



**State v Auma (Criminal Case 13 of 2018)
[2023] KEHC 24686 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24686 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE 13 OF 2018
RE ABURILI, J
OCTOBER 31, 2023**

BETWEEN

STATE PROSECUTION

AND

JACKLINE AUMA ACCUSED

JUDGMENT

Introduction

1. The accused person Jackline Auma is charged with two counts of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* Cap 63 Laws of Kenya. The particulars of the offence are that on the 6th day of June 2018 at Shauri Yako Estate, Muhoroni Township in Muhoroni Sub-County within Kisumu County, the accused murdered Elizabeth Achieng Ojwang and in the second Count, she is charged with the murder of Leon Benedict Okoth at the same place, time and date. The accused person pleaded not guilty to the charges. The prosecution called six (6) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

2. PW1 Evans Okoth Okeno testified that Elizabeth Achieng Ojwang was his wife and Leon Benedict Okoth their son. He testified that the accused was his house girl. He recalled that on the 6th day of June 2018 at about 6.00pm he was at their home in Nyamasaria whereas his wife was at her workplace in Muhoroni. He testified that he last spoke to his wife on 5th June 2018.
3. PW1 testified that on the morning of 6th June 2018 his wife sent him a text by a WhatsApp but when he responded to it, it was not delivered. He testified that at about 6.00pm he sent a text message but the said message was not received so he phoned her on her Safaricom number, but it was not going through and when he tried her Airtel number it also did not go through.



4. PW1 testified that Priscilla was his wife's colleague at Kandege Dispensary in Muhoroni sub -county. It was his testimony that he first talked to Priscilla on 7th June 2018 at about 11.00am when she called him and asked him if Elizabeth had gone to Kisumu but he informed her that Elizabeth had not gone to their house on 6th June 2018.
5. PW1 testified that he phoned Damaris, his wife's friend, who gave him his wife's sister's (Cynthia) phone but on calling it, the number did not go through. He testified that he went to Muhoroni at about 11.00pm on 7th June 2018 and on entering the room he found his wife's body lying on the floor, with a nylon rope on the neck, in a pool of blood and further that their son Leon was lying dead in the bed.
6. It was his testimony that his wife had injuries on her nose, soft tissue injuries on the abdomen that looked like a burn. PW1 further testified that Leon's body did not have any visible physical injuries at that time. PW1 testified that the bodies were taken to Star Mortuary.
7. He further testified that the accused had worked for them for about one month before the incident happened and that during that time, he did not encounter anything bad about the accused as she was doing her work normally.
8. PW1 testified that he last talked to Elizabeth on 5th June 2018 as he called her on video call as he wanted to see his son. It was his testimony that Elizabeth lived with Leon, the accused and Cynthia her sister.
9. He further testified that on the 6th June 2018 Cynthia was not at that house as she was at their home in Bondo so it was only Elizabeth, Leon and the accused who were at the house. PW1 testified that on the 11th June 2018, he recorded his witness statement at Central Police station, Kisumu. He further testified that he was later called to point out the accused.
10. In cross-examination, PW1 stated that he had been married to the deceased for a year and that they had a happy marriage. He stated that their matrimonial home was at Oyugis while he lived in Nyamasaria, and the deceased at Muhoroni. PW1 stated that the deceased used to go to Nyamasaria every weekend and that they used to communicate everyday through phone on texts and video calls.
11. It was his testimony in cross-examination that on the 6th June 2018 he sent her a text on and WhatsApp at 8.00am but the later it was not delivered. He stated that on the morning of 7th June 2018, he tried to reach the deceased on her phone. He reiterated that not a single day passed without him and the deceased communicating and so it bothered him that over 12 hours had lapsed and the deceased had not communicated.
12. PW1 stated that on the 7th June 2018, he was at Onjiko when Priscilla called him and informed him of the bad news. He reiterated that by the time he got the message of his wife's passing, she had not reached out to him for about 12 hours. PW1 stated that the accused had worked for them for a month and that the deceased had complained about her to him.
13. It was his testimony that he did not know that prior to the incident, the accused had fought with the deceased or that the deceased had physically abused the accused. PW1 stated that the deceased could control her temper when they were together but he did not know about her in Muhoroni.
14. PW2 Priscilla Otieno, a clinical officer at Muhoroni and a workmate of the deceased Elizabeth Achieng testified that she knew the accused who was the deceased's house help. She testified that the deceased lived in Muhoroni with her late son, her sister and the accused. It was her testimony that on the 5th June 2018 the deceased's sister had travelled to Bondo so the deceased remained with the accused and her late son.



