



**Republic v Juma (Criminal Case 9 of 2020) [2025] KEHC 11303 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11303 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL CASE 9 OF 2020**

**GL NZIOKA, J**

**JULY 23, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BENSON KIMANI JUMA ..... ACCUSED**

**JUDGMENT**

1. The accused was arraigned in court 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 of the offence are that on the 27<sup>th</sup> day of March, 2020 at Magumu location in Kinangop sub-county, within Nyandarua County, he murdered Joyce Wanjiru Kimani.
3. The charge was read to the accused and he pleaded not guilty thereto. The case proceeded to full hearing. The prosecution case was led by the evidence of (PW1) Joyce Wanjira Nyambura. She testified that the accused is her husband. That she was staying with him and their two children namely Joyce Wanjiru (deceased) aged 2½ years and Mercy Nyambura aged 2 years.
4. That on the material date, she left the accused at home with the deceased and went to attend to her daily work of selling second hand clothes. That she went with the younger child, Mercy Nyambura. That at the time she left the house the deceased was in good health and as a matter of fact, was playing outside the house.
5. (PW1) Nyambura stated that when she returned home later in the evening at about 8:00pm, she found the accused at home and when he opened the door he inquired from her whether she had seen the askari. However, she did not know of any askari outside their house and asked the accused which askari he was talking about. That, at that point, the accused told her the deceased child was unwell.
6. That (PW1) Nyambura rushed to check on the deceased child and noticed that she was in bed, covered but unconscious and told the accused they take the child to hospital but he declined saying that he



- had bought her medicine from a chemist. That upon inquiry as to what had happened, the accused told her that the child had gone to her grandmother's home, fallen down and injured her eyes and face which were swollen.
7. However, PW1 insisted that the deceased child be taken to the accused's parents' home and they went. That in the company of the accused's sister, one Fatuma, the deceased's child was taken to a Magumu Hospital, and upon examining the child, the doctor advised the parents to report the matter to the police station as the deceased child had been defiled. Further that bloodstains were noted in her private parts.
  8. In the meantime, the deceased child was referred to Naivasha District Hospital but died the same day in the evening. At the same time, the matter was reported at Magumu police station and the accused was arrested and placed in the cells.
  9. The post mortem was conducted by (PW3) Dr. Titus Ngulungu who concluded that the child died as a result of traumatic pressure to the chest, nose, limbs and shock. That the shock was caused by pressure on the uterus, rectum and vaginal area, and forced pressure on the mouth, nose, chest and genital penetration. The doctor took nails, swab of vagina and blood for DNA analysis.
  10. Subsequently analysis was conducted on the afore samples and other items by (PW7) Susan Ngugi and she concluded that, the deceased's pink top and grey trouser marked 'E' and 'F' respectively and the finger nails were moderately stained with blood of human origin. That the vagina swab (marked 'A' and 'B2') and top (marked 'E') were stained with semen. However, the seminal stains on the high vaginal swab item 'A' and item 'B2' did not generate DNA profile on analysis.
  11. At the conclusion of the investigation and recording of witness statements the accused was charged accordingly.
  12. At the close of the prosecution case, the accused was held to have a case to answer and placed on his defence. He confirmed that (PW1) Joyce is his wife and she left the house with their younger child to go to work and leaving him with the deceased child. That he stayed with the deceased child up to 4pm and as the weather changed as it seemed as though it was going to rain, he left the deceased child with (PW2) Ibrahim Kingori and went to his mother's house.
  13. That when he returned to pick the deceased child he found her asleep on the seat and took her home. That he cooked food and they ate with the deceased but she vomited. That he went and bought paracetamol from the chemist and gave her. However, when the wife returned home, she found the child was not opening her eyes, and they took her to his parents.
  14. That in the company of his sister Fatuma, they took the child to Magumu Hospital; wherein the doctor said the child had been defiled. Subsequently he was arrested, taken for buccal swabs and charged. He denied defiling the deceased or killing her but stated that he does not know what happened to the deceased.
  15. At the conclusion of the entire case, the prosecution relied on the evidence on record while the defence filed submissions dated 1<sup>st</sup> August 2024. The defence argue that the prosecution has not proved its case beyond reasonable doubt as there is no direct or other evidence linking the accused to the offence.
  16. That, the prosecution attempted to rely on circumstantial evidence which was however not convincing. That, (PW1) Joyce, the mother of the deceased, testified that the accused had never mistreated the deceased. Further, (PW7) Susan could not identify who was the owner of the seminal stains on the deceased's clothes.



