



**Republic v Kioko (Criminal Case 10 of 2017)
[2022] KEHC 14669 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14669 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 10 OF 2017
MW MUIGAI, J
OCTOBER 27, 2022**

BETWEEN

REPUBLIC STATE

AND

MAGDALINE MWENDE KIOKO ACCUSED

RULING

Background

1. The accused herein Magdaline Mwendu Kioko has been charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars being that the accused on February 9, 2017 at Kitengei Village, Kaliluni Sub - Location in Kathiani sub-County within Machakos County murdered NM.
2. The Mental Assessment dated March 28, 2017 was carried out on and filed in Court on March 29, 2017 found the accused person Fit to plead. The Accused person herein took plea on March 29, 2017 whereof after the charges were read out to her in a language that she understood she pleaded Not Guilty. A plea of Not Guilty was entered on her behalf.
3. The Accused person was represented by Mr Kyalo Advocate while the state was represented by Mr Machogu and later Mr Mwongera.
4. The hearing took off and the prosecution called a total of Ten (10) witnesses.
5. PW 1 Felister Mbithe Musau told the Court that on 9/02/2017 at around 7.00 am, she prepared her son NM (deceased herein) aged 4 ½ years old to go to school. However, at around 3 pm the deceased child came home. She then instructed the deceased to go to her grandmother's place as she needed to attend a church meeting. Later at around 5 pm she was called by her sister-in-law Jemimah Nzula that she was needed at home urgently. She rushed home and on the way she met a young man by the name



Kamau Wambua who informed her that her daughter had fallen and was bleeding from the mouth and nose. A large crowd had already thronged her home. Her neighbours were at the place where her child had been thrown. She did not visit the place since she lost consciousness and came to around 7 pm. Police arrived and took photographs of the body of the deceased. The body was later taken away by the police. The following day the area Chief convened a meeting and enquired on the issue of who was behind the death of the deceased and the accused herein volunteered and owned up to the crime. She is well known to her as she is her aunt. We had earlier disagreed in 2014 as she claimed that they were occupying her land. The dispute had been reported to the village elder. The accused ran away from home for about one month before the dispute could be resolved. Since then they did not engage in any other dispute upto the time of death of the deceased. She visited the mortuary and identified the body of the deceased.

6. In cross examination she stated that she knew the accused herein as her husband is related to her. Her home and that of the accused are near each other. She has lived there for four years. She did not witness the incident. Nobody else saw the accused committing the offence. She did not approach the deceased at the scene. The land dispute was not resolved. The accused had a problem with her husband as she used to leave her house for a while then come back.
7. PW 2 John Kioko Mutinda told the Court that on 9/02/2017 while at his shop within Kathiani market a cousin by the name Christopher Mutiso Juta informed him that there was a problem at their home. He rushed there and found a large crowd at the home of his cousin Musau. The area chief was also present. He approached the scene and saw the body of NM who was well known to him. It looked like he had been hit with a stone on the right side of the head and was bleeding from the mouth and nose. Police officer arrived and took photographs. The body was taken to the mortuary. The following day the chief and area Member of County Assembly convened a meeting and the accused herein admitted to have killed the deceased. She is their relative. They had never had any dispute with her before.
8. In cross examination he stated that he received a call and rushed to the scene whereby he found a crowd of about 150 people at the scene. He did not witness the incident.
9. PW 3 SM (a minor but is possessed with sufficient intelligence) told the Court on 9/02/2017 at 4pm, he was at school and left at 5 pm and proceeded home. He found his brother N at the farm belonging to his parents lying down and bleeding from the mouth and nose. He then informed Mwende (the accused herein) who is their neighbour to go and see for herself. Mwende (the accused) declined but later agreed to go but only approached the deceased from a safe distance and left for her house. Mwende was then dressed in red rubber shoes but she later changed them and wore another pair. Later he went and briefed his grandfather Paul Wambua who was at his house. He led him to where the deceased was lying and he instructed him to go and alert David Maingi. He escorted him to the scene and left him there with his grandfather. At the scene he saw a stone near the body. He noticed N had died. Later he recorded his statement.
10. In cross-examination he told the Court that the accused herein is a wife to his grandfather's son and she is called Mwende. The accused used to live at her home which is not far from their home. The accused and his grandfather were the only ones at home as he was in school until 5 pm.
11. Pw 4 Alfred Kimanthi Mutisya that On 9/02/2017 at 1630 hrs he was at his shop when he received a call from the village elder that there was a body of a child at a neighbour's house. He rushed there. The neighbour is Magdalene Mwende Kioko. Other neighbours were Ndambuki and Paul Wambua. The house belonging to Magdalene Mwende Kioko is about hundred meters from his. He found the Assistant Chief Joseph Mumo and also the village elder Paul Muasya and other villagers. He was led to where the body of the child lay which is three meters away from the house. He had been seeing the