15. PW2 testified that on the 6th June 2018 she and the deceased left for work as usual and worked the whole day. She testified that the deceased left work at 5.00pm whilst she remained with other colleagues verifying their end-of month reports. It was her testimony that on arrival at home, her 3 years old child told her that the deceased's hand was bleeding.
16. PW2 testified that she inquired from her sister, who informed her that when the deceased arrived, she heard her and the accused having an argument. PW2 testified that she went to the deceased's house and knocked and the accused opened the door. It was her testimony that on inquiring as to what had happened, the accused informed her that Baby Leon was hurt during the day and when the deceased got home, she was annoyed because the accused had not informed the deceased about the injury leading to them exchanging words before the deceased left with Baby Leon.
17. PW2 testified that she went and informed sister Josephine who was a neighbour and colleague with whom they went back and inquired from the accused as to what had happened but the accused stuck to the same story she had earlier told PW2. It was her testimony that the house was clean and must have been mopped some hours or minutes before. She further testified that she and Josephine left and went to look for Elizabeth at St. Vincent Rachar and Muhoroni sub-county hospitals but did not find her and concluded that she must have gone to Kisumu.
18. PW2 testified that she went to inform the accused that the deceased might have gone to Kisumu, then the accused informed PW2 that she held the same view. It was her testimony that when she went to the deceased's house, the bedroom was locked with a padlock so they only accessed the sitting room. She further testified that on the 7th June 2018 she got the deceased's husband's number from colleagues and called him inquiring whether the deceased had been in touch with him but he informed her that he had been looking for her as her phone had been switched off as well as that of the deceased's sister.
19. PW2 testified that in the evening when she got home, the accused had not returned to the house of the deceased. It was her testimony that earlier that morning, the door to the deceased's house was open but she did not see the accused and thought that the accused could have gone to the shops. She testified that in the evening, neither the deceased nor the accused were around. PW2 testified that Evans told her that he had reached Cynthia who had also not heard from the deceased.
20. It was PW2's testimony that at 7.00pm, she went to Mama Michelle and they decided to start looking for the deceased afresh so they peeped through the door and the sitting room was okay but on peeping through the bedroom window, they saw the deceased lying on the floor, in some blood while Baby Leon was on the bed. She testified that she called sister Josephine, (their hospital in - charge) who came and also peeped through the window and saw what they had seen earlier. It was her testimony that the accused was nowhere to be seen.
21. In cross-examination, PW2 stated that she and the deceased were friends and that the distance from her house to that of the deceased was about 3 metres. It was her testimony that she discovered the body at about 7.30pm on 7th June 2018. She testified that the deceased's bedroom door was locked and that she saw blood on the floor. She further stated that her neighbours had a security light which was adjacent to the deceased's bedroom window and that they also used the torch from her phone and saw blood.
22. PW2 stated that when she left for work on 7th June 2018, the kitchen door was open, but she did not see the accused around. She stated that the deceased did not always tell whenever she left her house. PW2 testified that the deceased was a jovial person at work and that she had been her neighbour for a month. She further testified that the deceased neither exchanged words with her sister nor complained to her about the accused. She stated that she was not aware if the deceased ever assaulted the accused.



