usiniue" it was PW6's testimony that he saw the man strangle the child and blood spilt out and he wiped blood on his shirt. PW6 told Titus he was going to report to the chief and they came quickly to the scene. According to PW6, they called police and police came to the scene and they went away. PW6 claimed that he had pictures that he could see them. He saw the child was placed on the seat. PW6 identified the photographs as MFI 3 a, b & c. testifying that the accused stabbed himself with a knife after child was stabbed. PW6 saw the side of the face as he held on the child. PW6 could not see his face.
 28. In cross-examination, it was PW6's testimony that they did not know the lady who went to them that day at the chief's office. As per PW6 he did not know if she had known his colleague. It was PW6's evidence that they followed the lady who had gone for help and followed her to the house. According to PW6 his colleague was at the door trying to open the door and he was at the window. PW6 called him and he told him to go to the chief. PW6 claimed that he is the one who saw first and he called Titus. He saw blood spilt out and the man was wiping the blood with the shirt according to PW6, the child lay on the seat and that child kept silent after it was stabbed. Testifying that he heard child cry "Dad I love you do not kill me I will not tell mum". PW6 claimed that at the window he could see clearly and there was a sitting room. PW6 saw the child held to the head and the man on the one side. PW6 saw the pictures shown to him in court (MFI 3 (C) photo and he was able to identify blood and a knife. According to PW6, he thought the blood was for the child and the accused person as he had stabbed himself and he lay there too. He claimed that doctor must come and tell the court. PW6 testified that Titus told him that saw the accused person stab himself when the door was about to be opened. PW6 did not want to see the blood of the child. He went away after the door was opened. He claimed that he did not know what happened there after.
 29. PW7 was Dr. Ndegwa Peter Muriuki and he works for Ministry of Health, Department of Diagnostics & Forensics Services- Medical- legal Section since 2005. He testified that he holds Bachelor of Science & Masters in Pathology and that he had two reports the one for Faith Muthio. It was PW7's testimony that he filled this Report on 5/2/2018 at Athi River Shalom Hospital. PW7 performed a post mortem



on Faith Muthio the body having been identified by Catherine Mwendu and Benedict Wambua mother and grandfather to the deceased. PW7 noted and confirmed that body of female African child of 9 years in blood stained clothes good nutritional status and height of 165 cm. PW7 noted penetrating stab wound right nipple 4x1cm, noted penetrating stab wound left nipple 4x1 cm, noted penetrating stab wound interior right shoulder of 3x1cm, noted penetrating stab wound below right scapula 3x1 cm, noted penetrating stab wound below left scapula 3x1 cm. according to PW7, the body was very pale and that the right chest cavity was penetrated is a fracture of the lateral cartilage and left chest cavity penetrated fracture of 3rd 4th 5th ribs at the level of anterior auxiliary line. PW7 testified that both lungs were perforated. According to PW7 left lung from behind, bilateral haemothorax blood in both lungs 1.5 liters and that hymen was intact. He claimed that other systems externally were normal. It was PW7's evidence that the cause of death was exsanguination for haemorrhage due to chest injuries due to multiple penetrating sharp force trauma consistent with assault. PW7 told court that after examination he proceeded to fill the post mortem Form MFI -1 on 5/2/2018.

30. In cross-examination, PW7 testified that he observed 5 stab wounds in total and 2 stab wounds at the back of the shoulder blade. He claimed that he did not communicate with the accused person as he did not know him/her

31. PW8 was CPL Richard Muthee. He told Court that previously he was attached to DCI Mlolongo. On 1/2/2018 at 2:30pm he was in the office with Inspector Peter

Momanyi (now retired). They received information that there was murder incident which occurred at Sun Brook Apartments at Mlolongo Township. They proceeded to the apartment. According to PW8 on arrival at the ground floor they found a crowd of people and they enquired which floor the incident occurred, a good Samaritan took them up to 5th floor room B21.

They assessed the scene as the body was removed by officers from Mlolongo police station and the suspect had been arrested and murder weapon taken by the police and scene of crime came and took photographs of the scene.

It was PW8's testimony that the beddings had blood and they did not do much. They left the scene and went back to the office. They took over the case as DCI officers and commenced investigations. PW8 testified that they recorded statements of witnesses. Later he filled the Post Mortem form and took the same to Shalom Hospital where the Pathologist was and post mortem was conducted. As per PW8, after post mortem was conducted, the cause of death was due to injuries caused by stabbing. They interrogated the suspect and later charged the accused person.

He testified that at the same time, he received the photographs from the scene of crime personnel, which showed the scene of crime. PW8 later recorded his statement to that effect. PW8 highlighted the things collected from the scene to be, blue handle knife with blood stained collected at the scene MFI-2 P- exhibit 2, photographs taken of the scene 3 photographs MFI 3 (a) (b) & (c) P- exhibit 3 (a) (b) & (c). He pointed to the accused as the one who was in the incident that day.

