



**Republic v EBN (Criminal Case 22 of 2020)  
[2022] KEHC 11220 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11220 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE 22 OF 2020**

**SN RIECHI, J**

**MAY 25, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**EBN ..... ACCUSED**

**JUDGMENT**

1. The accused EBN is charged with offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The particulars of the offence are that EBN on the 5<sup>th</sup> day of June 2020 at [particulars withheld] village in Bumula Sub-county within Bungoma County murdered PM.
3. The case for prosecution is that on June 8, 2020 PW4 VN a minor who was aged 6 years testified that he had been sent by the mother to draw water from a well. On arrival and preparing to draw water he saw a body of a child in the well. He went and informed his mother A who informed his father. Police were then informed.
4. PW2 MSS who is a Mason and plumber was informed that there was a body of a child in a well at the home of Emanuel. He went there and found police officers. He was asked and he entered the well and removed the body of a child police took away the body. In cross-examination by Mr. Wamalwa, he stated that he saw the accused who was the mother of the deceased present and crying. He confirmed that the husband of the accused was present. He was informed that the child had not been sired by accused's husband. He also attended the burial which was at the accused's uncle's home where the child was buried.
5. PW6 No. 226768 Copl Joseph Ouma attached to Nasiala Patrol Base received information from EN that his son had seen a body of a child in a well. He PC Kaberia and PC Kipruto went to the scene



- where they found many people. The accused was also present. Members of public wanted to beat her and they brought A the husband of accused. They took the accused and A to the police station.
6. PW7 No. 42672 Sgt Harrison Mogomo accompanied Sgt Laban the OCS Bumula, and chief Inspector Omari to the scene. On arrival they found Copl Ouma already at the scene. The body was retrieved from the well. The accused and her husband Alfred were suspects and were arrested and taken to the police station. On being cross-examined by Wamalwa R for the accused, he confirmed there was no eye witness to the murder.
  7. PW8 Dr. Haron Ombangi who produced a post mortem form prepared by Dr. Musa Ochieng who performed the post mortem testified that the body had no fracture but there was oedema in the lungs – indicating a collection of fluid in the lungs. He formed opinion that the cause of death was due to drowning.
  8. The accused gave sworn evidence in her defence. She testified that the deceased was her son and was aged 7 months. He was sired by another person not A. On June 4, 2020 she went to her parents’ home and returned in the evening when Alfred started quarrelling her about why the child was crying. He demanded that she gives him the child which she did. She did not know where he went with the child. He did not come back. The next day she received information that a child had been found at the well. She went there and confirmed it was the deceased. She was arrested and taken to the police station and her husband A was also arrested and later released.
  9. Mr. Wamalwa for the accused filed written submission. He submitted that all the prosecution witnesses were suspecting the accused as the person who killed the deceased because she was the mother. He submitted that however strong the suspicion, it cannot be the basis of a conviction. Counsel submitted that the prosecution failed to call crucial witnesses in particular AAM who is alleged to have picked the child and taken it to the house of 2<sup>nd</sup> wife JA. These two witnesses were not called and that was fatal to the prosecution case. Counsel submitted that the defence of accused was cogent and unshakable. Finally, counsel submitted that since the deceased was a child under the age of 12 months accused should have been charged with the offence of infanticide not murder.
  10. The accused is charged with the offence of murder contrary to section 203 of the [Penal Code](#). Section 203 provides:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
  11. The ingredients of the offence which the prosecution must prove beyond reasonable doubt are:
    - a) The fact and cause of death.
    - b) The unlawful act or omission causing the death
    - c) That it is accused who caused the unlawful act or omission or inflicted the injuries that caused the death of deceased.
    - d) That the accused committed the unlawful act with malice aforethought.
  12. On the issue of fact and cause of death, even the accused who was the mother of deceased confirmed in her defence that the child died and body was retrieved from the well. PW8 Dr. Haron Ombangi who produced the post mortem prepared by Dr. Musa Ochieng testified that the child died as a result of drowning as there was fluid collection in the lungs and stomach.



13. PW1 VN testified that while going to draw water from the well, he saw a body of the child inside the well. He informed his parents who informed the police. PW2 Martin Sifuna Sikuku went to the scene on receipt of information that there was a body of a child in the well. He found many people including police officers. He offered and went into the well where he retrieved the body of the deceased. Both the accused and her husband were among the members of the public at the scene. He also attended the burial of the child at the accused's uncles home.
14. There is evidence therefore to establish that deceased was found in a well having been thrown there and he died as a result of drowning in the water in the well. There is however no eye witness who saw the accused throw the child in the well. In short there was no direct evidence to show that it is accused who threw the child into the well.
15. The prosecution can prove a charge against the accused by tendering direct evidence by witnesses who will testify on what they saw, heard, or smelt. The prosecution can also prove a charge against an accused person by proving a set of facts or circumstances from which the court would draw an inference that it is accused and no other who committed the offence. This is referred to as circumstantial evidence.
16. The evidence against accused being circumstantial evidence the prosecution must prove the elements stated in *Abanga Alia Onyango v Republic* Criminal Appeal No. 32 of 1990: -

“It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy three tests (1)

- i) The circumstances from which an inference of guilt is sought to be done must be cogently and firmly established.
- ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of accused.
- 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 accused and no one else.