23. PW2 further stated that she had met the deceased's husband once before.
24. PW3 No. 65712 Senior Sergeant Julius Matata Mutisya testified that on the 7th June 2018 at 6.00pm he was the night duty officer at Koru Police station when he got a phone call from Corporal Onsembe of Muhoroni police post who informed him that there was a murder scene within Muhoroni area. He testified that he proceeded to the scene, which was about 500 metres from the main stage at Muhoroni on the left side facing Muhoroni Sugar Company.
25. PW3 testified that Corporal Onsembe led him to the scene where he found a large group of people surrounding the house with the sitting room door open. It was his testimony that they broke into the bedroom where they found the body of a lady lying on the floor with blood on the mouth and a nylon string tied on the neck. He further testified that there was peeling skin on the left side of the stomach, as if it had been burned.
26. PW3 testified that there was also the body of a baby on the bed that was well covered but already dead with mucous oozing from the mouth. It was his testimony that there were some doctors/medical clinical officers from Muhoroni who removed the baby's clothes as he watched. He testified that the baby did not have physical injuries.
27. PW3 testified that as they were there, the deceased's husband arrived and confirmed that the lady was his wife and the baby was his. It was his testimony that the DCI Muhoroni arrived, and took over the scene. He further testified that he removed the bodies from the scene and took them to Star Hospital Mortuary Kisumu to await postmortem. PW3 testified that he learnt that it was the maid who was employed by the deceased who committed the offence.
28. In cross-examination, PW3 stated that he did not know the accused and had never seen her before. It was his testimony that the accused was not at the scene of crime when he got there. He reiterated that it was some clinical officers, whom he knew as he had been visiting the hospital in Muhoroni, who removed the clothes off the baby. PW3 stated that he did not interfere with the scene of crime.
29. PW4 No. 81545 PC (W) Susan Chebet testified that on the 8th June 2018, she was in Muhoroni when she was assigned a case by the Acting DCIO, Inspector Manure. It was her testimony that together with PC Kimutai, they proceeded to Shauri Yako Estate, Muhoroni where on the 7th June 2018 an incident had happened, whereby 2 bodies were discovered in a house at Shauri Yako Estate by the neighbours who reported to the Area Chief who reported at Koru Police station.
30. It was her testimony that on the 8th June 2018, they went to the scene, to conduct investigations where they found the door to the house closed. She testified that they found children in the next house from whom they sought to know if they had the keys to the locked house and the children gave the keys to the police officers. PW4 testified that they opened the door of the house which was one bed-roomed with a sitting room; and a kitchen. She testified that items were scattered inside the house; both in the sitting room and bedroom.
31. PW4 testified that in the bedroom, there was a pool of blood on the floor. She testified that they searched for exhibits and found a curved kitchen knife that was stained with blood under the bed and collected it then returned to the police station. PW4 produced the knife as PEX1.
32. It was her testimony that they were told that the suspect was a house girl so they began their investigations and recorded statements. She testified that on the 9th June 2018 she proceeded with PC Kimutai to Star Hospital Kisumu where they met the pathologist, Dr. Muchana, together with relatives of the deceased. She testified that they saw the bodies at the mortuary and that the body of Elizabeth had two stab wounds on the chest while the young baby boy had no visible injuries.