32. In cross-examination, PW8 gave his evidence that they found the body removed and accused was arrested. They only assessed the scene there were blood stains. He testified there was no doubt whose blood it was as after they took over the matter the police officers told them that where the blood was the body of the deceased was there. He testified that they recorded witness statement and collected photographs and the knife which was handed over to them by the police officers who arrived at the scene first.

33. According to PW8 excerpt photograph report indicated the deceased death. He testified that the deceased mother implicated the accused person, that the deceased's mother said that the accused killed



- the deceased and she confirmed that she saw the incident as it happened. According to PW8, the deceased mother peeped at the door and saw what was happening, she saw the accused person stabbing the deceased inside the room B21 and she told PW8 that deceased died and the doctor confirmed the deceased death.
34. He claimed that he believed her and that the deceased and accused person were the only one in the room. He was told by the deceased mother as she was there and she made the statement. PW 8 told court that there are photographs of the scene and there is no accused person in the photos. He stated that the accused person will explain to the court. PW8 claimed that he is not a photographer but scene of crime took the photographs and there are blood stains and the knife and that the photographer would explain to court not him. Testifying that there was no accused person in the photographs and that he read the witness statements. He cannot remember very well the evidence. He claimed that the witness statement of Arresting officers/ police officers. According to PW8, the accused person was lying next to the knife and that the scene of crime did take the photograph and that PW8 was not at the scene so he did not take up the matter. He relied on the evidence on record/ statement to charge the accused person.
 35. PW8 did not take the finger prints on the knife as when they arrived at the scene the other police officers had arrived to the scene and there. According to PW8, something to connect the accused person with the incident. It was PW8's testimony that the accused person was found in the house where the knife with blood stains was found and that the deceased mother did not confirm to PW8 her whereabouts the previous night.
 36. PW4 was No. 76404 PC (D) Muthoni Christopher (Recalled), upon recalling of PW4, he testified that on 1/2/2018 as the 1st person who arrived at the scene as per his Statement, they were called on 1/2/2018 and arrived at the scene of murder. According to PW4, they found a little girl lifeless and the older/ bigger man struggling. They immediately met with the community. He testified that Esther Miu photographer for the police station. He claimed that they were not Scene of Crime officers. She took the photographs not PW4.
 37. In cross-examination, PW4 testified that the scene of crime officers could not be reached at the time. He was at the Airport and the others were few in Nairobi and that the police called the lady who took the photographs.
 38. In re-examination, PW8 told court that he only knew her by one name Mary since she lost her husband and stopped taking photographs
 39. At the close of the prosecution's case, court issued directions that parties file and serve their written submissions which directions were complied with.

Submissions on a Case to Answer

The Accused Person's Submissions

40. The accused person in his submissions dated 16th June,2023 and filed in court on 21st June,2023, Mr. Ojiambo, Counsel for the accused person relied on Section 210 of the Criminal Procedure Code Cap 75 and averred that the accused had no case to answer and should be acquitted.
41. On tests for no case to answer, Counsel submitted that to put the accused to his defence would be akin to asking him to fill the gaps in the prosecution's case and to clarify significant inconsistencies. Counsel placed reliance on the cases of *Anthony Njue Vs Republic* Crim. App. No 77 of 2006 (2006) eKLR and



Public Prosecution vs Zainal Abidin B. Maidin & Another Criminal Appeal No. 41 LB 202-08/2013, cement his point that the defence ought not to be called merely clear or clarify doubts.

42. Counsel submitted on lack of material evidence to the ingredients of offence of murder submitted that without the material evidence, the prosecution case cannot succeed even if the accused remained silent. According to Counsel a murder charge cannot be prima facie if it does not disclose motive. Counsel contended that none of PWS testified on this hence without proof of motive, the charge fails even without a defence.
43. It was averred that no forensic investigations were conducted on the alleged knife and no forensic evidence was tendered. Counsel opined that without forensic evidence this honorable court cannot establish the critical questions of whose fingerprints were on the said kitchen knife, who last used or handled the said kitchen knife and who else among the people involved caused the alleged injuries on the deceased and accused.
44. It was the counsel's argument that the police did not conduct independent investigations as they completely relied on the narratives advanced by PW1 only which according to counsel were undependable and unreliable. Counsel sought credence in the cases of *Bitange Ndemo Vs Director of Public Prosecutions & 4 others* [2016] eKLR and *Republic Vs Director of public Prosecutions & 2 others ex-parte Praxidis Naomi Saisi* (2016) eKLR, to buttress his point.
45. It was Counsel's position that the prosecution's Case rests entirely on accounts of circumstances narrated by the prosecution's witnesses. Counsel claimed that these accounts were unconvincing, inconsistent and contradictory couched as an afterthought to accuse an innocent man.
46. Counsel further submitted that the charge information was defective as it did not disclose the accused's conduct that constitutes the offence of murder. It was the Counsel's contention that charge information as couched did not adequately inform the accused of the particulars on which he was charged, it does not state the motive, manner, weapon, time of the alleged murder. Counsel submitted that the charge was deliberately worded to ambush, trap and corner the accused. Counsel urged the court not to put an accused person to his defence on such a Charge.

