



REPUBLIC OF KENYA



**Republic v Kimwele (Criminal Case E012 of 2022)
[2025] KEHC 3443 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3443 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE E012 OF 2022**

**JN ONYIEGO, J
MARCH 20, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

JAMES KALONZO KIMWELE ACCUSED

JUDGMENT

1. The accused person is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on 22.06.2022 at Boji area within Madogo Location, Tana River County murdered Fundi Kalonzo.
2. Having denied the charge, the matter proceeded to full trial. Prosecution called nine (9) witnesses in support of the state case.
3. PW1, Kunyo Abadada testified that on 22.06.2022, he was at his place of work when he received a call from his children requesting him to go home. He stated that upon returning home, he found women screaming. Upon making enquiries, he learnt that one of his tenants had lost a child. He told the court that the mother of the child claimed that her husband had killed their baby. On cross examination, he stated that the accused person after the incident fled the scene and was later arrested within the village about less 1km from the scene.
4. PW2, Auron Kunyo testified that on the material day, he was at home when a village elder called and informed him that someone had killed his child. He proceeded to the said scene where he found a baby lying on a carpet. He stated that the mother to the deceased child told him that her husband had killed their baby and thereafter fled. That upon getting the cell line of the accused person, he called and the accused told him that he feared for his life. That the accused person was willing to return home but the elders opted to pursue him and along Degi Primary School, they caught up with him. Upon being questioned why he committed the unlawful act, the accused person averred that the child had fallen



- sick. It was his case that they took the accused person to Madogo Police station as the police proceeded to the scene to pick the body of the deceased.
5. PW3, Jacline Kitonga Kimwele, a boda boda rider testified that on the material day, he received information from the neighbours that James Kilonzo's son to Fundi Kilonzo was sick and was admitted in hospital at Garissa. He thus proceeded to the hospital where he gave James and his wife Mwendu some food.
 6. He recalled that the baby was in an incubator. That on 21.06.2022, he visited them at the hospital again. On that day, he found the baby in the I.C.U. with a bandaged head. On 22.06.2023, Mwendu called and told him that the baby was feeling unwell and so, he went to their house where he confirmed that indeed the baby was unwell as he could not breastfeed. While there, he urged the parents of the deceased to take their child to the hospital but the deceased's parents claimed that they had no money.
 7. He later learnt that the baby had died and his body was taken to the mortuary. On cross examination, he reiterated that the child had been admitted at Garissa general hospital as he was born pre-maturely. It was his testimony that the child had been discharged against his mother's opinion as they had no money to facilitate his treatment.
 8. PW4, Kitheka Mwendwa, a businessman and Chairman to Kamba community in the region recalled that on 30.06.2022 he went to Madogo Police Station to make a follow up on the death of the deceased. While there, he was told to visit Garissa hospital to witness post mortem on the body of the deceased. He recalled that the doctor who performed postmortem examination established that the child had died due to a head injury. On cross examination, he stated that the body was not opened and therefore, post mortem was superficially done.
 9. PW5, Ibrahim Adan Gedi, a village headman stated that on the material day, he was from grazing his goats when he found many people gathered at PW1's plot. That he saw a baby lying dead on a carpet while his mother was crying that her husband had killed their baby. According to him, he did not see any visible injury but nonetheless decided to report the matter to Madogo Police station.
 10. He told the court that the father to the deceased's baby suspected that the baby did not belong to him. On cross examination, he stated that the mother of the deceased said that she had left the deceased with the accused as she left for the toilet but upon going back, she found the baby dead.
 11. PW6, No. 261328 PC Evans Kanathi, recalled that on 22.06.2022, he was at the police station when he heard some noise from the members of the public and upon peeping, he saw a male adult being brought towards the office. That the DCI informed them that the suspect had allegedly killed his 6-day old child. The DCI requested him to accompany PC Oduor to the scene where they were joined with OC crime IP Abdullahi. On arrival, they found the body of the deceased lying lifeless on a mattress and therefore, called other officers to come and process the scene. That the body of the deceased was taken to the mortuary for preservation and post mortem.
 12. PW7, Noor Dara stated that on the material day, he was in the house when PW1 called and informed him of the incident herein. He thus left for the scene where he found the deceased lying dead on the ground. He stated that he informed the area chief together with the police. That the mother to the deceased informed them that the accused had allegedly killed the baby as he suspected that he was not his. On cross examination, he averred that he saw marks on the neck of the child as it had been strangulated.
 13. PW8, Dr. Fred A. Naibei stated that he conducted post mortem on the body of the deceased and on general observation, noticed that the body of the deceased had undergone rigor mortis. That the deceased had a swollen fractured head, a whitish discharge flowing from his mouth and a laceration on