17. Furthermore, (PW6) Corporal Nderitu the arresting officer arrested the accused without conducting any investigations and was unable to identify him in court. That, the investigations of the case were at best shoddy.
18. That, (PW5) Corporal Musoi, the investigating officer, began his investigations two (2) days after the offence and did not visit the chemist where he bought paracetamol. Further, he did not know the circumstances under which the accused was arrested and decided to charge the accused before receiving the government analyst report on the seminal stains.
19. The defence further submitted that, the present case is marred with inconsistencies on the date the offence was reported, in that while (PW5) Corporal Musoi stating that it was reported on 27<sup>th</sup> March 2020, the Occurrence Book and Investigation diary indicates that it was reported on 28<sup>th</sup> March 2020.
20. Lastly, the defence faulted the prosecution and (PW5) Corporal Musoi for failing to call Fatuma as a witness despite the fact that she had recorded her statement. That the claim that Fatuma refused to testify was not sufficient as it was never brought to the attention of the court for summons to be issued. That her evidence would have exonerated the accused.
21. At the conclusion of the case I note that the offence the accused is charged with is provided for under section 203 of the *Penal Code* as follows;

‘Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.’
22. Pursuant thereto the ingredients of the offence are settled by case law. In that regard the Court of Appeal in the case of; Joseph Githua Njuguna vs Republic (2016) eKLR stated as follows: -

“Under section 203 of the *Penal Code*, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are:

  - (a) the death of the deceased and the cause of that death;
  - (b) that the appellant committed the unlawful act which caused the death of the deceased;
  - (c) and that the appellant had harboured malice aforethought. See Milton Kabulit z& 4 others v Republic [2015] eKLR.”
23. In considering the evidence adduced, the submissions filed and analyzing the same, I find that as regard occurrence and cause of death, it is not in dispute that the death of the deceased occurred. Both parties confirmed through the evidence adduced that the death occurred
24. Furthermore, the cause of death is not in dispute. (PW3) Dr. Titus Ngulungu who carried out the post mortem procedure on the deceased’s body noted inter alia that; the deceased’s cheeks and lips were swollen, that there were abrasions on the right cheek measuring about 40mm. Further, there were multiple bruises on the forehead, nose, chin measuring 40x40mm. Furthermore there were bite marks on arm, extensive bruises on the front and inner thighs on both legs.
25. That the deceased’s genital, urinal system and private parts were swollen and torn and when probed, the tear was up to the rectum and the rectal vagina fistula could be seen. In addition, that the lungs had collapsed. Furthermore, the brain was swollen due to lack of oxygen. Hence the conclusion that the



- cause of death was traumatic pressure to the chest, nose, limbs and shock due on the uterus, rectum and vaginal area.
26. Based on the afore evidence in the post mortem report, consequently, the cause of death is clearly established.
  27. The next issue to determine is who caused the death of the deceased and whether he had malice aforethought. In that regard, it is not in dispute that when the deceased woke up on the material date, she was in good health. Both (PW1) Joyce and (DW1) the accused confirmed it.
  28. Further it is an established fact from the evidence of (PW1) Joyce and the accused that by 8pm to 8:30pm the deceased was unconscious necessitating her being taken to hospital.
  29. The question is; what happened to the deceased child? According to the mother, she left the child in the custody and care of the accused. The accused does not deny that fact. Therefore, the accused was the person last seen with the deceased before her death.
  30. Based on the afore, the doctrine of last seen applies. The doctrine states that the last person seen with the deceased will be presumed to have killed the deceased unless evidence to the contrary is adduced.
  31. The said doctrine was discussed by the Court of Appeal in the case of; *Kimani vs Republic (Criminal Appeal 41 of 2022)* [2023] KECA 1390 (KLR) (24 November 2023) (Judgment) where the court stated that:
    31. "... The doctrine of 'last seen alive' is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before their death was responsible for his or her death and the accused is expected to provide an explanation as to what happened..."
    33. In the Nigerian Case of *Achie vs State* (1993), the Court relied on the case of *Ismeni vs State* (2011) Kuktan JSC on the doctrine of 'last seen' and expressed itself as follows:

