



REPUBLIC OF KENYA



**Republic v Nyokabi (Criminal Case 45 of 2019)  
[2022] KEHC 11271 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11271 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 45 OF 2019**

**TM MATHEKA, J**

**MAY 25, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**SAMUEL NDUNGU NYOKABI ..... ACCUSED**

**JUDGMENT**

1. The accused person Samuel Ndungu Nyokabi was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) Cap 63 Laws of Kenya. It is alleged that that on 6<sup>th</sup> September, 2019 at Kaburini Estate, Kiamaina Sub-Location in Nakuru North Sub-County, within Nakuru County, the accused with others not before court, murdered Joseph Thuo Samuel.
2. On 18<sup>th</sup> September, 2019, the accused pleaded not guilty to the charge and particulars hereof.

**Prosecution Case**

3. The prosecution called a total of eight (8) witnesses in support of their case.
4. PW1, Mercy Nyambura, mother in law to the accused person, testified that on 6<sup>th</sup> September, 2019 she was at her home when the accused in company of his daughter L N came. She inquired where the other child PW aka Joseph Thuo aka I (said I) was and the accused told her that he was unwell and had been taken to the hospital by his (accused's) mother. She instructed her daughter, PW3 to bring food to the accused which she did and after the accused took one spoon of food he started crying saying "if my child has died I will throw myself into Menengai Crater". After a short while the accused requested PW3 to call his wife. PW3 called her from the video show room. When she the accused started beating her saying "you left the child now the child is unwell". She intervened and stopped the fight and the accused's wife managed to escape.



5. The accused's mother LN came. She was in the company of a boda boda rider. She asked the accused's mother where the child was. She did not respond. It is the boda boda rider who told her that the child had died. The accused's mother told her to go and report the death together with the accused but she refused telling them that they had to report to the police because the child had died in their hands. The two left with the boda boda rider. She and her daughter followed them and found they had booked the report and gone to their home. They followed them there.
6. At the accused's house she saw I. He was laid on the seat. He was dead. She confronted the accused's mother who told her that she had not taken the child to hospital but had been called by the accused about the child and had gone there with the boda boda rider. That he was the one who had confirmed that the child was dead as he was cold and stiff.
7. Back at Kihingo Police Post they were referred to Mairo Kumi Police station but said they did not have the fare to go. They went back home.
8. The *Nyumba Kumi* elder gave instructions that the child be left where he was as the police would come the following day.
9. The following day when she went back to the accused's house she found that instead of going to report to Mairo Kumi Police Station the father of the accused had decided to start preparations for burial. They created their own preservation method whereby they dug a hole, place split banana plant and charcoal and lay the child there and sprinkled the body with salt water. A neighbour was assigned to make the coffin. The plan was to bury him the following day. PW1 protested as she could not see how they could be burying the child without establishing what had happened to him. She instructed PW3 to report the incident to the police and the police officers came to the scene and moved the deceased's body to the County Mortuary. Her, the accused and his parents' attended the postmortem and were told that the child was suffocated to death.
10. In addition, she testified that the accused was her son in law married to her eldest daughter AW. That the two had a troubled marriage and most of the time they would quarrel. His wife would leave her home for several days then return.
11. PW2, Leah Nyokabi, a minor and daughter to the accused, told court that she saw the accused strangle and beat I with a Mwiko because he had put salt in the ugali.
12. PW3, Miriam Mugure, was the accused person's sister in law, sister to the accused's wife. Her testimony was similar to that of PW1. In addition she stated that the accused's wife one AW after a quarrel with the accused left her matrimonial house for about a fortnight prior to the deceased's death and had been staying at her parent's home. She also saw the scars on the deceased's neck.
13. PW4, James Kamau Karuma, a neighbour to the accused, and one of the *Nyumba Kumi* in the area recalled that on 6<sup>th</sup> September 2019 at about 5pm he received a phone call from his neighbors to the effect that a child of the accused person had been killed. He sent another elder to check on the issue and report to him. The report was that the child had marks on the neck and the private parts and had been killed. He reported to the chief who directed him to go there himself. He did so and found the burial arrangements. He instructed the accused not to bury the child until a report had been made to the police. He remained at the scene until the police came from Kihingo Police Post who took the deceased's body to the mortuary and later arrested the accused. He testified that the accused person's wife was not arrested as she had disappeared. He said she was a drunkard, that her family was a family of drunkards and had influenced the accused person into the same.