33. PW4 testified that the doctor conducted the post-mortem in her presence and informed them that Elizabeth died as a result of manual strangulation and that the boy died from a closed head injury. She testified that a cartilage was taken from Elizabeth's body and on the 27th June 2018, she took the knife and the cartilage to the Government Chemist for DNA testing.
34. PW4 testified that they continued to look for the accused who they learnt was a Ugandan. She testified that the accused was later arrested in Uganda and brought to Kenya and charged with the double murder.
35. It was her testimony that when they went to the scene, she saw 2 houses within one compound that were about 3 metres apart. She testified that apart from the scattered things and the blood stains, she did not see anything else which was strange. She testified that she was at the scene for about 30 minutes and that apart from the children, she did not see any adults.
36. PW4 further testified that the people she identified as witnesses were neighbours; the husband of the deceased and police officers who handled the case. She testified that it was the neighbours who told her that the suspect was the house-help whose name was Jackline Auma. She further testified that during her investigations, she did not find any relationship between the deceased and the accused other than the accused being a house-help. She testified that she also did not find out how the accused related with her neighbours.
37. PW4 testified that the accused was brought back to the country by DCI officers from Nairobi Headquarters. She testified that she did not know the accused prior to the arrest.
38. In cross-examination, PW4 testified that she was one of the three Investigating Officers. She stated that she went to the scene, and found the house locked and that they were given the keys to the house by children of the neighbour whose parents had instructed them to hand over the keys to police officers. She testified that the children did not access the house. She reiterated her testimony in chief that items were scattered inside the house with blood on the floor.
39. PW4 stated that she was present during the post mortem where the cause of death of Elizabeth was found to be manual strangulation. She reiterated that the knife produced in court was the murder weapon. She further stated that she could not recall any nylon rope on the neck of the deceased.
40. PW4 further stated that the Investigation Diary was recorded by Corporal Onsembe and that therein was a note that 'her neck had been tied with a manila rope.' She testified that the officer who went to the scene and who removed the body may have seen the rope as she went to the scene the following day after the body had been removed. PW4 further stated that she had not produced the manila rope in court and she was not aware whether it had been produced in evidence. She further testified that no DNA testing was done on the manila rope. PW4 testified that she concluded that there was sufficient evidence to charge the accused because on the fateful day, the accused was the person inside that house with the deceased and that the accused escaped after the incident.
41. PW5 Polycarp Lutta Kweyu, a Principal Government Analyst at Kisumu Government Chemist, testified and produced a report which he prepared on 15th March 2019 following a request from PC Susan Chebet DCI Muhoroni who submitted the following 2 items on 27th June 2018:
 1. A blood stained kitchen knife marked 'A1'
 2. Cartilage sample from Elizabeth Achieng marked 'B1'.



42. It was his testimony that they were to carry out DNA analysis on the items and establish any genetic relationship. PW5 testified that he did his analysis and established that The stain on the kitchen knife tested positive for human blood. He then generated DNA profiles as per the back of the report.
43. He further testified that by comparing the DNA profiles, he concluded and opined as that the DNA profile generated from the blood stain on the kitchen knife matched the DNA profile of the deceased Elizabeth Achieng. PW5 produced the Exhibit Memo and the Report as PEX2 and PEX3 respectively.
44. In cross-examination, PW5 stated that he did not receive any sample from the accused for comparison.
45. PW6 Dr. Dickson Muchana, a consultant pathologist based in Kakamega testified and produced two postmortem Reports; one for Elizabeth Achieng Ojwang and the other for an infant Leon Benedict Okoth.
46. It was his testimony that on the 9th June 2018 he carried out autopsies at the Star Hospital mortuary in Kisumu in the presence of Evans Okeno and Bornel Okeno. Dr. Mchana testified that Elizabeth Achieng was an adult female in her mid 20s, with mild obesity of trunk, 5 ft 7 inches long. He testified that her body was preserved using formalin and 2 – 3 days had lapsed since her death and further that the nails, lips and tongue appeared dark bluish in colour.
47. Dr. Mchana testified that there was a ligature mark on the upper neck almost across the neck about 3mm wide, complete loop and a stab wound on the right upper chest on the front below the 1st rib while the second stab wound was at the back at the right, above the 10th rib near the spine. It was his testimony that there were minor bruises on the face, left cheek and back of the neck.
48. PW6 testified that internally, there was bleeding into the right half of the chest about 600mls and that the right lung had one superficial perforation on the upper lobe and a deep perforation on the lower lobe but the lung had not collapsed. He further testified that there was a bruise contusion on the forehead but that all other systems were essentially normal.
49. Dr. Mchana testified that he formed the opinion that the cause of death was failure to breath or asphyxia due to manual strangulation. He testified that he took a small part of rib cartilage and gave to the Investigating officer for further investigations and issued Burial Permit No. 0981993. He Signed the Postmortem form on 9th June 2018. PW6 produced the postmortem Report as PEX4.
50. Dr. Mchana also testified that he also conducted an autopsy on the body of Leon Benedict Okoth on 9th June 2018 at the Star Mortuary in Kisumu which body was identified by Evans Okeno and Bornel Okeno.
51. It was his testimony that the body was of an African male infant of good nutrition, well preserved for 2 – 3 days from the time of death and was aged about 3 months old. He testified that externally, the lips and tongue appeared bluish in colour, the top of the head was swollen, with a bruise and no other injuries were noted. He further testified that there were no signs of ill health on the baby.
52. Dr. Mchana testified that internally, there was extensive bleeding below the skin of the scalp, extensive bleeding into the brain substance while all other systems were essentially normal. It was his testimony that he formed the opinion that the cause of death was closed head injury secondary to blunt force trauma. Dr. Mchana produced the postmortem Report for baby Leon Benedict Okoth as P. Exhibit 5 and testified that he issued Death Certificate 0781994.
53. In cross-examination, Dr. Mchana stated that the cause of death for Elizabeth Achieng was asphyxia due to manual strangulation. He further stated that she had 2 stab wounds in the chest but the lungs



