



**Republic v HNM (Criminal Case E041 of 2021)  
[2022] KEHC 16641 (KLR) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16641 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL CASE E041 OF 2021  
RM MWONGO, J  
DECEMBER 19, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**HNM ..... ACCUSED**

**JUDGMENT**

1. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) cap 63 laws of Kenya.
2. The particulars are that on the night of 6<sup>th</sup> and December 7, 2021 at around midnight, at Kiandai village, Mwerua location in Kirinyaga West Sub-County, Kirinyaga County, she unlawfully murdered JW, her son aged four (4) months.
3. When arraigned in court the accused pleaded not guilty. Subsequently, a positive probation officer's pre-bail report was filed to enable the court decide on a bail application made by the defence counsel. Eventually, the defence sought to engage with the state on a plea-bargaining agreement (PBA). The state was agreeable.
4. On November 3, 2022 the parties were ready with a plea-bargaining agreement which they had signed. The parties also completed the court form for recording of a plea-bargaining agreement.
5. The facts as presented by the prosecution in the plea-bargaining agreement and to which the accused has agreed, are as follows: On July 27, 2021 the accused gave birth to her son, JW. He had no birth or health complications from the time of his birth.
6. On December 6, 2021 at about midnight, the baby started crying relentlessly, and the accused started inflicting injuries on the child's cheeks seeking to induce the baby to sleep. She made the baby sleep



on her stomach, and having been under stress of financial difficulties, she also fell asleep thinking the baby was well.

7. On the December 7, 2021 she woke up at around 7.00 a.m and went to prepare some porridge for her son. On trying to wake him up, she realized that he was unresponsive, and had died.
8. A post mortem report dated December 15, 2021 by dr Karomo, which was attached to the plea-bargaining agreement, indicates that the external appearance of the child was that he had central and peripheral cyanosis, no signs of strangulation were seen, and there were excoriation (pinch) marks on both cheeks. Internally, he found milk particles within the trachea, and the digestive system disclosed a full stomach with milk partially digested.
9. Dr Karomo formed the opinion that the cause of death was:

“Asphyxia following choking on stomach contents”
10. The plea-bargaining agreement was recorded and adopted by the court pursuant to section 137 F Criminal Procedure Code, after the following actions had been taken: The accused took oath and informed the court that she understood all her legal rights set out in section 137 F (1). The court was satisfied in terms of section 137 G Criminal Procedure Code that the accused was competent to make a plea agreement, was of sound mind, and had acted voluntarily.
11. Accordingly, the court convicted the accused for manslaughter and fixed the state for mitigation on December 19, 2021. The court also directed that a probation officer pre-sentence report be filed.
12. At mitigation, the defence counsel stated that the accused had never had a history of anti-social behaviour; that she had no intention of killing her child; that the incident was an unfortunate accident; that the accused had no criminal record; that the accused was remorseful; that she sought the court’s leniency; and that she prayed for a non-custodial sentence of 3 years’ probation.
13. The state submitted that the accused should be sentenced to twenty (20) years imprisonment as she should be made to understand that a child is protected by the law.
14. The court has carefully considered the facts set forth in the plea-bargaining agreement. In particular, the court notes that no witnesses other than the pathologist are indicated. It is also clear that the baby died from asphyxiation due to choking on his own food and no ulterior intention is attributed to the accused.
15. Under the circumstances, the best conviction the state would potentially have achieved is therefore one of manslaughter. Even then, there is no evidence that the accused had any awareness that placing her baby on his stomach could have resulted in his death. As such, under the circumstances, the penal consequences must be minimal and proportionate.
16. I have taken into account the probation officer’s report filed on November 17, 2022. It indicates that the accused was born on May 24, 2001 and was 20 years old at the time of the offence. She has another child aged 3 ½ years. The community know the accused as a good person who related well with members of the community. The victim impact assessment disclosed that the deceased child’s father laid no blame on her, and that he is not opposed to her release and return home.



17. The probation report recommends that:

“..... The offender is suitable for non-custodial mode of treatment and recommend a probation order during which the (probation officer) will work closely with her parents to enable her engage in formal education and later a course of her choice”.

18. Taking all these matter into account, and having in mind the object and purposes of the judiciary sentencing policy and guidelines, I am of the view that a custodial sentence will deter and not aid, the accused’s rehabilitation and will not achieve any useful societal purpose.

19. Accordingly, I sentence the accused as follows:

- 1) She shall serve a two (2) years non-custodial sentence during which she shall be engaged in a programme designed by the probation officer and to include community service.
- 2) Should the accused fall afoul of the law and be convicted of any offence within those two years, the accused shall automatically be liable to re-sentencing herein.

20. Orders accordingly.

**DELIVERED AT KERUGOYA THIS 19<sup>TH</sup> DAY OF DECEMBER, 2022.**

**RICHARD MWONGO**

**JUDGE**

1. Accused: Present in Person

2. Magee holding brief for Asimwe

3. Mamba for State

