



REPUBLIC OF KENYA



**State v Janeno (Criminal Case E011 of 2021)
[2022] KEHC 3400 (KLR) (30 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 3400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E011 OF 2021
RE ABURILI, J
MARCH 30, 2022**

BETWEEN

STATE PROSECUTION

AND

JACK OMOLLO JANENO ACCUSED

JUDGMENT

1. The accused person herein Jack Omollo Janeno 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 April 13, 2021 at Nyangoma sub-location, Central Sakwa Location in Bondo sub-county within Siaya County, the accused murdered one Ishani Shanel.
2. A mental assessment was carried out on the accused on the June 8, 2021 at Jaramogi Oginga Odinga Teaching & Referral Hospital and he was found fit to stand trial. The accused person took plea on 9/6/2021 before Hon Lady Justice J. Kamau at Kisumu High Court and the accused denied committing the offence. A plea of not guilty was entered.
3. The prosecution called five (5) witnesses whose evidence is summarized below.
4. PW1 Vallery Akinyi Onyango, the deceased's mother testified that the accused was married to her aunt and that he had also taken her in as a helper to his mother but that he turned her into his wife. It was her testimony that sometime in February 2021 the accused went to her home looking for a worker for his mother so her mother allowed her to go with him. She further testified that at the accused's home, the accused moved her to a house that appeared like a store where she would live and that he provided for her all her necessities and that during the night, the accused prepositioned PW1 for sex but she refused informing him that she was his daughter.
5. PW1 testified that the following day the accused told her that he wanted a wife to bear him a son. It was her testimony that the accused, with knowledge of his wife, continued sleeping with her in that



small house though they did not have sex and that after a month, she informed the accused that she was looking for a job and not marriage.

6. It was her testimony that on the April 13, 2021, the accused returned home as she was cooking porridge for her 9-month old baby. That as soon as he entered the house, he threw the baby onto the floor, and called her, telling her that he was furious as the baby had urinated on the beddings. PW1 testified that the accused called his wife and showed her the urine while she rushed into the house and picked the child. She stated that the accused snatched the child from her and locked himself with the child in the house. She testified that the child was crying while she-PW1 was screaming for help and that the child then went silent. PW1 testified that the accused then opened the door whilst holding the lifeless child hanging on his right hand and told her to take the child and breast feed it. She tried to breastfeed the child but the child was unconscious and that the child's head and body were swollen.
7. It was her testimony that she told the accused that they take the child to hospital but the accused refused saying that he could not take himself to the government as he would be arrested. That the accused then left PW1 with the child in the house. She testified that it was about 6-7pm and that she was not aware that her child was dead.
8. PW1 testified that she remained with the child until 6am when the accused returned to her house and took the child and placed it in her bag which had assorted clothes then he tied the bag onto a motorcycle Reg. No. KMFB149X Make Boxer 100cc, and he rode it, escorted her up to the road and near a market place where he stopped a boda boda rider, paid him money, removed the bag which had her child inside and tied it on that bodaboda which she climbed on. It was her testimony that the other boda boda took her up to a certain place then he told her that he had no fuel and so left her there with her bag and child which she carried as she walked on foot to her home. The witness identified a jungle bag with assorted baby clothing.
9. It was her testimony that she arrived at her home crying prompting her family members who met her to inquire as to what had happened. She stated that she showed them the child and they removed the body from the bag and called the Chief and police officers who went to the scene. It was her testimony that the Child's body was taken to the mortuary at Bondo where she witnessed the postmortem. PW1 identified the accused person in the dock as the one who killed her child.
10. In cross-examination by Mr. Otongo Advocate for the accused, PW1 stated that she was 17 years old and that her child had been born on the June 11, 2020. She stated that one Jackton Oduor Apata was the child's father. It was her testimony that she had not taken a birth certificate for the baby and that she did not have any other babies before the deceased child. She testified that she had never called on anyone to pray for the child and that the child was only prayed for at Mama Lucy Hospital where it was born.
11. She further testified that she visited the accused person's home in February 2020 but could not recall the exact date. She stated that the accused's wife was her aunt as she was her father's sister. She stated that the accused went and picked her from her home and that the accused's home was within Bondo.
12. PW1 further stated that the accused picked her to go to work for his mother but a day after, he started seducing her to be his second wife to which she declined. She stated that she recorded her statement with the police in which she wrote that she was 19 years old despite the fact that she was born in 2003. She further reiterated that she did not accept to be the accused's second wife but that he forced her to be. She further stated that it dawned on her that her aunt had agreed to her being brought as a wife and not as a worker.
13. It was her testimony that the accused beat her severally well within the view of her aunt. She stated that she had no phone to call her mother and inform her of what was happening to her. She further stated