never collapsed. It was his testimony that the rope could have been used to strangle her whereas Baby Leon died due to bleeding into the head caused by blunt force trauma on the top of the head.

The Defence Case

54. Placed on her defence, the accused testified on oath that she hailed from Uganda and came to Kenya to work as a house-help and further that she worked for Elizabeth Achieng. It was her testimony that on the 6th February 2018, she was in Muhoroni in the house of the deceased who started quarrelling her after her return from her work at 4.00pm. The accused testified that the deceased told her that she, the accused, had not arranged the house the accused responded by informing the deceased that she had not been feeling well.
55. The accused testified that she got out and the deceased followed her saying the accused was despising her. She testified that the deceased slapped her and they both got into the house with the deceased entering first followed by the accused. It was her testimony that the deceased slapped her again. She further testified that the child was sleeping on the bed inside the house.
56. The accused testified that they started fighting and both fell down. It was her testimony that the deceased took the knife and wanted to stab her but she struggled and snatched it from her then she stabbed the deceased using the said knife. She testified that she never touched the child but that as she fought with the deceased, they fell down so she was not aware if they fell on the child who was nearby.
57. The accused testified that after stabbing the deceased, she stood, got out then went to her home. She denied using the rope to strangle the deceased and stated that she heard of a rope in court.
58. In cross-examination, the accused stated that she lived with the deceased alone with her child Leon who was aged 3 months and who was in the house on the material date. She further stated that she fought with the deceased Elizabeth from the house. The accused further stated that she snatched the knife from the deceased who wanted to stab her with it. She stated that she was arrested in Uganda. She further stated that she never knew that she could report to the Chief or the police station and that the neighbours were not present as they had all gone to work.

Analysis and Determination

59. The accused person Jackline Auma is charged with the offence of murder of two people, a mother and her three-month-old child. The main issue for determination, having considered the evidence by the prosecution witnesses and the defence proffered by the accused person is whether the prosecution has proved its case against the accused person beyond reasonable doubt. Section 203 defines the offence of murder and requires proof of the following elements beyond reasonable doubt: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the accused person and that the unlawful killing was with malice aforethought.
60. The first question for consideration is proof of death. In the instant case, there is no dispute of the deceased persons' death. This was confirmed by all the prosecution witnesses, more so by the evidence of PW6 Dr Muchana who carried out the postmortem on the two bodies of two deceased persons as identified by their relatives and reached the conclusion that the cause of death of Elizabeth Achieng Ojwang was manual strangulation and that of the baby Leon Benedict Okoth was head injury caused by blunt force trauma. Accordingly, I find and hold that the prosecution has proved the element of death and the cause thereof beyond reasonable doubt.