- child before. Blood was oozing from the mouth and nose. The OCS was alerted and he rushed there in company of a scenes of Crime's Officer who took photographs. The body was taken to Kathiani hospital mortuary. He later recorded his statement.
12. In cross- examination he told the Court that his home is about one hundred meters away from the scene. He knew the accused herein. Accused's grandfather is called Wambua. The baby was already dead. He did not witness the incident.
 13. Pw 5 Dr John Mutunga based at Machakos Level Five Hospital produced post mortem performed on the body of the deceased on behalf of Dr Okinyi who he had worked with for a few years hence familiar with his handwriting and signature. The post mortem was conducted on February 13, 2017 at Kathiani hospital. The body had been properly preserved but had several bruises on the face, head and neck. There were swellings on those areas. The windpipe (trachea) was confused and had haemorrhage. The heart also had haemorrhage. The cause of haemorrhage was due to congestion of the blood vessels due to strangulation. There were multiple skull fractures with lacerations of brain tissue. The cause of death was blunt injury (head) due to blunt trauma. He could not determine the exact weapon. The deceased also died due to asphyxia. The manual strangulation must have been done by a third party and similarly the head injuries. Blood was taken for testing. Postmortem report dated 13-2-2017.
 14. Pw 6 No 70318 Pc Kenneth Settim previously based at Kathiani Police Station stated that on 10/2/2017 while on duty at around 10.00 am he received a member of public by the name of Magdalene Mwendu Kioko who was accompanied by an Assistant Chief Joseph Mumo and members of public. It was then claimed that the said lady had killed a neighbour's child. The lady is the accused herein. He interrogated her afterwards and she was in good condition. He placed her in the cells.
 15. Pw 7 No 91747 Pc Kyambi Benson of Kathiani police station stated that on 9/02/2017 he was at the office when OCS Kipkoros George informed him that a child named N had been murdered. He accompanied the OCS and two other officers to the scene. They were led by the Assistant Chief Joseph Mumo. They found the body of the deceased lying on the ground and bleeding profusely. It looked like the deceased had been strangled. There were two stones near the body and were bloodstained. They made enquiries from the large number of people. They also interrogated certain persons and they learnt that the mother of the deceased had left the baby as she went to church. There were about six houses within the compound. It was claimed that the accused had been left with the baby. The deceased was found three meters away from the house of the accused herein. The scene officers took photographs. They collected the body and took it to Kathiani Hospital. The following day the accused was brought by members of public on claims that she had confessed to the murder. She was interrogated and cautioned. She was later presented before Hon Lorot (SPM) for confession recording.
 16. In cross- examination he stated that he is not the investigating officer since it is George Kipkoros who was the OCS then. They received report at about 6 pm and reached the scene around 8 pm. Mother of the deceased claimed she had left the baby around 3 pm. We arrived at the scene in time before anyone could tamper with it. We are the only ones who touched the body at the scene. The stones were next to the deceased. He could not if fingerprints were lifted from the neck of the deceased. Grandmother of the deceased lived about 100 meters from the scene. The area Chief was one Joseph Mumo and he had received a call from one of the villagers named Muasa Paul. We received the report from the mother of the deceased the following day. Deceased's mother was deeply affected and could not talk much.
 17. Pw 8 No 232591 ACP George Kipkoros currently the Deputy OCPD Gatundu South previously was at Kathiani Police Station. He stated that on 9/02/2017 he was at the police station when the assistant chief of Kaliluni sub location Joseph Mumo informed him of the murder of a child aged 4 years by the name N. He accompanied his officers PC Mwenda, PC Warui, Driver Sgt Nguli rushed to the scene.