- that she used to talk to her aunt and that she had said in her statement that she told her aunt that the accused was unhappy with her child because he was not his biological father. It was her testimony that within the 2 months' duration she never went home as the accused refused to allow her to go.
14. PW1 stated that the accused would beat up her child from time to time and whenever she intervened, he beat her as well for defending her child. She reiterated that the accused and his wife never allowed her to go away. It was her testimony that the accused could sleep in his house or in her room with her on the bed. She stated that the child could wet the bed even when accused slept on it. It was her testimony that when the accused returned on 13th at about 6.30 pm and found the bed wet, she told him it was small and that she could turn the mattress as it was late and that there was no sunshine to dry the mattress. She stated that the accused kicked her child and stepped on the child's head when the child was on the ground.
 15. PW1 further stated that on that evening, they never ate dinner. She stated that she screamed on seeing her child being beaten. She reiterated that the accused locked her inside the house with the baby at around 7 pm and that she did not know what was happening to the baby when he locked her in the house with her until 6 am. She stated that the accused did not sleep in her room that night and that the next morning he packed her baby in the bag and took her to the road and placed her on another motorcycle and told her to go away to her home.
 16. She stated that she did not know the boda boda rider who carried her and further that her family did not know what was happening and that her mother only knew that her child was dead upon her arrival at her home. She stated that her child was not sick and that neither did the child fall from the bed. She reiterated that she never ate dinner that evening.
 17. It was her testimony that she did not know whether the accused sent money for burial arrangements of her child. She stated that she could not recall the date the child was buried and reiterated that it was the accused who killed her child.
 18. PW2 Rose Atieno Obonyo testified that the deceased was her grandchild while PW1 was her daughter. She testified that the accused was the husband to PW1's aunt and that he went to her home and informed her that his mother was very old and sickly so he wanted Vallery –PW1 to go and work for her but later PW2 learnt that the accused had forced PW1 to be his wife.
 19. PW2 testified that on 14/4/2021 at about 8 am, she was at her home when her other daughter who was milking a cow told her that she had heard screams from the roadside. She testified that she got out of the house and heard the wailing which she identified as those of her daughter Vallery, PW1. She testified that she ran towards the road and saw Vallery crying and carrying a jungle green bag and upon inquiry as to where her child was, Vallery pointed at the jungle bag.
 20. It was her testimony that she opened the bag and saw the child Shanel inside with clothes covering it. She testified that the child was dead and its head swollen. She testified that she called the Assistant Chief, Dan Odongo and upon asking Vallery on what happened to the child, she told her that the accused killed the child on the bed. It was her testimony that the Assistant Chief came and called the police from Rwambwa who went and took the child to the police station where they recorded their statements before removing the body to Siaya Hospital Mortuary for preservation.
 21. PW2 testified that on April 13, 2021 at about 10 pm, Antonete Adhiambo, her daughter brought her a phone with the accused on the line who informed her that he had returned from work and found Shanel very sick and that he was in hospital and the child was on oxygen. It was her testimony that the accused also told her to speak to Vallery who spoke while trembling and repeated the words which the accused had told her. She stated that when Vallery went to her home on 14/4/2021 with a dead child,