61. The next question is whether the death of Elizabeth Achieng Ojwang and baby Leon Benedict Okoth were as a result of an unlawful act or omission. Article 26 (1) of *Constitution* guarantees every person the right to life. The postmortem report prepared by PW6 revealed that the cause of death of Elizabeth was manual strangulation and that of the baby Leon was head injury caused by blunt force trauma. The doctor also found that there were ligature marks on the neck of Elizabeth which was evidence of manual strangulation using a rope. Further that Elizabeth had two stab wounds on the chest. The body of Elizabeth Achieng Ojwang was found lying on the floor in a pool of blood and the body of baby Leon Benedict Okoth was found lying on the bed and covered, with no obvious physical injuries. There is no evidence to suggest that the deceased could have committed suicide. In the circumstances, I am persuaded beyond reasonable doubt that the deceased persons, Elizabeth and baby Leon died as a result of unlawful acts.
62. The other question is whether it was the accused person herein Jackline Auma who unlawfully caused the death of the two deceased persons Elizabeth Achieng Ojwang and Baby Leon benedict Okoth as per the Information dated 12th June, 2018. None of the prosecution witnesses actually saw the accused person unlawfully kill the two the deceased persons. The burden of proof lies on the prosecution to establish the guilt of the accused person beyond reasonable doubt and the accused bears no burden to exonerate self. This is because the accused enjoys unlimited rights under the *Constitution* at Article 50(2), to remain silent, not to give self incriminating evidence and to adduce and challenge the evidence adduced against her. In other words, the accused person was under no duty to testify on how the deceased met their death.
63. In essence, the prosecution case was based on circumstantial evidence.
64. In *Abamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:
- “However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -
- “It has been said that the evidence against the Applicant is circumstantial. So it is, but 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 from evidence to say that it is circumstantial.”
65. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:
- “Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:
- “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:



- (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 unerringly pointing towards the guilt of the Subject;
- iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

66. In this case, PW2, testified that the deceased had left work at 5pm and headed home but after that she could not locate her despite trying to reach her on phone, both she and the deceased’s her husband were not successful in tracing the deceased’s. PW2 testified that he went up to the house of the deceased and on inquiring from the accused who was the house help of the deceased and caretaker of the baby Leon Benedict Okoth, the accused informed PW2 that Elizabeth had left with Baby Leon after the accused and the deceased Elizabeth had quarreled and that most likely, Elizabeth had taken the baby to hospital in Kisumu.
67. PW2 testified that after searching for the deceased Elizabeth for a day and failing to trace her, PW2 and her neighbour managed to peep through the deceased’s bedroom window and that is when they saw her motionless body lying in a pool of blood with baby Leon lying in the bed unresponsive.
68. From the evidence adduced by the prosecution, it is clear that the accused person was the last person to see and be with the two deceased persons prior to their being found lying dead. In her defense, the accused person herself stated on oath that she and Elizabeth had fought and that she ended up stabbing Elizabeth when Elizabeth took the knife and tried to stab the accused. the accused denied harming the baby but stated that it was likely that in the course of the fight, she and the deceased might have fallen on the baby in their struggle.
69. The accused in this case was assessed mentally on 2nd October 2018 and found to be mentally sound. Thus, having been the last person to be with the two deceased persons when they were alive, she was required to offer an explanation on how the deceased met their deaths. She did tell the court on oath on how she fought with the deceased Elizabeth Achieng after a quarrel and that the deceased slapped her then tried to stab the accused with a knife which the accused picked and stabbed the deceased Elizabeth Achieng. The accused denied injuring the baby. Sections 111(1) and 119 of the *Evidence Act* provides as follows:

“ 111.

