



**Republic v ENW (Criminal Case 26 of 2016)  
[2022] KEHC 14286 (KLR) (Crim) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14286 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE 26 OF 2016  
J WAKIAGA, J  
OCTOBER 24, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ENW ..... ACCUSED**

**JUDGMENT**

1. The accused was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code, the particulars of which were that on the 2<sup>nd</sup> day of August 2015 at unknown time in Njiru District within Nairobi County jointly with another not before the court murdered LWK.
2. He pleaded not guilty to the charges and to prove its case against him, the prosecution called and examined a total of eight witnesses and when put on his defence, the accused offered sworn statement of defence without calling any witness.
3. The prosecution case as per the evidence of PW1 SWW, who was the mother of the deceased, the accused, who was not the biological father of the deceased moved together with her as a husband and they lived together for a period of one year and seven months, during which period of time he showed love to the deceased but as is common in those kind of union, whenever the accused was not in the house, the deceased would report to her that the accused used to pull his nose.
4. It was her evidence that one week before the incidence, the accused brought into her house another woman whom he introduced to her as his wife and therefore her co-wife, and being a good traditional wife, she had no objection to that arrangement.



On the 27<sup>th</sup> day of December 2014, they had a dispute, which led to her throwing the accused out of her house and the same went away, only to come back in April 2015, and once again, since love they say is blind, she took him back.

5. At that time, she was working at a pub between 7pm and 6 am and therefore she used to take the deceased to a night baby care, as the accused who did not disclose to her the nature of his job would also be away for three nights in week. On the 18<sup>th</sup> may 2015, against her norm sand practice, she left the deceased with the accused while going on duty together with his alleged other wife and in the morning at 6.45 am when she came back from duty, she found the door locked from outside and when she entered into the house using the spare key, she found the deceased sleeping but noticed that he had blood on the side of his head, when she called the child, he was non responsive.
6. Besides the body of the child there was a handkerchief and a bathing towel which had blood stains and when she lifted up the child, his head was not stable, she then raised an alarm attracting the neighbours, before taking the deceased to a local clinic called Samaritan, then to Mama Lucy before being referred to Kenyatta National Hospital, ICU where he died.
7. She tried calling the accused and his other wife on phone but their phones where off, neither did they come back for their clothes from her house until March 2016 when the same was arrested and that any time they quarrelled, the accused used to threaten, that he would kill her. In cross examinations stated that the accused forced her to stay with the other woman and that when he left the child with the deceased he was well.
8. It was her further evidence that when she inquired rom the accused what the child had told her that he used to pinch his nose, the accused would say that she was not punishing him whenever he had done something wrong and that there was a time the accused had pushed the deceased against wall in her presence and he chased her away together with the child from her house and she reported him to the police.
9. PW2 RNK testified that she had been a friend and a neighbour of pw1 for three years before the accused whom they knew as “wella” moved in with her. It was her evidence that the accused used to be abusive and used to beat the child and that everytime pw1 was not at home, the child would run to her place and that at the time of the death of the deceased , the accused his wife and PW1 were living together and on 1<sup>st</sup> August 2015, she heard pw1 crying at 6.30 am when she found the deceased lying down on his stomach, she then accompanied her to the local clinic where the deceased was attended to before being referred to mama Lucy and later on to Kenyatta national hospital where he died.
10. In cross examination, she stated that the accused and PW1 were not living happily as he used to beat her up and she would run to her house and at one time they reported him to the police but when the police came for him, they found that he had moved out and that there was a time her sister called M told her that the accused had pushed the deceased to the wall and that the accused killed the child since he did not like him and he used to slap and cane the child who would then run into her house and that the accused did not want them to talk to PW1.
11. PW3 Dr. Edwin Walungowho conducted post mortem examination on the body of the deceased stated that the same had blood stains on the front side of shirt and that there were bruises on the front side of the head and the neck and that the anus was widely open suggesting sexual assault. He stated that there were bruises on the blood vessels of the neck suggesting that there was strangulation and as a result of his examination, he formed an opinion that the cause of death was asphyxia due to manual strangulation. In cross examination, he stated that there was no blood from the mouth but that there