- she informed PW2 that the accused had on the previous night forced her to tell PW2 that the child was in hospital, on oxygen and very sick.
22. PW2 identified the accused in court and stated that he had lived with Vallery for about one month. It was her testimony that a postmortem was done on the child and they found that the child had been killed.
 23. In cross-examination, PW2 stated that she was 35 years old while Vallery was 19 years old. She stated that she had 8 children in total and that Vallery was the 3rd born. It was her testimony that Vallery called and told her that she had been forced to marry the accused after which she called Vallery's phone which was picked up by the accused whom she informed to release Vallery to return home.
 24. She further stated that Vallery never told her of any disagreements during her stay with the accused or that the child was ever sick and hospitalized prior to the April 13, 2021. It was her testimony that when Vallery returned home she told her that the motorcyclists had left her on the way and so she walked home with the bag.
 25. It was her testimony that she called the Assistant Chief and that she was the one who opened the bag and saw the dead child. She further stated that when the police arrived, they accompanied the Police to Rwambwa Police Station where she recorded her statement with the police. She stated that she wrote that according to her daughter, the child was not taken to any hospital and also that the child died while the accused was with her daughter alone in the house and that the accused had locked her out of the house.
 26. PW3 Paul Onyango Kanoni the area Chief Usonga Location testified that on April 14, 2021 at 10.00 am, he received information through a call by Charles Ouma who told him that one of his residents married to her aunt's husband had reported that the said husband to her aunt in Central Sakwa had killed her child by kicking the child and placing her in a bag and gave it to her to take it to her home.
 27. PW3 testified that he went to the scene and found a child in a bag so he called Corporal Kigen of Nyadorera Police Post as well as the Chief of Central Sakwa whom he informed of what had transpired and sought help in arresting the suspect. PW3 testified that CPL Kigen went and collected the body and took it to the Police Post. He further testified that he also called one Mr. Mark, then acting Chief Central Sakwa, who told him that he knew the suspect. It was his testimony that on the May 23, 2021, he received information of the arrest of the suspect. PW3 stated that he did not know the suspect who hailed from Sakwa Location.
 28. In cross-examination, PW3 stated that he personally saw the dead child in a jungle bag but he wouldn't know who first opened the bag though the zip was half opened. He further stated that he also touched the bag to see the child and viewed the body of the dead child. It was his testimony that he saw the mother to the baby.
 29. PW4 No. 50823 CPL Suleiman Opondo the investigating officer in this case testified that on the April 14, 2021 he was in the office at around 10 am when he received a report from his in charge that the OCS Siaya Police Station had received a report of murder from Nyadorera Police Post.
 30. He testified that shortly, three people arrived being the mother of a dead child one Vallery Awuor Onyango, her mother Rosa Atieno Obonyo among other family members and told him how on April 13, 2021 one Jack Omollo Janeno who lived with Vallery as husband and wife arrived at home and found the deceased child Shanel asleep on a bed and had wet the said bed so he got angry and called the child's mother into the house before hitting the child on the head leading to it losing consciousness after which he locked the child and PW1 inside the house and left until April 14, 2021 when he took the dead child, placed her inside a jungle green bag and ordered the mother to have the bag placed on



a motorcycle which he rode from Wagusu village to Siaya town where he paid another motorcyclist to carry the dead child and PW1 to Nyadorera.

31. It was his testimony that he learnt that the girl arrived at her home and reported to her parents who reported to the police. He further testified that he organized for the postmortem as the body had been taken to Siaya Referral mortuary and that after investigations were concluded, the child given out for burial. He stated that the accused was arrested and charged. He further stated that the bag had assorted child clothing. He produced the jungle bag and assorted child's clothing as PEx1.
32. PW4 further produced the motor cycle which was said to have been used by the accused to ferry the deceased and PW1 to Siaya, Registration number KMFB 109X model Boxer written "Janeno Ja Wagusu" at the front and which was recovered from the accused's home, as PEx2.
33. It was his testimony that upon arresting the accused, they took him to Kisumu J.O.O.T.R.H for mental assessment where he was found fit to plead and they charged him with murder. He identified the accused in court as the person he arrested in connection with this case.
34. In cross-examination, PW4 stated that he had been a police officer for 36 years and had investigated murder cases before. He stated that he was the investigating officer as well as the arresting officer in this case and that he arrested the accused on the night of 23rd and May 24, 2021 over one month since the incident was reported. It was his testimony that on the 14.4.2021, he did not visit the home of the accused and could not confirm that the child urinated on the bed but that he visited the scene on the day they arrested the accused.
35. He further stated that he interviewed the accused after arresting him. It was his testimony that it took them time to arrest the accused because he was preparing the file which he took to the ODPP who sanctioned the charges before he went to arrest the accused. He testified that he believed the word of PW1 to be correct and that PW1 told him that the accused was hostile to the child. He further stated that he prepared the postmortem form and instructed the doctor to assess the cause of death. It was his testimony that he saw the child's head and chest swollen.
36. PW5 Dr. Gabriel Juma, a medical officer at Siaya County Referral Hospital for 7 years testified that he conducted the postmortem on Ishani Shanel Adhiambo on the April 19, 2021 at Siaya County Referral Mortuary at 2.30 p.m. He testified that the body was of a female African child aged 9 months.
37. It was his testimony that externally, the child had a large bruise of about 6 cm in diameter on the right parietal area and a haematoma of more than 10 cm on the right occipital parietal area while internally, the head had front parietal linear fracture of the skull, subdural and epicranial haematoma. It was his testimony that in the brain, there was intracranial haematoma on the left and right but that other systems were normal.
38. As a result of the examination, the cause of death was found to be severe blunt injury with skull fracture and intra cerebral haemorrhage. He stated that he signed a death certificate No. 1556207 and stamped and dated it the April 19, 2021. He produced the postmortem report as PEx3.
39. In cross-examination, PW5 stated that they examined the whole body but found more serious injuries on the head. He stated that they did not base examination on instructions by the police. He further stated that it was not possible to tell what blunt object was used however, a high fall alone would not cause such injuries because there were bruises as well. He stated that he did not find injuries on the chest.