"In a case of culpable homicide as in the present one where the doctrine of last seen has been applied, the law presumes that the person last seen with the deceased before the death was responsible for his death and the accused is expected to provide an explanation of what happened."
  32. The last seen doctrine stands as negation or an exception to the doctrine of "presumption of innocence", as it is the law that where the victim was last seen by the accused, and is found dead, it will be presumed that the last person that he was last seen with is responsible for his death.
  33. Pursuant to the aforesaid, the burden of explaining what happened to the deceased shifts to the accused. In response, the accused mentions (PW2) Abraham Kingori whom he alleges he left the child with between 4pm to 8.30pm.
  34. At this stage, it is paramount to interrogate this defence. First and foremost the accused's wife (PW1) Joyce testified that when she got home, the accused told her that the child had gone to her grandmother's place, fell down, and got injured. Notably, that explanation completely contradicts his defence that he left the child at any time with (PW2) Kingori.
  35. In fact, during the cross-examination, the witness (PW1) Joyce reiterated that the accused told her yet a different version that the deceased saw his mother and as she rushed to greet her, she fell down and got injured herself.
  36. In re-examination, (PW1) Joyce told the court that the accused's mother was not at her house when she left for work and it is the accused who told her the mother had visited them.



37. Finally, on that point, it is noteworthy that, when the accused was arrested he did not give the reason of the mother's visit and/or injuries the child sustained on visiting her or rushing to greet her but introduced a different version of leaving the child with (PW2) Kingori.
38. The question is, which of these reasons advanced is true?
39. Be that as it were, (PW2) Abraham Kingori Wairimu testified and stated that on the material date, he went to work as usual, returned home, ate food with his family and retired to bed. That the following day, he was informed of the child's sickness and inquired as to why he was not informed of the same earlier and (PW1) Joyce and accused's sister Fatuma told him that the accused had objected to him being informed of the same.
40. That on 29<sup>th</sup> March, 2020, the police officers called him to go to the police station to explain how he knew the accused. That he went, was taken to Nairobi for buccal swab and later released. He denied having seen the accused and the deceased child on the material date. He confirmed that he had no disagreement with the accused and could not understand why he was implicating him in the commission of the offence.
41. In cross-examination, he stated that he did not know where the accused and the family lived and that they were not close neighbours. Further, that on the material date, there was no one in his house from 3pm.
42. Based on the afore evidence of (PW2) Kingori and the accused's defence, the question that arises is; who is telling the truth. In analysis their respective evidence the following are revealed;
- a. That, what the accused told the wife (PW1) Joyce regarding what happened to the child is not the same as what he told the police and has testified too in his defence
  - b. That, the physical injuries that (PW3) Dr Ngulungu noted on the body of the deceased were inter alia physical and wide consisting of; bruises, abrasions and genital assault. Further that the deceased child is said to have been bleeding in her private parts and which were also swollen, and badly torn. If indeed the accused left the deceased with (PW2) Kingori, and Mr. Kingori hurt the child that much, wouldn't he have noticed these physical and sexual assault injuries on the deceased when he picked her up and inquired from Kingori as to what had happened to the deceased. Would he just take the child home, buy drugs and kept quiet?
  - c. Furthermore, the buccal swab from (PW2) Kingori did not yield positive results when analyzed at the Government analyst, just as did that of the accused. Therefore, no evidence links (PW2) Kingori to the offence that he physically and sexually assaulted the deceased.
  - d. Finally, the accused only came to implicate (PW2) Kingori when arrested. He had not reported him to the police officers before he was arrested rendering his defence an afterthought.
43. Based on the aforesaid, it is the finding of this court that, the explanation offered by the accused on what happened to the deceased is not plausible, convincing, does not hold water and inadequate.
44. In his submissions the accused argue that the case is based on pure circumstantial evidence. I agree, that indeed there is no direct evidence linking him to the offence. In that regard, in the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal stated as follows: -
- “However, it is a truism 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 a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ state d as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So, it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.” (emphasis mine)

