



**Maina v Republic (Criminal Case 19 of 2016)
[2022] KEHC 16681 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16681 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL CASE 19 OF 2016
RM MWONGO, J
DECEMBER 20, 2022**

BETWEEN

ROSE NJERI MAINA ACCUSED

AND

REPUBLIC RESPONDENT

RULING

1. The accused is charged with Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of the offence are that on the night of November 14, 2016 at Kiamuguongo Village in Kirinyaga West Sub-County within Kirinyaga County unlawfully she murdered Peter Kariuki Njeri, her son, a minor.
2. The brief facts of the case are that on November 14, 2016, the accused Rose Njeri Maina went to Kagio Township at about 1800hrs. She picked her son, PKN, who been attending [particulars withheld] Primary School until then, and left with him. The boy had been living with his grandfather, Benson Gichira Ngigi, and the accused was only known to visit occasionally, This time, she took the boy in a hurry while he was out playing with other children
3. On the way, she called Samson Maina Rukungu, the biological father of the boy and informed him that she was on the way with the minor, but he was sick and unable to walk at Kanyiri River. She said she needed assistance as the minor was too heavy for her to carry alone. He sent, Grace Muthoni, who on arrival at the River found the minor lying down unconscious. She assisted and took the minor to Karatina District Hospital where he was pronounced dead on arrival.
4. According to the state the Accused killed her son and the motive was that she wanted to be in a relationship with a man who was not willing to take her and the child.
5. The hearing of the case commenced in December, 2016, when the accused was arraigned in court and pleaded not guilty. It has been handled by four Judges.



6. The prosecution called eleven (11) witnesses, none of whom were eyewitnesses to the alleged killing.

The Law on Case to Answer

7. The state is obliged to prove that there is a *prima facie* case to which the accused is expected to answer. This burden is upon the prosecution throughout and does not shift to the accused, who is constitutionally guaranteed innocence until proven guilty.

8. A *prima facie* case, has been defined as follows In Republic v Abdi Ibrahim Owl [2013]eKLR:

“‘Prima facie’ is a latin word defined by Black’s Law Dictionary 8th Edition as, “sufficient to establish a fact or raise presumption unless disapproved or rebutted”. ‘Prima facie’ is defined by the same dictionary as “the establishment of a legally required rebuttable presumption.”

9. Thus, *prima facie* means the establishment of a rebuttable presumption that an accused person is guilty of the offence he/she is charged with. In *Ramanlal Trambaklal Bhatt v R* [1957] EA 332 at 335, the court stated as follows:

“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’s case, the case is merely one in 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 questionthere 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 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, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”.

10. The exercise of determining whether an accused has a case to answer is underpinned by section 211 [CPC](#) which requires that:

“...if at the close of the evidence in support of the charge and after hearing the summing up of submissions the “it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence”

The Evidence

11. With this background of the law, I now examine the substance of the prosecution evidence.
12. The evidence of PW 1 Joyce Wangui Mwaniki, was that she met the accused at the gate of their plot walking with the deceased at about 6.30am on the material day. The next day she heard that the deceased had died.
13. The evidence of PW 2 Mercy Wanjiru Muchiri was that testified that she was a resident at the plot where the deceased lived with his grandparent. The minor was in good health. She recalled seeing the accused taking the minor with her, and was shocked to learn on the November 15, 2016 that the minor had died.



14. PW3 Benson Gichira Ngiria was the custodian of the boy since the grandmother had travelled to Nairobi on the November 14, 2016. He left the boy jovial and in good health on the November 14, 2016 as he went to attend a burial that delayed. On arrival back home at about 7pm he was informed that the minor had been picked by the mother. On the November 15, 2016, he was informed to report Kagio Police Station and later to Baricho Police Station as the boy had died.
15. PW4 Grace Muthoni testified that she was instructed by Pw-10 (Samson Maina Rukungu) that she should proceed to Kanyiri River to assist the accused who had a sick child. Upon arrival, she found the minor in a lot of agony as he struggled to breath with difficulty. She used all her effort and assisted the accused and the minor to get to Karatina Hospital and was informed the minor died.
16. Lucy Wanjiru Maina testified as PW 5. On November 14, 2016 she was telephoned by a lady from the plot informing her that the child was taken away by her mother. She wondered where the mother was taking him as she had lived with him for 8 years. The next day she was informed that the child had died. The accused had told her that she was planning to get married but did not want her suitor to find out about her child.
17. PW6 was Isaak Kabugi. He testified that on November 14, 2016 he was called by Grace Muthoni at about 9.00pm to go and assist them carry the child of Rose Njeri who was sick. He accompanied Grace Muthoni to the scene about 40 metres away. He found Rose Njeri and the deceased child sleeping on the ground. He helped to carry the child to his grandfather's house, Samson maina. Then they all took the child to Karatina Hospital. The child died on arrival at the hospital.
18. PW7 Peter Murrithi Mwangi testified that he used his vehicle KBK 348 B to transport the deceased child to karatina Hospital. The child was pronounced dead upon arrival at the hospital
19. PW8 Jemimah Njoki Maina testified that on the material day she was called by her sister Serah Wangui Maina and informed that her sister's sick child been taken to hospital. Her mother suspected that Rose had killed her child. On attending the postmortem and did not see any visible injuries on the body.
20. The chief of Kibingoti sub-county David Wachira Maina testified as PW9. He said that on December 15, 2016 he received a report that there was a child who had died and it appeared he was killed by the mother. On locating the accused, she allegedly confessed to having killed the child to offer sacrifice to Devil Worship for Sshs 20,000. He arrested her and took her to Baricho Police Station. No formal confession statement was taken.
21. The accused's father Samson Maina Rukunqu testified as PW 10. He said that on the 3rd of December, 2016 in the company of Police Officer from Baricho Police Station he witnessed the Post Mortem of the minor Peter Kariuki who was the son to the accused. The minor did not have any physical injuries neither was he sickly.
22. The star witness was PW11 No xxxx PC Luke Kiprotich, the investigating officer. He stated that he was able to establish that the minor who lived with the grandparents was picked by the biological mother on the November 14, 2016 while in sound health; that the minor who had been picked at 6pm was dead by 9pm, which made the accused the prime suspect as the minor had been well and playing with others before the mother came.
23. He re-arrested the accused who had been escorted to the station by the Assistant Chief and Administration Police Officers from Kibingoti AP Post. On November 17, 2016 he went to view the deceased body. It had injuries on the chicks like bruises and on the lips. The investigations indicated that the deceased died as result of aphasia due to suffocation. During the Post Mortem which he attended, the minor had bruises on the upper lip with some injuries on the chicks like bruises and on the lips.