Defence Case

40. Placed on his defence, the accused gave a sworn statement and stated that Vallery was a daughter to his wife's brother and that he had informed his wife that he wanted to marry a second wife so she connected him to Vallery. It was his testimony that he went to Vallery's home, met and spoke to her parents who agreed that he could marry her and on the February 12, 2021, he started living with her though he had no child with her.
41. It was his testimony that Vallery came with Baby Shanel from her home and they lived with the baby as well. He further stated that when Vallery came she used to sleep on the floor in his elder wife's house but later he built her a small house. He further testified that when he met Vallery and the baby, the baby was thin and was sickly and that when she came to his home, she stayed for a day and took her to Hospital on 14/2/2021 and thereafter they used to take her to various hospitals.
42. He further testified that on March 16, 2021 they took her to Mbaga hospital where she was treated for fever and malaria but she never fully recovered. He produced the treatment book from Mbaga as DEx 1. He testified that the child used to feed poorly and could convulse. He testified that on April 13, 2021 until the morning of April 14, 2021, he left his house and went to Wagusu Centre where he stayed until 6pm when it started drizzling. He stated that he went with a motorcycle to ensure his animals were at home.
43. It was his testimony that he reached the house and saw Vallery at the door who went to him and told him that the child was very sick and her condition had worsened. He stated that he entered the house and sat on a plastic chair then got out and brought in his motorcycle. He testified that the child was lying on the bed and when he asked Vallery why she had not dressed the baby yet it was raining, Vallery did not answer.
44. He stated that he left to go and get his animals but before that, he called his daughter Rael Auma Omollo and told her to come and see that Vallery had not dressed the child yet it was cold and raining. He stated that he then left and tied his animals then returned and found when they were dressing the child from the big house.
45. It was his testimony that food was made which they ate and after watching the 9pm news he left with Vallery and the child to their small house. He further testified that he communicated daily with Vallery's mother about the child's health. He stated that in the morning, he left with Vallery and the child as his mother-in-law wanted the child to be prayed for as she was a weakling as she was born when his mother-in-law had also delivered a child.
46. The accused testified that he carried Vallery and the baby in a baby carrier and a laptop bag and they proceeded to Bondo where he fueled the Motor Cycle before proceeding to Siaya where they bought some items and proceeded towards Boro when Vallery stopped him saying she had forgotten her airtel airtime so they walked around looking for a shop to buy credit. He testified that Vallery bought airtime and called her mother who never responded so they proceeded past Mwer, Uranga and reached Nyadorera where Vallery once again called her mother but there no response.
47. It was his testimony that they were near her home so he told Vallery that he could not enter her home and asked her to go to her home since her mother was not responding and because he was not prepared to meet her mother as he had no sugar to give her. He stated that there was a boda boda stage nearby so he asked her to call a motorcyclist and he negotiated her fare with him after which Vallery boarded with the baby and the bag containing clothing and they left. He stated that Vallery carried a small bag which he had bought for her sister at Bondo on a different occasion. Further, that when they reached



Siaya, they bought some small items namely, soap and sugar which were parked in a carton box hence Vallery carried a carton box and a bag.