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:



Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”
70. In the circumstances of this case, the accused does not deny killing the deceased but raised a defense of self defence against Elizabeth Achieng, the 1st deceased. The question is whether the said defence is available to her.
71. Section 17 of the *Penal Code* Cap 63 Laws of Kenya stipulates that:
- “ 17. Subject to any express provisions of this Code, or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law.”
72. In the case of *Republic v Simion Owour Otieno* – Migori HCCR Case No. 23 of 2015 [2017] eKLR, the court at Migori cited the Court of Appeal decision in *Ahmed Mohamed Omar & 5 others v Republic* [2014] eKLR in which the Court of Appeal stated the following regarding the defence of self-defence:
- “ The common law position regarding the defence of self defence has changed over time. Prior to the decision of the House of Lords in *DPP v Morgan* [1975] 2 ALL ER 347, the view was that it was an essential element of self defence not only that the accused believed that he was being attacked but also that such belief was based on reasonable grounds. But in *DPP v Morgan* (Supra) it was held that:-
- “...if the appellant might have been laboring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellant’s belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”
73. Further to the above definition, the courts have held that if self-defence is raised as an issue in a criminal trial, the same must be disproved by the prosecution, the reason for this being that it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In essence, therefore the prosecution is under a duty to prove that the violence used by the accused was unlawful. As was held in *Republic v Williams* [1981] 3 ALL ER 411,
- “ In case of self-defence, where self-defence or the prosecution of crime is concerned, if the jury come to the conclusion that the defendant believed or may have believed, that he was being attacked or that a crime was being committed or that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant’s alleged belief was mistaken, and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly



held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been laboring under it, he is entitled to rely on it.”

74. PW6 who carried out the postmortem on the bodies of the deceased Elizabeth Achieng Ojwang and her baby boy Leon Benedict Okoth testified that the cause of Elizabeth’s death was manual strangulation. PW3 who was among the first officers to access the murder scene testified on how they found Elizabeth’s body lying on the floor with blood on the mouth, a nylon string tied to her neck and peeling skin on the left side of her stomach as if it had been burned and baby Leon well covered in bed with mucous oozing from his mouth. PW6 also testified that postmortem on Elizabeth’s body revealed that she had two stab wounds on the right chest among other injuries.
75. In *Sinaraha Baya v Republic* [2019] eKLR the Court of Appeal sitting at Mombasa referred to its earlier decision in *Victor Nthaga Kiruthu & Another v Republic* [2017] eKLR in which it summarized the relevant principles on the defence of self-defence as follows:
- “i. Self-defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one’s family or one’s property from the real or threatened attack. Self-defence is therefore a justification in the application of force recognized by the common law.
 - ii. The law generally abhors the use of force or violence, but there are instances when a person is justified in using reasonable amount of force in self-defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.
 - iii. It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self-defence. It is sufficient if he apprehends an attack and uses force to prevent it.
 - iv. The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.
 - v. What amounts to reasonable force is a matter of fact to be determined from the evidence and the circumstances of each case.”[emphasis added
76. In this case, the accused stated that the deceased slapped her and followed her into the house and took the knife which she wanted to use to stab the accused. However, the multiple stab injuries she inflicted on the 1st deceased’s body and the blunt force trauma applied of a three-month-old baby was in my view, way excessive and negated any defence of self defence, if any, in light of the surrounding circumstances. There was no evidence as to where the deceased could have derived the knife at that time and who a fall could have landed the two allegedly fighting people to the head of the baby and not on any other part of his body. I reject the theory that the fight landed the two adults to the child or that the deceased reached out for the knife. There is no evidence of any injuries sustained by the accused as a result of the alleged fight yet the deceased was according to the pathologist, well built. In my view, from the manner in which the deceased was found lying stabbed and strangled, she was waylaid, stabbed and she struggled with the accused hence the scattered items in the house and after she fell, the accused strangled her, upon which the accused hit the baby with a blunt object and left him to die then she



locked them in the bedroom as she observed the situation before finding the opportunity to escape, after lying to PW2 that the deceased Elizabeth had left with the baby.