- By consent, he tendered as Exhibit (1), a toxicology report which indicated there was no chemical substance in the body.
24. The evidence adduced by the prosecution witnesses merely establishes that the person last seen with the deceased was the accused. It is circumstantial evidence. There is no evidence of what caused the death of the child.
25. At the mention on March 7, 2022, it was agreed by consent that due to the age of the case the prosecutor would close his case on March 29, 2022. n that date the prosecutor waited for witnesses to be brought by the concerned police officers. None showed up. The prosecutor reported to court:
- “Ive been witing for police officers to come to court... they are now disowning the file and being rude regarding proceeding with case....In the circumstances I have painfully decided I can do no more but to close our case.....We are constrained to close our case and file submissions”
26. At the time the prosecutor closed their case, the Pathologist who conducted the post mortem had neither testified nor produced the post mortem report. Accordingly, the cause of death of the deceased remains unknown. It could be illness, or something more sinister. It will never be known. Nor will it be possible to connect the accused with the said death given that the only evidence available is that the deceased died having last been seen walking with the accused.
27. In the case of *Ndungu v Republic* [1985] eKLR the court of Appeal held as follows regarding post mortem reports:
- “Where the body has been examined a postmortem report must be produced, the trial court having Informed the prosecution that the normal and straight forward means of seeking to prove the cause of death is by regularly producing postmortem examination report as a result of which the medical Officer who performs the postmortem examination is cross-examined.”
28. As for circumstantial evidence, it was held by the Court of Appeal amplified in *Sawe v Republic* [2003] KLR 364, as follows:
- “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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shifts to the party accused.”
29. The prosecution is duty bound to prove that there was malice aforethought, intention to cause harm or death, knowledge that the act or omission causing death and intention. Section 206 of the *Penal Code* stipulates that Malice aforethought shall be deemed to be established by evidence proving:
- a. An Intention to cause the death or grievous harm.
 - b. Knowledge that the act or omission causing death will probably cause death of or grievous harm to the same person.
 - c. An intention to commit a felony.



30. As it stands, the prosecution submits that the accused by hurriedly picking the minor from the grandparents had all the malice aforethought to harm and cause the minor's death, which allegedly was occasioned by the injuries noted during the Post Mortem that indicated that the minor died as result of aphasia due to suffocation. However, the post mortem report has not been produced, and thus that view is unascertained and unsupported.
31. In the instant case the prosecution has not provided evidence that shows that the accused committed the said act of murder, or had malicious intent. There was evidence led, though, to the effect that the child was already sick. In these circumstances, there is no basis on which the accused can be put on her defence; except to fill in the many gaps in the prosecution's case.

Disposition

32. Section 306 (1) of the [Criminal Procedure Code](#) provides that:

“When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty. (2) When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence.....”

33. In the end, I have not seen any evidence that persuades me to come to a position that the accused did anything untoward that caused or contributed to the deceased's death.
34. In light of all the foregoing, and in particular, given that the evidence adduced by the prosecution witnesses is largely circumstantial, and further given the absence or failure of the prosecution to call the Pathologist or produce a post mortem report to detail the cause of death, the prosecution has failed to make out a prima facie case requiring the accused to mount a defence.
35. Accordingly, there being no case to answer, the prosecution case is hereby dismissed. The accused is hereby acquitted and she shall be set at liberty forthwith, unless otherwise lawfully held.

Orders accordingly.

DATED AND DELIVERED AT KERUGOYA THIS 20TH DAY OF DECEMBER, 2022

RICHARD MWONGO

JUDGE

Delivered In the presence of:

Mr. Ndana, for the Accused

Rose Njeri Maina, Accused present

Mr. Mamba, for the State

Court Assistant: Mr. Murage