48. It was his testimony that on the April 13, 2021 after the rain had subsided, he slept then heard a fall and upon lighting the torch, he saw a baby who slept on the floor, convulsing. He stated that he told her mother to pick the baby and breast feed her. The accused testified that the child had difficulties feeding and made sounds as if she had asthma. He stated that when he left with Vallery, his elder wife was awake and his daughter was preparing to go to school. It was his testimony that he parted with Vallery at 10.00 am after giving her a phone and Kshs. 2000 and informed her that if she met her mother they should go to the prayer man. He stated that he went home via Bondo where he stayed until noon.
49. The accused testified that he then went home and slept and that the following day he received a phone call from Vallery's father informing him that Vallery's baby had died so he wanted the accused to arrange and go collect the body. He testified that he communicated with his elder wife and asked her to go and bring the body so that they bury it. It was his testimony that he hired a vehicle and sent his elder wife to go and bring the body on April 14, 2021 but when she arrived at Vallery's home, his father in-law called him saying he wanted support to bury the baby at their home. He stated that he then called his elder wife and informed her to give out Kshs. 6000 after which she returned home.
50. It was his testimony that the following day at 10am, Vallery's father went to the accused's home at Wagusu and informed him that he had many visitors so he wanted a coffin, sheep, food stuff etc so the accused borrowed Kshs. 10,000 and gave it to him after which he left. The accused further testified that later on, Vallery's father told him that people at his home were saying many things but he did not want any issue so he was to bury the child then go about his business at Ugunja and that Vallery should return to the accused's home but that the following day, he again called the accused saying he needed more money.
51. The accused testified that he called Rael and told her to send Vallery's father Kshs. 5000 which he appreciated stating he would bury the baby then they would talk later. He testified that the baby was buried on April 26, 2021 and that he did not attend the funeral.
52. He testified that he first saw policemen on the May 19, 2021 who arrested him and took him to Bondo Police Station after taking his Motor Cycle. He stated that the policemen did not tell him why they had arrested him and that they took him to Bondo Law Courts on 20/5/2021. It was his testimony that the military bag that was produced before the court as an exhibit was a strange bag which he had never seen in his life. He further reiterated that he never killed the baby as he married its mother because he wanted more children.
53. In cross-examination, the accused stated that the child was of ill health but when referred to the postmortem as to the nutritional status of the child, the accused stated that he could not confirm the truthfulness of the report.
54. It was his testimony that there were three plastic chairs in the house which his wife pulled together and placed the child on the said plastic chairs so the child fell and injured her head. He testified that the child fell twice towards the end of March and the time they took her to Alego. He stated that they never took her to hospital because they were going to Alego.
55. The accused testified that the child was alive when they took her to Alego and that she was carried in a baby carrier placed on the mother's chest and not in a handbag. He testified that he learnt of the Child's death when he was called and informed of the same. It was his testimony that he was interrogated by the Police at Bondo who said they would rely on the statement by the child's mother.



56. The accused denied telling the police that when he picked up the child from the floor, he noticed her unconsciousness and told Vallery to breast feed her. He further stated that he never attended the child's funeral because another lady had died in their village and as he had helped a lot in the funeral arrangements. He denied not attending the funeral on the basis that he had killed the baby. He further stated that he gave money to his father-in-law through his wife and daughter as his daughter sent Kshs. 5000 which MPESA message he had in his phone.
57. In re-examination the accused stated that at the police station, he spoke in Dholuo and the police wrote their own things which are not what he had told them.
58. DW2 Benta Adhiambo Omollo testified that the accused was her husband and that they had four children. She further testified that Vallery was her niece, being her brother's daughter, and that she had since become her co-wife when she arrived on 12.2.2021 to marry her husband.
59. It was her testimony that Vallery arrived at her home with a child who was sickly and who had marks on her skin. She testified that the child was taken to hospital twice. She testified that on the April 13, 2021 she returned home in the evening when her husband called her and another girl to go and see how Vallery had left the baby naked yet it was cold and raining. She testified that she went, took the baby to her house and that the baby's mother then brought clothing and dressed her.
60. It was her testimony that they ate together as they watched the programme Zora when Vallery revealed to them that the child was ill and that as she had tried to treat her in vain, the child's grandmother wanted the child taken somewhere for prayers. DW2 testified that they agreed with Vallery as well as her husband that the child would be taken for prayers.
61. DW2 testified that the following morning at 8.00am, her husband carried Vallery, her child and clothes in a laptop bag and they left together for Alego for prayers. She testified that her husband returned at 2pm on 14/4/2021 and that he received a phone call that the child had died. She stated that they were told that the child was to be buried by them. It was her testimony that she went home and spoke to her brother, Vallery's father, Martin Onyango, who told her that as a family and the church, they had agreed to bury the child and not to take the body to Sakwa.
62. She further testified that Vallery's family asked for support financially which she relayed to her husband via phone who told her to give them the Kshs. 6,000 she had in her phone which she surrendered to Vallery's brother. It was her testimony that the following day, Vallery's father went to Sakwa asking for more help so they borrowed Kshs. 10,000 which they gave to him. She further testified that Vallery's father called them the following day asking for more financial help and her daughter Rael send him Kshs. 5000.
63. It was her testimony that when the child left home for Rwambwa for prayers, she was alive. She stated that Vallery left home with a laptop bag. The witness declined to comment about the military jungle bag.
64. In cross-examination, she stated that when her husband was arrested, the police did not interrogate her. It was her testimony that she could not tell what transpired in the house where only Vallery, the accused and Shanel were before her husband called her to go see how the child was. She further stated that on that particular night, the accused slept in Vallery's house as they were to leave early in the morning to take the baby for prayers.
65. She further stated that on that evening, Vallery never cooked in her house but that DW2 cooked in her own house as they watched the television. She stated that her husband sent her to Alego because it



was her home and that she was to bring the body of the baby for burial at Sakwa. She stated that her husband was an in-law and thus he never went there.