77. I am not satisfied that the injury on the head of the child was as a result of a fall on him. See *Racho Kuno Hameso v R* [2014] eKLR as cited by the Court of Appeal in *Lucy Mueni Mutava v Republic* [2019] eKLR where the defence of self defence and provocation were raised, the Court of Appeal dismissed the two defences on account of the multiple injuries sustained by the deceased, among other reasons given by the Court.
78. I reiterate that the defence of self defence is not available to the accused in view of the type of injuries sustained by the deceased Elizabeth as the accused did not have to strangle her which was the ultimate cause of death, after subduing her with a stab using the knife which was subjected to DNA analysis and found to contain the blood of the deceased Elizabeth. In addition, the manner in which the body of baby Leon was found well covered in bed with no visible injury and with the pathologist's findings that the baby's head was hit with a blunt object is evidence of the baby having been hit and returned into the bed to lie as if it was asleep.
79. In my view, the defence of self-defence was an afterthought and is not available to the accused person. It is hereby dismissed.
80. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused person who unlawfully caused the death of Elizabeth Achieng Ojwang and Baby Leon Benedict Okoth, the two deceased persons.
81. Finally, on the question of whether there was malice aforethought on the part of the accused when she unlawfully killed the two persons herein, Section 206 of the *Penal Code* defines Malice aforethought as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

82. The Court of Appeal in the case of *Joseph Kimani Njau v R* [2014] eKLR, the Court of Appeal held as follows:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;



- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed...”

83. In this case, PW6 who carried out the postmortem on Elizabeth’s body found that the cause of death was manual strangulation. PW6 also noted that Elizabeth had two stab wounds on the chest that were deep enough to perforate the right lung although the lung did not collapse. As for the deceased baby Leon, he suffered such a terrible death for a toddler to have extensive bleeding below the skin of the scalp and into the brain substance. The accused person herein, in my estimation, must have intended to cause the two deceased persons grievous harm or death.
84. In the circumstances I am persuaded beyond reasonable doubt that the prosecution also proved this limb of the presence of malice aforethought on the part of the accused beyond reasonable doubt.
85. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the Information of murder against the accused person Jackline Auma beyond reasonable doubt on both counts brought against her. I thus find the accused person, Jackline Auma guilty of two counts of murder as charged and convict her accordingly.
86. Sentence to be pronounced after records, mitigation and victim impact statement are received by the court.
87. I so order.

SENTENCE

1. The accused person herein Jackline Auma has been convicted of the two (2) counts of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The court has heard her mitigations and the victim impact statement of the father to the first victim Elizabeth Achieng Ojwang and he 2nd victim, her son Leon Benedict Okoth. The accused is a first offender and stated that she was sorry and is the sole breadwinner for her child and her only sibling as they are orphaned.
3. The accused is a first offender yes, but she is guilty of double gruesome murder of two human beings. She is in my view, the house help who came from hell to snatch valuable lives from the deceased whose loved ones are still pained to date. The pain of losing a 25 year old daughter and a 3month old grandson cannot, indeed be compensated by any amount of money or even an apology.
4. Albeit the convict herein says that she is sorry, her demeanor betrays her. I see her feeling nothing about the double murder. She gave a very dry mitigation in her own words, not showing remorse at all. What did the baby Leon do to deserve death? What really did Elizabeth Achieng Ojwang do to deserve not only deep stab wounds but also manual strangulation? She had just delivered the baby who was only three months old.



5. Punishment for murder upon conviction is death, as stipulated in Section 204 of the Penal Code. However, applying the principals espoused in *Francis Karioko Muruatetu vs Republic* (2017) eKLR case, it is clear that the death sentence is not mandatory hence the court has discretion in sentencing. Nonetheless, this court has the power to pronounce death penalty where circumstances call for it.
6. In the instant case, taking into account the mitigation, Victim Impact Statement and circumstances under which the double murders were committed, and applying the principles set out in the Judiciary Sentencing Policy Guidelines and the objects and purposes of sentencing, I exercise discretion and sentence the accused person herein Jackline Auma to serve Life Imprisonment for the murder of Elizabeth Achieng Ojwang in count one and life imprisonment for the murder of baby Leon Benedict Okoth in count two. Both sentences to run concurrently.
7. Right of appeal is 14 days of today.
8. I so order and proceed to close this file

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF OCTOBER, 2023

R. E. ABURILI

JUDGE