14. PW5 No. 58255, Snr Sgt. Samuel Makau from Kia Maina Police Post received the report on 7<sup>th</sup> September 2019 at 6:00pm that there was a body of a child in a house at Makaburini Village. He went there to the home of the accused and found body of the child aged about 1 ½ years placed in a small hole in the centre of the house. He saw it had injuries on neck. Upon interrogating the accused about the child's death he informed him that the child had been unwell and died on 6<sup>th</sup> September, 2019 and that he decided to keep the body for burial at a later stage. However, the members of the public present at the accused's home informed him that the child had been killed. He informed DCI and scenes of crime personnel who came took photographs of the scene and he moved the deceased's body to the Mortuary.
15. PW6, Damaris Wanjira, was the accused person's neighbor; she testified that on 6<sup>th</sup> October, 2019 she was informed about the deceased's death by her neighbor. She went to the accused's house and saw the child lying dead on a seat with bruises on his face. She noticed that they had prepared a temporary place to preserve the body.
16. PW7 DR. Titus Ngulungu performed a post –mortem examination on body of deceased. Externally he found nail cyanosis, linear abrasion on jaws, near eyes, cheeks, nose and chin, bruise on the left shoulder, lips and deformed nose due to pressure. Internally he found body had no oxygen, collapse of nose, pin point hemorrhage in the lungs and heart, swollen brain for lack of oxygen. He formed an opinion that the cause of death was Asphyxia due to covering of the mouth and nose.
17. PW8, No. 77782 PC George Mugambi, investigating officer, received a report of killing of a child and visited the scene in company of his three colleagues. He reiterated the testimony of the other witnesses as per their recorded statements. He took photographs of the scene and the deceased's body was taken to the Mortuary. He said the deceased's mother was not there but the accused was present. He was informed by the accused's neighbors that accused with his wife had a troubled marriage and the accused had beaten his wife and she ran away. Upon this information he arrested the accused on the basis that he was the last person in contact with the deceased.
18. On cross examination, he stated that the deceased's mother is not a witness as she ran away and efforts to trace her have been rendered futile. He said that the couple were partakers of alcohol and muguka, that some witnesses stated that there was fracas in the house of the deceased before the child was killed. That the two did not live together continuously He told court that he decided to charge the accused because his seven (7) year old daughter (PW2) witnessed him strangle her brother. He said by the time he reached the accused's house the deceased body had been moved from the seat for preservation. He also said that there was no possibility the mother killed the child then disappeared. It was his evidence that the deceased's mother run away after being threatened and beaten by the accused.
19. At the close of the Prosecution case, this Court on 31<sup>st</sup> January, 2021 ruled that the accused person had a case to answer and put him on his Defence.

### **The Defence Case**

20. The accused person testified on oath that on 7<sup>th</sup> September 2019 he left for work leaving his wife at home ok. About 11:00 a.m. he went back home and found his daughter playing outside. He went to the store and took some things for work. The daughter told him that her mother had left so he took her to the shop. He then asked her whether the mum had left with the baby. She said no, the baby was sleeping. He rang his mother and requested her to go check on the children since they were on their own and proceeded back to work. While at work, he received a phone call from his neighbor that there was a problem at home. He went home and found people standing there. He was told that his child was dead inside the house. He went and reported the matter at the police station, and took the day off



at work. The body was in the house. The police did not come that day. The next day he was hanging out with his friends. The Police came and asked him where the child was and he told them he did not know. His parents, neighbours showed them where the child was. He was then arrested.

### **Analysis & Determination**

21. It is trite that the standard of proof in criminal cases is beyond reasonable doubt. It is onus of the prosecution to prove their case.
22. For Prosecution to secure a conviction on the charge of Murder, it has to prove three ingredients against an Accused person. In *Anthony Ndegwa Ngari vs Republic* [2014] eKLR, the elements of the offence of murder were listed as follows:-
  - (a) the death of the deceased occurred;
  - (b) that the accused committed the unlawful act which caused the death of the deceased; and
  - (c) that the accused had malice aforethought.

### **The death of the deceased**

23. The death of the deceased is not in dispute. He did not die of the natural causes. The post-mortem report P. Exhibit 1 produced by PW7 confirms that the cause of death was Asphyxia due to smothering. The body also had some abrasions and what some witnesses referred to as scars.

Whether the prosecution established that the accused committed the offence.

24. The accused's child the minor PW2 told the court what she saw. PW2 testified that she saw the accused person hit Ido with a mwiko and also strangle him. She was the sole eye witness to the actions of the accused that led to the death of the child. With respect to the competency of this witness to testify I turn to Section 125 (1) of the *Evidence Act*, which states; -

“All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause”.