In *Deepok Sarna v Republic* the Court of Appeal stated that: -

“In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. Each fact sought to be relied on must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on one hand inference of facts to be drawn from them on the other. In regard to proof of primary facts the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved the question whether the fact leads to an inference of guilt of the accused shows be considered.

In dealing with this aspect of the problems the doctrine of benefit of doubt applies. Although there should not be any missing link in the case yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from proved facts. In drawing these inferences the court must have regard to the common cause of nature events and to



human conduct and their relations to the fact of the particular case. The court, thereafter has to consider the effect of proved facts. In deciding the sufficiency of circumstantial evidence, for that purpose of conviction, the court has to consider the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt.”

17. In this case the prosecution sought by evidence and has established the following

1. That the deceased was a child aged 7 months.
2. That the accused was the mother of the deceased.
3. That accused was with the child on the night of June 4, 2020.
4. That the child was found drowned in a well on the morning of June 5, 2020.

18. The accused in explaining how the deceased died stated in her defence.

“PN the deceased was my son. He was the 2nd born. He was aged 7 months. The deceased was sired by a person I don’t remember his name but was staying in Nairobi. The father of deceased was not Alfred.

On June 4, 2020 I had gone to my mother’s home at 9 a.m. at Kimwanga. I came back in the evening. We quarreled with my husband. He asked me to give him the deceased child. I did not understand why we were quarrelling. He was saying the child was not his because the baby was crying the whole night. The child was not troubling me at night. I gave the child to him. He left. I don’t know where he went with the child. I waited up to 10 p.m. and he did not come. The next day I received information that the child was in a well. I asked him and he told me he will show me. We went with him and I observed and saw it was my child. I started crying. Police came and took me to the police station. My husband was later brought to the police station at Bumula. He was released and I was detained.”

19. On being cross-examined by M/s Omondi she replied:

“On that day we quarreled over the child. He asked me to hold the child as I was cooking. The child was 7 months old. He was breast feeding. I slept till the next day without the child. I went to ask A about the child at 7 a.m. the next day. He had locked the door. I went with him and heard people screaming that there was a child in the well.”

20. From accused’s defence she confirmed that the child was not sired by A, and that she had forgotten or does not know the names of the father of the child. She also confirmed that the child was 7 months old and was at that time breast feeding. She informed the court that she gave this 7 months old breast feeding child to A who did not come back and she slept up to the next day at 7 a.m. The evidence of the accused is not credible and her demeanour as a truthful witness doubtful. This court finds that accused was the person who last had the child aged 7 months and who was recovered in a well having been drowned. I am satisfied that the prosecution has proved circumstances which irresistibly point to accused and no other as the person who threw the child into the well, where he died.

21. Mr. Wamalwa R has submitted that crucial witnesses, A the husband of accused and J the co-wife were not called to testify. While A was mentioned and would have testified, I do not find that failure to call him was fatal in view of the evidence adduced by the prosecution.



22. After carefully considering the evidence, I am satisfied that the accused is the mother of the deceased Peter Namayi. I also find it established that the deceased was aged 7 months. The accused therefore killed the child who was below 12 months old. I agree with Mr. Wamalwa R for accused in his submission that an offence of infanticide should have been preferred against the accused. It is common knowledge in our health system that lactating mothers most of them suffer mental imbalance of giving birth effect. In the case of *Elizabeth Mwelu Mwau v Republic*[2015] eKLR Justice Nyamweya held as follows:

“I therefore agree with the appellant that the facts do not disclose the offence of killing an unborn child, and that the appropriate charge should have been that of infanticide. This is for the reason that the general state of health and mind of women who kill their children during or shortly after birth, may be such that it negates the degree of intention and willfulness that is required with other forms of destruction of life, and which fact is recognized in the offence of infanticide.”

23. Section 181(1) of the *Penal Code* provides:

“When a woman is charged with the murder of her child, being a child under the age of twelve months, and the court is of the opinion that she by a willful act or omission caused its death but at the time of the act or omission she had not fully recovered from the effect of giving birth to that child and that by reason thereof or by reason of the effect of the lactation consequent upon the birth of the child the balance of her mind was then disturbed, she may, notwithstanding that the circumstances were such that but for the provisions of Section 210 of the Penal Code she might be convicted of murder, be convicted of the offence of infanticide although she was not charged with it.”

24. Section 210 of the *Penal Code* provides:

“Where a woman by any willful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of a felony, to wit, infanticide, and may for that offence be dealt with and punished as if she had been guilty of manslaughter of the child.”

25. I therefore find the prosecution has proved a charge of infanticide contrary to section 210 of the *Penal Code* against the accused E B N and convict her accordingly.

**DATED AT BUNGOMA THIS 25TH DAY OF MAY, 2022**

**S.N RIECHI**

**JUDGE**