66. DW3 Rachel Auma Omollo, the accused's daughter with DW2 testified that Vallery was her step-mother and Shanel her step-sister. It was her testimony that on the night of April 13, 2021 her mother and Vallery left for gold mining.
67. She testified that at about 6pm, her dad returned home on a motorbike which he parked and called them saying, "come and see what is happening here" prompting her and her mother to go where the accused showed them the baby who was naked lying on the bed yet the weather was bad.
68. DW3 testified that her mother took the child and proceeded to their house as her father proceeded to attend to the animals and that Vallery brought the child's clothes and dressed her. She stated that they watched news together then ate dinner which her mother had cooked. It was her testimony that Vallery informed them that she would arrange to take the sickly baby for prayers as had been suggested by her mother.
69. It was her testimony that the following day at 6am, she saw his father prepare a motorcycle which Vallery boarded with the deceased who was in a baby carrier on her chest. She testified that her father and Vallery went away and he returned at 2pm when he told them how he escorted Vallery to Nyadorera.
70. It was her testimony that the following day, her father received a phone call on the death of Shanel and they asked him to bury the body. She testified that her mother was given a vehicle to go bring the body and that on the April 16, 2021 Vallery's father came and said he wanted support for burial including a ram, coffin, clothes and food which he quantified totalling Kshs. 18,000.
71. DW3 testified that her father borrowed Kshs. 10,000 and gave him then he left. She testified that on the April 17, 2021 Vallery's father called her dad and asked for more help because of the many visitors who were not anticipated. She stated that they got money late and she went to the nearby Centre and deposited Kshs. 5000 which she sent to Vallery's father. It was her testimony that she first saw a jungle green military bag in court as she had never seen it at their home. She denied that it was her father who killed the baby and stated that Vallery left with the baby still alive.
72. In cross-examination, DW3 stated that she lived in her home. She stated that she could not tell what transpired before her dad called them that evening as she was not in Vallery's house. She further stated that she could not tell what happened in the night after her dad and Vallery went to sleep in their house.
73. She reiterated that the baby was sickly, yellowish, vomiting and had diarrhea. It was her testimony that at times, Vallery used to place the child on the plastic chairs and the baby would fall down. She admitted that she never took the child to hospital as they used to go with her father. She stated that she sent money via m-pesa to Martin Onyango which evidence was in her M-PESA message. She stated that her father borrowed Kshs. 5,000 from her.

Analysis and Determination

74. I have considered the evidence tendered by both by the prosecution and the defence and in my view, the main issue for determination is whether the prosecution has proved the charge of murder against the accused person to the required standard of beyond any reasonable doubt.



75. Section 203 of the *Penal Code* provides that:
- “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
76. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR the Court of Appeal held that:
- “For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”
77. The question therefore is whether the prosecution proved:
- a. That there was the death of the deceased and the cause of the said death;
 - b. That the death was caused by unlawful act or omission;
 - c. That the accused committed the unlawful act which caused the death of the deceased;
 - d. That the accused had malice aforethought
78. On whether there was proof of death and the cause of the said death, the death of the deceased was proved by the evidence of PW1, 2, and 3 all who testified that they saw the body of the deceased child in a jungle green bag carried by PW1.
79. PW1 testified that the accused having found that the deceased baby had urinated on the beddings, threw her to the floor then locked himself with the child in the house with the child crying then it went silent and upon opening the door, the accused was holding the lifeless child hanging on his right hand and told PW1 to take the child and breast feed it. It was her testimony that she tried breast feeding but the child was unconscious and that the child’s head and body were swollen. The doctor who performed the postmortem on the deceased’s body also confirmed her death.
80. On what was the cause of death of the deceased, PW5 Dr. Gabriel Juma who carried out the postmortem found the cause of death of the deceased child who was aged 9 months to be severe blunt injury with skull fracture and intra cerebral haemorrhage.
81. On whether the death of the deceased was caused by an unlawful act or omissions and whose unlawful act or omission it was, as stated herein above, the death of deceased was as a result of severe blunt injury with skull fracture and intra cerebral haemorrhage.
82. In *Gusambizi Wesanga v Republic* [1948] 15 EACA 65 the Court stated:
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”
83. The evidence before court points to an unlawful act that led to the death of the deceased who was minor and who could not have inflicted on herself those kind of fatal injuries. PW1 testified that the accused threw the child onto the floor after finding that she had urinated on the bed. That when PW1 tried to rescue the child, the accused snatched the child from her and locked himself with the child in the house. She testified that the child was crying while she-PW1 was screaming for help and that the child then went silent. PW1 testified that the accused then opened the door whilst holding the lifeless