25. Section 19 (1) of the *Oaths and Statutory Declarations Act* complements this with respect to children or persons of tender years;

“Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth”.



26. The child herein was taken through a *voire dire* examination the purpose of which was stated in [Patrick Katburima v Republic](#), [2015] eKLR where the court held:
- “We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed.”
27. The child testified. She was able to identify the accused person. I observed that she was able to understand questions and respond to them intelligently. She gave unsworn testimony and was subjected to cross examination by defence counsel. She clearly told the court that no one had told her what to tell the court.
28. The child herein understood the nature of saying the truth. Her testimony was subjected to cross examination and she comprehended the questions put to her.
29. Was her testimony credible?
30. Section 125 (1) of the [Evidence Act](#), states; -
- “All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause”.
31. Section 19 (1) of the [Oaths and Statutory Declarations Act](#) has something to do with receiving evidence of a child in the following:
- “Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth”.
32. Having formed the opinion that the child was intelligent enough to give evidence, and having observed her testifying and on cross examination, I had no reason to doubt that she was telling the court what she had seen. Her father punishing her brother for having poured salt in the ugali.
33. This child’s testimony is corroborated by other events that happened thereafter. First he reported that the child was sick. Then he lied to PW1 that his mother had taken the child to hospital, while the child was lying dead on the seat at home.
34. The accused’s conduct and demeanour is expressed by the witnesses. When he went to his mother in law he was fraught with stress. When he was given food, he threw it away, kicked the plate and began to cry, threatening to harm himself if the child was dead. He told PW1 and PW3 that his own mother was at the hospital with the child a fact that turned out to be false as he had left the child in the house and instead sent his own mother to check on him.
35. The accused’s temperament was demonstrated from his action of attacking his wife in the presence of her mother and sister, while accusing her of abandoning the children, and leading to one of them



being unwell. Clearly this was evidence that she had not been at home, a fact that was established by the PW3 that she had been home for two weeks prior to this incident.

36. It is evident that his wife was not at home at the material time, she had run away, as was the norm.
37. Evidence given by witnesses brought out the accused and his wife as 2 parents who spent time drinking and chewing muguka, and for his wife, running away from her marital home and spending most of her time drinking and in video shows.
38. The facts are that the accused was at home with the children when the deceased sustained the injuries that caused his death.
39. The post mortem report showed that the body had no oxygen, and there was an abrasion, on the jaws, near the eyes, cheeks and nose at chin, bruises on the left shoulder, lips. These injuries would be consistent with being hit with something like a mwiko, the nose was deformed due to pressure, and this could be what the child PW2 saw the father doing, it would appear that the accused for some reason was disciplining the child for messing up with the food and went to. far, and ended up smothering the child.
40. The accused person in his defence did not shake off any of the circumstantial evidence that pile up against him. His testimony that he did not know what happened to his child is not believable taking into account his conduct and demeanour on the day the child was found to be dead.
41. The totality of the evidence points to the accused person as person who caused the death of his child and tried to pretend that the child was unwell.

#### **Did the accused act with malice aforethought?**

42. The court must determine whether accused, with malice aforethought inflicted the injuries that resulted in the death of the deceased. The ingredients of murder were explained in the case of [\*Roba Galma Wario vs Republic\*](#) [2015] eKLR where the court held that;

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

43. Malice aforethought was defined in the following cases;
  - (a) [\*Nzuki v Republic\*](#) [1993] KLR 171 where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.- Intention to cause death- Intention to cause grievous bodily harm- Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.
44. I have considered with a lot of anxiety the evidence on this part. The accused’s child told the court that the father beat the child for having done wrong. The accused person appears to have been inflicting some discipline on the child with anger against the mother. That state in which the child was found was in total neglect. I can only infer from the facts that he for some reason hit the child, in the process smothered him.
45. I do not find an intention to cause grievous harm to the child. I do not find malice aforethought.



46. I find that the accused caused the death of his child. I find him guilty of the offence of Manslaughter Contrary to Section 202 as read with 205 of the [Penal Code](#), and convict him accordingly.

**DATED, SIGNED AND DELIVERED THIS 25<sup>TH</sup> DAY OF MAY 2022.**

**MUMBUA T MATHEKA**

**JUDGE**

In the presence of;

CA Edna

Accused present.

Ms. Murunga for state

Ms. Ogange for the accused