- were two bruises on the neck and that the anus was open which only happen in children due to sexual assault.
12. PW4 HNW stated that she had met the accused once in the house of pw1 and that on the 11<sup>th</sup> august 2015, she identified the body of the deceased to the Doctor for purposes of post mortem examination in. It was her further evidence that PW1 told her that the accused used to beat the deceased and she advised her to end the relationship which she did not do. In cross examination she stated that PW1 used to work at night as a bar maid and that every time she was beaten by the accused she would go to her house.
  13. PW5 Inspector Joseph Mathengestated that on the 17<sup>th</sup> march 2016 while on patrol at Embakasi, they received information from an informer on the where about of the accused whom they preceded to arrest. In cross examination he stated that he arrested the accused on the strength of the information received that he was suspected of having committed murder at Dandora, which information he confirmed through the OB and that at the time of arrest the accused was just walking around and did not resist arrest.
  14. PW6 Corp. Newton Lumulaattended to the post-mortem examination and collected samples for toxicology and sabs to confirm whether there was presence of spermatozoa, he produced the exhibit memo and the report thereon from the Government Chemist which confirmed a negative result for toxic substances.
  15. PW7 James Michael Welimo produced the said report and stated in cross examination that there was nothing in the said report connecting the accused to the deceased and that no samples were taken from him.
  16. PW8 PC James Ndirangu the investigating officer, stated that he recorded witness statements and took the accused for mental assessment upon arrest at pipeline area and that after the incidence the accused ran away together with the lady they were staying with in PW1's house. He stated that the mother of the deceased had met the accused in a pub and he moved into her house.
  17. When put on his defence the accused testified on oath and stated that he was a member of the dreaded Mungiki sect in charge of levying cess at night in Nairobi and was living at Pipeline area since 2004 until the time of his arrest in 2016. He denied having committed the offence but stated that he met Pw1 while she was working at a pub and on 2<sup>nd</sup> December 2014, she took him to her house where he found her living with the deceased and another lady called Ngoiri, and that he started visiting them from time to time and he thereafter started a secret love affair with the other woman and when PW1 found out dispute a rose between them and every time they fought, she would take the child away either her leaving him with the other woman .
  18. He stated that since the child was young and did not know right from wrong, he would from time to time counsel him, he denied ever beating the deceased and or leaving his clothes, neither had she chased him away from her house. He stated that the last time he saw PW1, the deceased and the other woman was on 30<sup>th</sup> June 2015, and did not thereafter switch of his phone as alleged until 17<sup>th</sup> march 2016 when he was arrested in his house at pipeline and taken to embakasi police station where he was told to assist with investigations on the murder of the deceased and was shocked to hear of his death.
  19. In cross examination he stated that PW1 was his lover and not wife and that whereas the same used to live in Dandora, he was living at pipeline. It was his further evidence that he did not record any statement with the police before he was charged and that he had left the mother of the deceased and moved on with his life.



## **SUBMISSIONS**

20. At the close of the defence case, the prosecution opted not to make any final submissions and urged the court to rely on the evidence on record and the submissions at no case to answer stage. The accused made his written submissions which were adopted by his Advocate on record.

The accused submitted that the incidence took place on 1<sup>st</sup> august 2015 and that he was arrested in march 2016 faraway from the locus in quo which brought in an element of alibi, he contended that the circumstantial evidence tendered by the prosecution was not cogent to connect him to the crime and further that the prosecution failed to establish that he had a motive to kill the deceased.

21. It was contended by the accused that he had an alibi defence since he was arrested at Pipeline ten kilometres away from where the deceased was killed and in support thereof he submitted the case of *Uganda v Sebyala & another* [1969] EA 204 where the court stated that an accused does not need to establish that his alibi is reasonably true and that all he needs to do is to create doubt as to the strength of the case for the prosecution.
22. It was submitted that crucial prosecution witnesses including the informer, who led to his arrest, were not called, in support of which the case of *Joseph Otieno Jumav R* [2011] eKLR, was tendered to the effect that if the evidence of the informer is necessary to prove the guilt of an accused person then it is necessary for him to testify. He referred further to the case of *Paul Kanja Gitariv R* [2016] e KLR where the court stated that where the prosecution calls evidence that is barely adequate, then failure to call vital witnesses may entitle the court to draw an inference that had such witnesses been called their evidence would have been adverse to the prosecution case.
23. He submitted further that the prosecution failed to establish the doctrine of common intention, between him and the lady they were staying with, it was contended that the prosecution case was riddled with material contradiction and inconsistencies and that the prosecution failed to prove its case beyond reasonable doubt.