- child hanging on his right hand and told her to take the child and breast feed it. She tried to breastfeed the child but the child was unconscious and that the child's head and body were swollen.
84. It was her testimony that she told the accused that they take the child to hospital but the accused refused saying that he could not take himself to the government as he would be arrested. That the accused then left PW1 with the child. This court had the opportunity to hear and see the witness PW1 as she testified. I believe her testimony. From that testimony, I am satisfied that the deceased baby died due to an unlawful act.
 85. On whether the prosecution have proved beyond reasonable doubt that it was the accused person herein who committed the unlawful act which caused the death of the deceased, the testimony of PW1 was that the accused threw the deceased baby to the floor then locked himself with the child in the house and upon opening the door, he appeared holding the lifeless child on his right hand and told PW1 to take the child and breast feed it but PW1 was not able to breastfeed the child as she was unconscious. PW1 testified that the child's head and body were by then swollen.
 86. The accused person's testimony was that the deceased was a sickly child whom he had taken to hospital on numerous occasions. He further testified that on the material date, he found the child naked whilst it was cold, which information he brought to the attention of his first wife, DW2 and daughter DW3. He further stated that PW1, the deceased's mother would occasionally put the child on plastic chairs and the child would fall down.
 87. The accused further testified that on the February 14, 2021 when he left with PW1 and the deceased for her home, the child was still alive. The accused's testimony was corroborated by both DW2, his wife and DW3, his daughter.
 88. However, both DW2 and DW3 testified that they did not witness what happened prior to the accused calling them to see the naked child in the cold. They also both testified that the accused slept in the house where PW1 slept on that particular night. The accused's testimony that he could not reach the home of PW1 because he did not have sugar to give her mother was contradicted immediately by his testimony that when he reached Siaya, they went and bought some small items like soap and sugar which were packed in a carton box and which PW1 carried to her home.
 89. The accused and his witnesses all testified that the deceased was a sickly child whom they usually took to hospital for treatment. To support this claim, the accused produced DEx 1 a hospital treatment book stamped from Mbeka dispensary. This was contrary to the evidence of PW5 who carried out the deceased's post-mortem and noted in the report produced as PEx 3 that from the examination of the body of the child during post-mortem, the deceased child was of well-nourished nutrition and well-built physically.
 90. I have also perused DEx1 and note that it has two stamps. The uppermost stamp has the date February 14, 2021 within its borders and is blank on the space left out for the date. The second date on DEx 1 is March 26, 2021.
 91. This points towards the fact that DEx 1 was filled on the February 14, 2022, just two days after PW1 went to live with the accuse. Further, the second stamp is dated 26/3/2021 whereas the accused testified that he took the child to hospital on 16/3/2021. The question I pose is, if the treatment book was genuine, why was it never brought to the attention of PW1 to admit or deny that she ever took her child to hospital on those two occasions for treatment for the stated ailments? The accused person waited until his defence to produce the treatment book which PW1 was never cross examined on yet the child belonged to her and not the accused person. Furthermore, the person who allegedly attended to the said child was never called as a witness to authenticate the document. Above the signature is EX CO.



The child was allegedly to be reviewed the next day but there is no evidence that she was returned to hospital for review. If the child was sickly, the question is where is evidence that from 26th March to April 13, 2021, the child had been to hospital for treatment after the alleged malaria treatment. Further, on 26th March 2021, the type of illness is not indicated. Only mv-multivitamin syrup was given. This court was not told why the person who authored that document was not called as a witness.