They met the Assistant Chief in company of members of public. They were briefed on the incident and led to the scene where they found a female child already dead. The body had some bruises on the neck indicating that she had been strangled. The left part of the head indicated that it had been hit with a blunt object. Blood oozed from the nose and mouth. Around the body were two pieces of stones which were collected as exhibits. They collected the body after photographs had been taken and escorted it to Kathiani District Hospital. The officers recorded witness statements. On 10/2/2017 the accused was brought to the station by the Assistant Chief and members of public with allegation that she had participated in the killing of the deceased. The previous day the mother of deceased kept on mentioning the name of accused as the killer. He then interrogated the accused who later recorded a confession before a magistrate (Hon Lorot). The accused is before court. I had not known her before.

18. In the cross – examination he stated the mother of the deceased was at the scene but she was then wailing and blaming the accused for killing the deceased. Mother of deceased claimed that she had left the baby taking porridge as she rushed to a church nearby. Yes there were several homes within the compound. He is the one who collected the stones which had bloodstains and that they were later forwarded to the Government Chemist. The photographs at the scene were taken by PC Simon Warui and who processed the same. We prepared an inventory of items recovered. The neck had finger marks while the left ear was swollen. The members of public kept a safe distance from the scene. No fingerprints were dusted on the body of the deceased. He did not find the accused at the scene.
19. Pw 9 Elizabeth Waithera Oyiengo testified as the Government Chemist told the Court that she received several items from Kathiani Police Station for analysis. The DNA profile generated from the bloodstains on the stone (E1) matched the DNA profile generated from the blood sample (E2) belonging to the deceased. The blood sample belonged to the deceased.
20. Pw 10 Abdulkadir Lorot a Judicial Officer currently based at Kibera Law Courts stated that on February 13, 2017 he recorded a confession from the suspect named Magdalene Mwendu Kioko. She had already recorded one before a Chief Inspector at Kathiani Police Station. The said suspect spoke fluently in Kiswahili language. She was accompanied by PC Woman Chepkemai Rono No 104761. She was not under any duress as and she willingly made the confession. The accused informed me that she wanted to say something about the incident. She raised issues of evil spirits. He did not establish on the date when she was arrested as his duty was only to record her statement. He did not interrogate the accused. The accused spoke in Kiswahili language and he translated into English.
21. The Prosecution closed its case on May 19, 2022.
22. On July 28, 2022 the Court directed the parties to file and serve their written submissions an order which the parties complied with.

Written Submissions

Prosecution Submissions dated July 28, 2022

23. The Prosecution submitted that it availed 10 witnesses in order to prove its case and relied on three issues to determine its case as follows:-
 - a. Was the accused involved in the murder of the deceased?
 - b. Did the accused have malice?
 - c. Was the cause of death as a result of the injuries inflicted?



24. On the issue of whether the accused was involved in the murder of the deceased the confession recorded by Pw10 clearly stated how the accused had differences with the mother of the deceased. On the date of the incident she alleged that she was bewitched and that she went to the house of the deceased's mother and assaulted the deceased child with a stone until the child died.
25. On the issue of malice On whether the accused have malice Section 206 of the Penal Code states that 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.

In this case it is evidence that the accused person had malice aforethought because she inflicted injury on the deceased using a stone.

26. On the issue of whether the cause of death was a result of the injuries inflicted, the doctor testified that the death was due to severe head injury caused by blunt trauma – Asphyxia from manual strangulation. That the DNA profile from the bloodstains on the stone (E1) matched the DNA profile generated from the blood sample (eE2) belonging to the deceased.
27. Reliance was made in the case of Ronald Nyaga Kiura vs Republic [2018] eKLR wherein paragraph 22 it is stated as follows: -

It is important to note that at the close of prosecution, what is required in law at stage is for the trial court to satisfy itself that *prima facie* has been made out against the accused person sufficient enough to put him on his defense pursuant to the provisions of Section 211 of the Criminal Procedure Code. A *prima facie* case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebutted is offered by an accused person.

