



**Republic v Mbithe (Criminal Case 17 of 2019)
[2022] KEHC 14667 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 17 OF 2019
MW MUIGAI, J
OCTOBER 27, 2022**

BETWEEN

REPUBLIC STATE

AND

FAITH KAVINDU MBITHE ACCUSED

RULING

Background

1. The accused herein Faith Kavindu Mbithe is 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 11th day of April, 2019 at [particulars Withheld] Village, [particulars Withheld] location within Matungulu Sub-County in Machakos County murdered DWM.
2. An initial Mental Assessment was carried out on 6/06/2019 and filed in Court on 10/06/2019 found the accused person Not fit to plead. This Court ordered for a comprehensive mental examination. The further mental examination was carried out on 1/07/2019 declaring the Accused person fit to plead.
3. The Accused person herein took plea on July 25, 2019 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.
4. The Accused person was represented by Mr. Kisini Muema Advocate while the state was represented by Mr. Machogu and Mr. Mwongera.
5. The hearing took off and the prosecution called a total of 8 witnesses.
6. PW.1 Solomon Makau J. Ndolo told the Court that on April 12, 2019 he received a call from the village elder one Thomas Mbithi who informed him that somebody had been killed and the body taken to the morgue. They proceeded to Kangundo District Hospital whereby they viewed the body. The post mortem was later conducted and revealed that the deceased's bones were broken. They later lodged



a report and investigations commenced. He knew the Accused person well as he is a cousin to the Accused's father. The deceased in these proceedings was the son to the Accused.

7. In cross-examination Pw1 stated that he did not know the cause of death. That he insisted for a post mortem to be carried out as the deceased child had not been known to be having any ailing illness. He did not see any injuries on the body.
8. Pw.2 Thomas Mbithi Kioko testified that he is the area chairman. That on November 4, 2019 at about 9.00 p.m. he was informed by his wife AM about the demise of the deceased herein. The following day he proceeded to Kangundo Hospital Mortuary. Upon viewing the body he discovered bruises on the neck. A post mortem was conducted on September 15, 2019 after he identified the body to the doctor. It was established that the deceased was strangled to death. It was decided that the Accused who is the mother to the deceased was to be questioned over the child's death. One Musau was her boyfriend and fathered the baby.
9. In cross-examination he stated that he saw bruises on the deceased's neck. The accused was arrested while at home. That he has never heard that accused had molested the child in the past. That he did not bother to find out whether there was another assailant involved in the murder other than the accused. He did not see the boy's father. The child was aged 1 year.
10. Pw.3 MM stated that the accused herein was/is her daughter. That on April 11, 2019 she was at Kwa Kamene attending a funeral when the accused herein called her and informed her that the child had died. She went home and accompanied by others they took the child to Kasusu hospital from where they were referred to Kangundo Hospital. The accused was advised to go and report to the police. The following day when she returned to the hospital she was shown the body of the child and she saw marks on the neck resembling those made by mosquito net tied around it. Earlier in the day before she left home to attend burial she left the Accused and deceased was in good health. The Accused person had separated with the deceased's father.
11. In cross examination Pw.3 stated that around 12 noon when she left for the burial, she left the deceased in the company of accused. She could not tell if any other person visited her home while she was away. She could not tell what transpired. She further told the Court that the accused loved her child very much and she doubted if she could have harmed the child. Pw.3 further stated that the accused's husband used to assault the accused person hence she left her matrimonial home and went back to live with her parents.
12. Pw.4 Francis Ngui told the Court that the accused person herein is his daughter. That on April 11, 2019 he was working at a place called Kyaume and returned home at around 2 p.m. and found the accused person (his daughter) with the child. He rested and then went back to work. The accused and the child were in good health. He later left home at around 6 p.m. and proceeded to Tala market. On the following day in the morning his wife (Pw.3) and accused person left for Kangundo hospital. He also proceeded to Kangundo Hospital later and was informed by the mortuary attendances that the child was strangled. On April 15, 2019 he identified the body of the deceased to the Doctor who conducted the post mortem. That the Accused had two children. That the eldest child lived with her husband while she lived with the youngest one is the deceased herein. He further stated that he is aware that the deceased was fathered by a different man.
13. In cross-examination he stated that he could not tell what transpired as he was away. That the accused loved her child very much and it is not possible for her to harm the child. He could not tell if somebody else visited the home and committed the crime as he was away.