## **ANALYSIS AND DETERMINATION**

24. The fact and the cause of death of the deceased was not disputed throughout the course of this trial, the mother of the deceased testified that when she returned back to her house from her night duties she found the same lying down in a locked room and that his neck was not stable. This evidence was corroborated by her neighbour PW2, he was eventually taken to Kenyatta National Hospital where he was admitted at the ICU, where he died. The cause of death was proved through the evidence of PW3 Dr Edwin Walongwo who produced post mortem examination report confirming the cause of death to be asphyxia due to manual strangulation. The accused person's submission that the said post mortem report was not produced by the maker is not supported by the evidence on record and I therefore find and hold that the prosecution proved beyond any reasonable doubt the fact and cause of death of the deceased.
25. The only issue in dispute is whether the said death was caused by an unlawful act by the accused person. As submitted by the accused, the prosecution case was solely based on circumstantial evidence as there was no eye witness who saw the accused commit the act. To sustain a conviction on a case based on circumstantial evidence, the prosecution is under a duty to establish the following: that the said evidence unerringly points to the accused and no other person as the perpetrator and that there are no other co-existing circumstances that could weaken or destroy the inference of guilt of the accused as was stated in the cases *Abanga Lias Onyango v R* and *Sawe v R*.



26. The court in the case of *Mwangi and another v Republic* [2004] 2 KLR 32 the court stated that in a case depending on circumstantial evidence each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of an explanation on any other reasonable hypothesis except that the accused is guilty as charged.
27. In this case the following circumstantial evidence were advanced by the prosecution, that accused was left with the deceased while his mother had gone to work and that when she came back the accused was nowhere to be seen and the door was locked from outside. The accused thereafter disappeared into thin air, this to my mind brought the accused within the doctrine of last seen with as was stated in the case of *R v EKK* [2018] eKLR where the court had this to say “41. I find that the prosecution’s evidence places upon the accused a statutory burden to discharge a rebuttable presumption that having been the last person with the deceased before she died, he should explain how she died. The statutory rebuttable presumption is spelt out under Sections 111(1) and 119 of the *Evidence Act*. These sections stipulate as follows:

“111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

42. Having been placed at the scene of the incident as the oldest person who was last seen with the deceased before she died, the accused has a duty to give an explanation of how the deceased met her death, or alternatively how they parted company.

43. 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.”



44. In yet another Nigerian case the court considering the same doctrine, in the case of Stephen Haruna v The Attorney-General Of The Federation [2010] 1 iLAW/CA/A/86/C/2009 opined thus:

"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."

45. Quoting from another jurisdiction, to be specific India, the courts there have developed that doctrine further. In the case of Ramreddy Rajeshkhanna Reddy & anr 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."

28. When put on his defence, the accused failed to dislodge the prosecution evidence that he is the last person to had been seen with the deceased alive and his alleged alibi defence was in respect of the date of his arrest and not on the date when the deceased died, as the evidence on record placed him with the deceased together only for him to disappear after the death.
29. The other circumstantial evidence, is the conduct of the accused person. He was living with the mother of the deceased and in his evidence they were lovers whereas the same considered her his wife, after the alleged commission of the offence, the accused went underground and did not communicate with PW1 until he was arrested some two years thereby portraying a guilty mind.
30. The final issue for determination is whether the accused had malice aforethought, there is evidence on record that the accused did not like the deceased and used to abuse him in what in his defence he stated correcting him, the evidence of PW2 was very clear that anytime the deceased was left with the accused, he would run into her house, further there is evidence that the deceased mother had evicted the accused from her house only for the same to find his way back.
31. I therefore find and hold that the accused had motive to eliminate the deceased who was not his biological child and that on the material day he succeeded.
32. I therefore find and hold that the prosecution proved all the elements of the murder and therefore find the accused guilty and convict the same of murder contrary to section 203 as read with section 204 of the penal code.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>th</sup> DAY OF OCTOBER 2022**

**J. WAKIAGA**

**JUDGE**