28. Also, in the case of Ramanlal Bhat Vs Republic [1957] EA 332 at 334 and 335 relied on by the state the Court stated as follows: -

“It may not be easy to define what is meant by a “prima facie case” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defense.”

29. Similarly, in R v Jagjivan M Patel & Others 1, TLR, 85 the Court stated; -

“All the Court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defense, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case



to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

30. The prosecution finally submitted that by availing testimonies of ten witnesses as well as documentary evidence it has proved its case beyond reasonable doubt and the accused ought to be placed in his defense under Section 306 (2) of the Criminal Code.

Accused Person Submissions dated July 7, 2022

31. The Accused submitted that there is no doubt that the deceased lost his life as a result of severe head injury caused by blunt trauma and a post mortem produced in respect of the same but the link between the accused person and the alleged offence is circumstantial and the fact that the confession was challenged in Court.

32. None of the witnesses saw the accused committing the offence/inflct harm on the body of the deceased. There is no evidence linking the accused person to the commission of the alleged since no one witnessed the incident.

33. In the case of *Jon Chebii Sawe vs Republic* [2003] eKLR Criminal Appeal No 2 of 2002) the Court laid down principles to guide Court where the evidence to be relied on by the prosecution is purely circumstantial evidence thus as quoted in the case of *Republic vs Pius Kikungu* the Court observed that:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

34. In view of the foregoing the accused submitted that the prosecution did not prove that the death of the deceased was the direct consequence of an unlawful act or commission on the part of the accused. There is no proof that the accused committed the alleged offence at all.

35. Although the confession made by the accused person was admitted in Court as evidence there, is a part of the evidence showing that the accused was not in her right mental mind during the commission of the alleged offence and/or at the time of recording the alleged offence hence the accused person ought to have been subjected to further mental and medical checkup to ascertain her mental status. The confession was made before the plea taking contrary to Evidence Act Section 25A and Confession Rule 2009 hence the said confession should not be used as a basis to link the accused person with the alleged offence without further evidence to corroborate the same.

36. The Defense submitted that Pw7 & Pw8 confirmed they presented the Accused person to Pw10 for purposes of recording a confession. Although, the Defense objected to its production as the Confession did not meet the requirements of Section 25 A, Out of Court Confession Rules 2009, Art 49 (i) (a) (d) Art 150 2 (a) & (4) of Constitution vide Ruling by the Trial Court of October 29, 2020 the Confession was deemed admissible in Court as evidence. On 19/5/2022, the Confession dated 13/2/2017 &



Certificate thereof were produced as Prosecution Exhibit 7 in Court. For these reasons the Defense urged this court to reject the produced Confession & Certificate.

37. According to the Doctor's evidence there were signs of strangulation on the deceased's neck but no finger dusting was carried out by the police. Pw3 (a minor) stated that his grandfather and grandmother were at home when the alleged incident occurred yet they were never called as witnesses.
38. The Defense raised issue with the fact that if the scene of crime was sealed as per evidence of PW9, then why was dusting of finger prints not done to confirm fingerprints of the Accused person on the deceased body as the Pathologist confirmed the cause of death as strangulation.
39. Reliance is made in the case of *Republic vs Morris Karani Alando* (Kakamega Criminal (Murder) Case No 32 of 2012) the Court observed thus:

“Applying the above principles to the instant case, I find and hold that the prosecution has not established a *prima facie* case to warrant the accused person being put on his defense. There was either poor investigation of the case or some lethargy on the part of the prosecution to call relevant witnesses to support its claims against the accused person. The only inference that this court can draw is that the prosecution failed to call those witnesses because they were likely to give evidence that was averse to the prosecution.

40. This therefore proves that the prosecution evidence was inefficient to warrant the accused person be placed in her defense.
41. It was finally submitted that the prosecution did not discharge their burden as the circumstantial evidence in the present case do not irresistibly point to the accused to the exclusion of all others so as to justify a conviction.