Submissions by the State

47. The state vide its submissions dated and filed in court on 11th May, 2023, the state counsel Mr. Mwongera relied on the *CASEs of Republic Vs Mohammed Dadi Kokane & 7 Others* [2014] eKLR and *Republic Vs Daniel Musyoka Muasya, Paul Mutua Muasya and Walter Otieno*, to buttress his point on the ingredients of murder and submitted on the following issues:
 - a. Was the accused involved in the murder of the deceased?
 - b. Did the accused have malice?
 - c. Was the accused identified appropriately?
 - d. Was the cause of death as a result of the injuries inflicted?
48. As to issue of involvement of the accused in the murder of the deceased, State counsel relied on the testimony of PW1, PW2 & PW6 which according to counsel placed the accused person in the scene of crime. state counsel contended that PW1 clearly testified that on 1/2/2018 she had left her child (deceased) in the house with the accused person and rushed to Mlolongo Police station to lodge a report about the accused person. It was averred by state counsel that PW2 & PW6 responded to her distress call and accompanied PW1 to the house. They witnessed the ill-fated ordeal whereupon the accused person took a knife and stabbed the child five times.



49. On the issue of Malice, counsel placed his reliance on Section 206 of the Penal Code to support his point on malice aforethought and averred that the accused had malice aforethought because he had an intention to commit death to child, based on the differences he had with his wife (PW1).
50. On the accused identification, counsel for the state placed reliance on direct evidence for identification by PW1, PW2, & PW6 who according to State Counsel identified the accused as the perpetrator of the heinous crime.
51. Regarding cause of death, it was submitted that PW7 the doctor testified that he filled the post mortem report and formed an opinion that the cause of death was exsanguination due to chest injuries due to multiple penetrating sharp force trauma consistent with assault.
52. Reliance was placed on the Cases of *Ronald Nyaga Kiura vs Republic* [2018] eKLR, *Ramanlal Trambaklal Bhatt vs Republic* [1957] EA 3323 AT 334 AND 335 and *R Vs Jagjiwan M. Patel and Others* (1) T.L.R (R) 85, to buttress his point on the establishment of prima facie case.
53. It was state Counsel's submission that it has proved beyond reasonable doubt and the accused ought to be placed in his defence under Section 306 *Criminal Procedure Code*.

Determination/analysis

54. At the Close of the Prosecution case, this Court read through the Court record and documentary exhibits produced during trial and considered the totality of the evidence.
55. In the case of Anthony Njue Njeru vs Republic Court of Appeal No 77 of 2006; the Court determined the scope and content of case or no case to answer Ruling by the Court as follows;

“[Is]Was there a prima facie case to warrant the Trial Court to call upon the appellant to defend himself? It is a cardinal principle of our law that the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of prosecution the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction”.

56. The issue of what is a prima facie case in criminal trials was clearly explained in *Ramanlal Trambaklal Bhatt vs R* [1957] E.A. 332 at P. 334-335 where it was said:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one:-

Which on full consideration might possibly be thought sufficient to sustain“ a conviction.”

This is perilously near suggesting that the court would not be prepared to convict if no defense is made, but rather hopes the defense will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is:-

“some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defense.”

57. In the instant case, on record the evidence recorded by previous Trial Court of PW1PW2 PW3 PW4 & PW5. Thereafter, evidence taken by this Court is of PW6 PW7 PW8 and recalled PW4.



58. The evidence of PW1 & PW2 placed the Accused person at the scene and saw the Accused person stab the child with a knife despite her pleading with him not to kill her. PW3 confirmed persistent violence and quarrel in the marriage between PW1 & the Accused person.
59. PW6 & PW4 arrived at the scene of crime PW5 identified the deceased's body for Post Mortem conducted by PW7 the Pathologist who confirmed the cause of death as exsanguination due to chest injuries due to multiple penetrating sharp force trauma consistent with an assault.
60. The exhibits of Photographs and the blue knife confirm stabs on the deceased by the Accused person who was at the scene in a locked house alone with the daughter and had also stabbed himself after stabbing his daughter.
61. The totality of the evidence adduced by the Prosecution cumulatively confirm a prima facie case that warrants the Accused person to be placed on his defense.

Disposition

1. Upon this Court's consideration of the totality of the evidence adduced and on record, the Prosecution has proved a prima facie case that warrants the Accused person to be placed on his Defense.
2. Further Mention for Directions on 2/11/2023.

RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 31ST OCTOBER 2023 (VIRTUAL/PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE

In the Presence of:

No Appearance - Accused Person

Mr. Odhiambo - For The Accused Person

Mr. Mwongera - For The State

Patrick - Court Assistant

Accused person – out on bond

Mr. Odhiambo: The Accused person is not available. I did not call him in time. He cannot come now because of fare.

Court: Further Mention 2/11/2023 for Accused person to attend Court.

M.W. MUIGAI

JUDGE

31/10/2023