14. Pw5 Mariam Saitoti told the Court that on April 11, 2019 at around 4.30 p.m she was at home with the accused's mother when the accused came and informed her mother that her child had died. They proceeded to the home and found the baby wrapped in a lessa. She suggested they take the child to hospital. Later she heard that the child had died. She was later called to record her statement.
15. In cross – examination she stated that the accused visited her home twice that day trying to request her mother to go and check on the child. That the child claimed that the child had pneumonia.
16. Pw6 Dr. Katua stated that April 15, 2019 he performed a post mortem on David Wambua Musau at Kangundo Level 4 Hospital. The deceased child was aged 14 months. Externally, there were linear lacerations of the neck and bruises on all sides of the neck. There was a fracture of axis vertebral axis at the neck and there were blood stains under the chin of the neck along the neck injuries. As a result of the examination he formed the opinion that the cause of death was due to strangulation.
17. In cross – examination other than strangulation he did not find any other ill-health problems on the child.
18. Pw.7 Peter Wambua stated that on April 12, 2019 at around 1.00 pm he was called by his cousin named Solomon (Pw1) who informed him that the Accused's child was found dead and they were at Kangundo Hospital. He proceeded there and met Pw.1 and Pw.2. They later went to the police station.
19. In cross –examination he stated that he did not know if the child was not strangled.
20. Pw.8 Chief Inspector Samuel stated that on April 15, 2019 he was based at Tala police station as the OCS. On that day at around 2.00 p.m. Francis Ngui Kilonzo (Pw4), Solomon Makau (Pw1) and Thomas Mbithi (Pw2) came to his office and they informed him that they were sent from Kangundo Police Station. They had a post mortem form and investigation diary with OB of Kangundo Police Station. He conducted investigations and on the same day we went to the Accused home and we found her and picked her as a suspect. The next day he recorded statements from the witnesses and concluded that the accused person was involved in the death of her child. The death occurred on April 11, 2019 and not April 10, 2019.
21. In cross – examination he stated that he was the investigating officer. He received the report on April 15, 2019 and he interviewed the three men and recorded their statement. He visited the scene the same day. He did not take any photographs. He became involved in the matter on April 15, 2019. When he visited the scene he did not find any weapon.
22. In re-examination he stated that the statement is a summary of the investigations.
23. The Prosecution closed its case and the Court directed the parties to file their written submissions.

Submissions by the Prosecution

24. The State submitted that on the issue of whether the accused was involved in the murder of the deceased, the evidence of Pw3 and Pw4 (Accused's mother and father respectively) proved that the accused person was the last person to be seen with her child.
25. 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.
26. According to the evidence adduced by the Accused person had malice aforethought since she strangled her child due to harsh economic hardship.
27. On the issue of whether the accused person was identified appropriately the accused person was properly identified by Pw.3 and Pw.4 who are her parents.
28. On the issue of whether the cause of death was a result of the injuries inflicted, the doctor who performed the post mortem testified that the death was due to strangulation.
29. 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 a *prima facie* has been made out against the accused person sufficient enough to put him on his defence 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.
30. 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 defence.”
31. 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 defence, 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.”
32. The prosecution finally submitted that it has proved it has proved beyond reasonable doubt and the accused ought to be placed in his defence under Section 306 (2) of the *Criminal Code*.



Accused person submission

33. The Accused submitted that there is no doubt that the deceased lost his life but the manner in which the life was lost is what is in doubt. According to the evidence adduced none of the prosecution witnesses witnessed the accused person committing the offence she has been charged with hence the evidence is circumstantial.
34. Most of the witnesses confirmed that the accused herein loved the deceased and they could not think that she could ever want to hurt the deceased herein.
35. The prosecution evidence did not meet the threshold of Section 206 of the Penal Code on malice aforethought.
36. The Prosecution did not prove whether the accused person directly or indirectly participated in the commission of the alleged offence.

Finding

37. The matter commenced hearing on 15/5/2019 by Hon. D. K. Kemei J who took the evidence of Pw1, Pw2, Pw3, Pw4, Pw5, Pw6, Pw7, Pw8.
38. This Court took over the matter on 4/11/2021 and ordered the Court proceedings to be typed first.
39. On December 14, 2021 the typed proceedings were ready and were provided to ODPP/Prosecution and Counsel on record for the Accused person, Mr. Muema and/or the Accused person.
40. On 7/2/2022, Section 200-201 CPC was read/explained to the Accused person by the Court Assistant Geoffrey in Kiswahili and she opted to proceed from where the matter stopped.
41. On 23/3/2022, this Court heard the evidence of Pw6 who produced the Post Mortem Report and Pw7 & Pw8 and then the Prosecution closed the case and parties/Counsel were to file Written Submissions.
42. 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.
43. 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”.

44. The issue of what is a *prima facie* case in criminal trials was clearly explained in *Ramanlal Trambaklal Bhatt V R* [1957] E.A. 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.”

45. In the instant case, on record the evidence recorded Pw3 & Pw4 confirmed that the Accused person, mother of the child was and had been with the child and at the time the child was well and healthy.
46. The evidence on record by formal witnesses PW6 & PW8, the Pathologist and Investigation Officer confirmed by their testimonies as follows; the doctor found upon examination the child had lacerations and bruises on the child’s neck the rest of the body the child was fine and the child had not been sick. The cause of death was strangulation. The Investigation Officer conducted investigations that led him to charge the Accused person with causing death of the child, the offence of murder c/s 203 of the [Penal Code](#).

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 defense.”
2. The evidence of witness Pw3 & Pw4 coupled with the formal witnesses Pw6 & Pw8 confirm that the deceased died from an unlawful act and places the Accused person as the person who was with the child and the circumstances outlined point to the Accused person.
3. 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.
4. 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:

FAITH KAVINDU MBITHE - ACCUSED PERSON

MR. MUEMA - FOR THE ACCUSED



MR. MWONGERA - FOR THE STATE
GEOFFREY/PATRICK - COURT ASSISTANT(S)