Finding

42. The matter commenced hearing on 14/3/2017 by Hon D K Kemei J who took the evidence of Pw1, Pw2, Pw3, Pw4, Pw5, Pw6, Pw7, Pw8, Pw9 & Pw10.
43. The Trial Judge Hon D K Kemei wrote and delivered Ruling of/on October 29, 2020 after conducting trial within a trial and the Confession was to be produced as exhibit in Court.
44. This Court took over the matter on 3/11/2021 and proceedings were typed and parties/counsel obtained the copies of the same.
45. On 1/12/2021, Section 200-201 *CPC* was read/explained to the Accused person by the Court Assistant Geoffrey in Kiswahili and the Accused person opted to proceed from where the matter stopped.
46. On 9/3/2022, this Court granted the order to have the matter placed before the Trial Judge to complete the hearing as it was mostly heard by the Trial Court and had been in Court for 5 years.
47. On 23/3/2022 *vide* a letter to the Presiding Judge dated 28/2/2022 by the Trial judge, he expressed logistical difficulty to come back and complete the case.
48. On 19/5/2022, the Prosecution recalled Pw 10 who virtually produced the Confession and Certificate as Prosecution Exhibits before this Court.
49. The Prosecution closed its case on 19/5/2022 and parties/Counsel were to file Written Submissions.



50. At the Close of the Prosecution case, this Court read through the Court record and documentary exhibits produced during trial and considered the totality of the evidence.

51. In the case of *Anthony Njue Njeru vs Republic* Court of Appeal No 77 of 2006; the Court determined the scope and content of case or no case to answer Ruling by the Court as follows;

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

52. The issue of what is a *prima facie* case in criminal trials was clearly explained in *Ramanlal Trambaklal Bhatt v R* [1957] EA 332 at p 334-335 where it was said:-

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

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

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

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

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

A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “*prima facie* case,” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

53. In the instant case, on record the evidence recorded is that on 9/2/2017 Pw3 found his brother’s body at their grand parents’ farm lying down and bleeding from the mouth and nose and there was a stone near the body. He met Mwendu, the Accused person their neighbor and told her to go and see the body for herself. He went to the homestead and came back and found Mwendu who was dressed in red shoes was now dressed in another pair of shoes.

54. PW 7’s evidence on record is that on 9/2/2017, he was part of the Scene Visiting Officers team led by the Assistant Chief to the scene where he saw the deceased’s body and had bled profusely. There were 2 stones that were blood stained produced in Court as Exh 3A & 3B. PW 8 evidence on record is that he was at the scene with PW7.

55. Pw9 evidence on record is that the stones marked E1 with bloodstains were presented for analysis with the deceased’s blood sample marked E2. And was confirmed to be the deceased’s blood on the stones.



56. Pw5 evidence on record is that he presented the Post Mortem on behalf of his colleague who they worked together for 4 years. The Report disclosed that the cause of the deceased's death was blunt injury (on the head) due to blunt trauma. The deceased also died from manual strangulation by a 3rd Party and head injuries.

Disposition

- (1) Upon this Court's consideration of the totality of the evidence adduced and on record, the Prosecution has proved a *prima facie* case ".....one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."
- (2) The evidence of witness Pw3 coupled with the formal witnesses Pw4, Pw5 & Pw7 & Pw9 confirm that the deceased died from an unlawful act and places the Accused person at the scene and time of incident and the circumstances outlined target the Accused person. The evidence on record discloses commission of the criminal offence of murder c/s 203 of the Penal Code and is sufficient to warrant the Accused person to be placed on her defense
- (3) The law requires that the Accused exercises the legal right as prescribed under Sections 306 CPC.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 27TH DAY OF OCTOBER, 2022 (VIRTUAL/PHYSICAL CONFERENCE).

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

MAGDALINE MWENDE KIOKO - ACCUSED PERSON

NO APPEARANCE - FOR THE ACCUSED

MWONGERA - FOR STATE

Patrick/geoffrey - Court Assistant(s)