- the right femur. He stated that although an internal examination was not done, he formed the opinion that the cause of death was due to the head injury. He further clarified that there was free movement of the neck and laceration which implied strangulation.
14. PW9, No. 1113594 PC Malik Mumo Oduor, the investigating officer recalled, that on 22.06.2022, it was reported by one Adan Ibrahim of a murder case. That in company of his colleagues, they visited the murder scene at Boochi area where Adan showed them the house rented by the accused person. Inside the house, they found a baby lying dead and so, he made arrangements to take the child to Garissa hospital but upon arrival, the baby was declared dead. He then embarked on investigating the circumstances under which the baby died and further, recorded statements from the witnesses. He reiterated that Susan Mwendu, the mother to the deceased told him that she had a quarrel with the accused person which prompted her to leave the baby with the accused. On returning, she found the baby lying dead on a mattress and the husband was nowhere to be seen.
 15. That he managed to arrest the accused person through the help of the members of the public and the area chief. Preliminarily, he caused post mortem to be done and the results showed that the deceased had been strangled. The outcome of his investigations informed him to prefer the charges herein against the accused person. On cross examination, he confirmed that the baby was born with medical complications but the same notwithstanding, there was an occasion when the baby was sneaked out of the hospital as its parents lacked money to pay for the hospital bill.
 16. The prosecution closed its case and via a ruling delivered on 07.11.2024, the court placed accused on his defence.
 17. DW1, James Kilonzo Kimwele in his sworn evidence denied killing the deceased. He averred that the deceased was his child with one Susan Mwendu. He further stated that the deceased was born prematurely and consequently was to be kept in an incubator for two months. That before the two months' expiry, his wife took away the child from the hospital and therefore, he was angered by that act.
 18. According to him, he returned the child back to the hospital but the mother escaped with it again urging that she would rather use the traditional medicine. It was his evidence that on 22.06.2022, he left to repair his motor cycle and thereafter visited his brother Joshua. That while at Joshua's place, he received a call from the chief informing him of what had happened. He thus decided to return home and while on the way, he met the chief who proceeded to arrest him.
 19. The court directed parties to file their respective written submissions.
 20. The prosecution failed to comply with the order on submissions while the defence filed submissions dated 10.12.2024. The accused person urged that the deceased died as a result of medical complications culminating to his being placed in I.C.U. prior to its death. That it was not easy to ascertain whether the deceased died as a result of medical complications or due to being sneaked out of the I.C.U., or lack of feeding or from the alleged strangulation.
 21. That the foregoing position was supported by the evidence of all the prosecution witnesses. The accused person faulted the prosecution for having failed to call material witnesses who could have helped this court reach a logical conclusion. To that end, it was urged that the prosecution failed to shift the burden as the essential elements of the offence of murder were not proved.
 22. I have considered the evidence adduced by the prosecution witnesses and the defense proffered by the accused person. The main issue for determination is whether the prosecution has proved its case against the accused person beyond reasonable doubt to sustain a conviction for the offence of murder as charged.