92. PW5 Dr. Gabriel Juma testified in cross-examination that though he could not tell what blunt object was used in causing the injuries sustained by the deceased, a high fall alone would not cause such injuries because there were bruises as well. This corroborates the testimony of PW1, in cross-examination, that the accused would beat up her child from time to time.
93. It is for the aforementioned reasons that I find PW1's testimony more believable than that put forth by the accused and his witnesses. Her evidence remained firm even under the rigour of cross-examination by Mr Otongo Advocate. Further, as seen from above, PW1's evidence on the accused throwing the child to the floor and continuing with the ordeal after snatching the child from PW1 and locking himself in the house and the child's lifeless body being swollen on the head when PW1 was given the child by the accused, is corroborated by the evidence adduced by PW5, the doctor who carried out post-mortem and found skull fracture and haematoma on the head and intra cranial haemorrhage-bleeding in the brain.
94. On the other hand, the accused person's defence appear totally made up to point towards a child who was sickly and who succumbed from her ailments and a possible fall from a chair onto the floor. However, as seen herein above this is not the case as even the treatment notes produced by the accused as DEx 1 appear clearly doctored. In my view, the writings for the two dates and the failure to call the maker of the said document is suspect. My conclusion is that that document was made up after the deceased had passed on, to cover up the unlawful acts. This is evidenced by the two different dates that I have observed on the said document. A sickly child of bad health with marks on her skin, as described by DW2 which marks PW5 could not detect OR as stated by DW 3 that she was sickly, yellowish and vomiting with diarrhoea or as stated by the accused that the baby was of bad health, and if the said baby fell on the floor from plastic chairs and was convulsing on 13/4/2021 and that when he lit the torch he saw the baby breathing as if she had asthma yet there was no urgency to take her to hospital that night and instead the accused slept until the following morning to escort the child and her mother to Alego so that the child could be taken for prayers does not add up and is a made up story that cannot be believed by this court.
95. The allegations by the accused and his wife and daughter that the child was sickly and of bad health was debunked by PW5 who examined the deceased's body and noted that she was well nourished and well-built physically. The evidence by DW2 and DW3 in my humble view, was choreographed in uniformity to aid the accused escape justice. DW2 on being questioned by the prosecutor whether she knew anything about the jungle bag responded that she had nothing to say about it.
96. I believe the testimony by PW1 that the accused locked himself into the house with the baby after throwing her on the floor and upon PW1 trying to rescue the child, the accused snatched it from her, then he locked out its mother who had tried to rescue the baby and that when he opened the door, PW1 saw the accused holding the child hanging in his hands. The accused person is therefore under a duty to explain how the crying child became lifeless moments thereafter, with a fractured skull and haematoma on the head as well as internal bleeding of the brain. He was the last person to be seen with the child while she was alive.



97. In *Republic v E K K* [2018] eKLR the court held thus and I agree, concerning the last seen with the deceased doctrine:

“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.”

98. In the Nigerian case of *Stephen Haruna v The Attorney-General Of The Federation* (2010) 1 iLAW/CA/A/86/C/2009 cited severally by Kenyan Courts, it was held that:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

99. From the Indian Jurisdiction, the courts there have developed that doctrine further. In *Ramreddy Rajeshkhanna Reddy & another v State of Andhra Pradesh*, JT 2006 (4) SC 16 the court held that:

“Even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

100. In the present case, it is the accused who the last person ‘to be seen’ with the deceased child after he snatched the crying child from her and locked himself in the house with the child who went silent. He is the one to give an explanation on how the deceased must have met her death within that short span of time, and why he locked himself inside the house with the child. In his defence, he claimed that the child fell on the floor, became unconscious and was breathing like she had asthma. This testimony juxtaposed with the testimony of PW1, I am unable to find credibility in the testimony of the accused.

101. In the circumstances, I am persuaded that the prosecution has proved beyond reasonable doubt that it was the accused who unlawfully killed the deceased baby.

102. On whether the accused had malice aforethought, under section 206 of the *Penal Code*, 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
- (c) an intention 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.”

103. In *Republic v Tubere S/O Ochen* [1945] 12 EACA 63, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
104. The nature of the accused’s attack on the deceased, a defenseless toddler by throwing him onto the floor and fracturing her skull point towards a person who for unknown reason intended to cause the deceased grievous harm. The nature of injuries suffered by the deceased as testified by PW5 is further evidence of the accused’s cruel intentions. The injuries as assessed by PW5 corroborate the testimony of PW1 that the accused threw the child onto the floor and that the child therefore must have hit her head hard onto the floor, fracturing her skull and suffering internal brain hemorrhage. From the testimony of PW1, which evidence I believe to be true, the accused prevented PW1 from rescuing the child. He snatched the child from her, locked himself inside the house with a crying child. The child then went silent after which he opened the door for PW1 who was screaming and handed her a lifeless body telling her to breast feed the already dead child. This is evidence of malice aforethought as the accused knew that the child was dead yet he told PW1 to breast feed a dead body.
105. I therefore find and hold that malice aforethought on the part of the accused person in unlawfully killing the deceased child has been proved beyond reasonable doubt.
106. The upshot of the above is that I find and hold that the prosecution has proved all the elements of murder against the accused person beyond reasonable doubt. I find the accused person Jack Omollo Janeno guilty of the offence of murder as charged contrary to section 203 of the *Penal Code*. I convict him accordingly.
107. Sentence shall follow after records and mitigation.
108. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 30TH DAY OF MARCH, 2022

R.E. ABURILI

JUDGE