23. Section 203 of the *Penal Code* under which the accused is charged provides that: -Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. Nyakundi J. in the case of Republic vs Ismail Hussein Ibrahim [2018] eKLR observed;
- “...the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt and that there is no burden on the part of the accused to prove his innocence at any one given time. The law only permits very few statutory exceptions where an accused person can be called upon to give an explanation in rebuttal. However, this does not shift the burden of proof from the prosecution”.
24. In Republic vs Mohammed Dadi Kokane & 7 Others [2014] eKLR the elements of the offence of murder were listed by M. Odero, LJ. as follows: -
- i. The fact of the death of the deceased.
 - ii. The cause of such death.
 - iii. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly
 - iv. Proof that the said unlawful act or omission was committed with malice aforethought.
25. On whether there is proof of death and the cause of the said death, PW8 testified that he conducted post mortem on the body of the deceased and consequently signed the post mortem report. He testified that he observed that the body of the deceased had undergone rigor mortis and the head was swollen on the left part. That in as much as he did not do an internal examination, he formed the view that the cause of death was a head injury as evidenced by fractured left temporal parietal skull bone. That the freely moving neck suggested a possible strangulation. From the foregoing, I have no doubt that the deceased subject of this case indeed died.
26. On whether the death of the deceased was caused by an unlawful act, there is no doubt that the death of the deceased was caused by the injuries that he sustained. Article 26 (1) of *the Constitution* of Kenya 2010 guarantees every person the right to life. Under Sub-article 3, a person shall not be deprived of life intentionally except to the extent authorized by *the Constitution* or other written law. [See *Guzambizi Wesonga vs Republic* [1948] 15 EACA 65]. The evidence before this Court irresistibly points to an unlawful act that led to the death of the deceased.
27. On whether the prosecution proved beyond reasonable doubt that it was the accused person who committed the unlawful act which caused the death of the deceased, there is no direct evidence tendered before this Court. It is clear that the prosecution is relying on circumstantial evidence to prove its case. The same notwithstanding, the prosecution is relying on the doctrine of last seen to prove its case against the accused person.
28. In the case of Ahmad Abolfathi Mohammed & another vs Republic [2018] eKLR, the Court of Appeal had this to say on circumstantial evidence:
- “However, it is altruism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence.”



29. The Court of Appeal in the case of *Moingo & Another vs Republic* [2022] KECA 6 (KLR) had this to say regarding circumstantial evidence:

“The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rest squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide case 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 an inference that the accused killed the deceased.” [Also see *Ngeno vs Republic (Criminal Appeal 24 of 2016)* [2024] KECA 757 (KLR)].”

30. From the record, it is clear that the house in which the baby was found dead, was occupied by the accused, his wife and the deceased. It is also a fact that the child prior to his death was sick having been born prematurely. It is also the testimony of pw3 and indeed the accused that the child was removed from hospital prematurely due to lack of money to meet hospital expenses.
31. It was alleged that the mother to the baby stated that she left the baby with the accused and on returning, she found the baby dead. That she suspected her husband because he had claimed that the child was not his. This bit of evidence is hearsay. It was not corroborated by the original source.
32. To the contrary, the accused stated that while in hospital with the sick baby, his wife forcefully demanded to have the child discharged as there was no money to meet the hospital bill. According to the accused, it was his wife who escaped with the baby from the hospital and that made him beat her on the night of 21-06-22. Accused said he left the baby alive on the morning of 22-06-22 as he proceeded to his place of work.
33. It is not clear as to who wanted the baby dead and who between the mother and father killed the baby. Unfortunately, the mother did not testify. From the alleged conduct of the mother disappearing with the baby from hospital yet the baby was required to be in an incubator for two months is questionable. Only the accused and the wife know the truth. In the absence of the deceased’s mother’s evidence, there is room for doubt as to who killed the baby.
34. It is trite that where there is reasonable doubt, such benefit must go to the accused person. See In *Elizabeth Waithiengi Gatimu v Republic* [2015] eKLR, Mativo, J (as he then was) stated that:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child



of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

35. Considering the totality of the evidence on record and unique circumstances surrounding the death of the deceased, there is some element of innocence being portrayed on the part of the accused. In my view, the accused’s explanation appears to be more probable hence a benefit of doubt. It is unfortunate that the innocent life was lost.
36. In a nutshell, it is my finding that prosecution has not proved its case beyond any reasonable doubt. Accordingly, I am inclined to find accused person not guilty hence acquit him accordingly. Accused is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF MARCH 2025

J.N. ONYIEGO

JUDGE