45. Similarly, the parameters for admission of circumstantial evidence were well settled in Rex vs. Kipkerring Arap Koske & 2 others [1949] EACA 135 as follows;

“In order to justify a conviction 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 and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

See also Sawe versus Republic [2003] KLR 354, Musili versus Republic CRA No.30 of 2013 (UR) and Abanga Alias Onyango versus Republic CRA. No. 32 of 1990 (UR)).

46. To revert back to the matter, the chain of events is clear, that the accused is left by (PW1) Joyce in the morning with the deceased while she in good health and in less than 12 hours, the deceased is unconscious. Notably, the accused is unmoved by that serious state of the deceased and is reluctant to take her to hospital but opts to buy her paracetamol. Subsequently, within another 12 hours, the child is dead. Taking into account these circumstances, who can explain what happened to the deceased child than the accused? And who else is more responsible for the death of the child than the accused?

47. Be that as it were, the last issue to deal with is whether the accused had malice aforethought. Malice aforethought is a legal term that indicates the mental state of a person who has committed a criminal act, in particular an offence of murder. It signifies deliberate intention to commit the criminal act and which was present before the act was committed.

48. In that regard, there are two types of malice aforethought, that is express and implied. The express malice arises when a person intends to kill or cause serious bodily harm, while implied malice is present in situation like murder occurring during the commission of the offence or when someone acts with a depraved indifference to human life.

49. Furthermore, Section 206 of the [Penal Code](#) defines malice aforethought as follows;

“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.”

50. Based on the afore provisions, knowledge that one’s action will likely cause death or grievous harm, even if there is indifference to the outcome, amounts to malice aforethought. Thus, to prove malice aforethought the knowledge of probable harm is equally relevant.
51. In addition, it is trite law that, every person is liable for the natural and probable consequences of his/her actions.
52. To revert back to the matter herein, the deceased was a child aged 2 ½ years. Indeed, a child of of extremely tender age. The accused is the father. He had the natural, moral, legal and parental responsibility to take care of the deceased and the degree of care expected is high due to the age of the child.
53. The deceased died as a result of both physical and sexual assault. The accused is a male adult and when he defiled the deceased, he knew very well the consequences of his action. The accused’s act of defiling the deceased to death is not only inhuman, barbaric, heinous, ferocious, brutal and but extremely cruel. The doctor indicated in the post mortem report that the child was so badly defiled that the internal organs could be seen.
54. What did the accused expect when he placed his entire body mass on a child of such tender age and even bite her in the course of the the defilement? The abrasions on the child’s mouth, cheeks and lips tell of the torture the deceased went through. The the lack of oxygen due to pressure exerted on her chest and body generally speaks volume of what painful death the deceased suffered. Such aggravating acts could only but result in the death of the deceased and only points to a person who had the intent to hurt to death. Even then a simple question is , why would the accused defile a two and year old child? Did he have any other alternatives?
55. I have considered the issues raised by the appellant in the submissions filed and I find that, they hold no water. First and foremost, the fact that (PW1) Joyce testified that, he had never mistreated the child does not exonerate him. Secondly, the fact that DNA results relating to the buccal swab taken from him were negative does not wash away all the other circumstantial evidence available and linking him to the offence. As regards the alleged failure of the Investigating officer to visit the scene and charging him before the DNA results were released did not prejudice the prosecution case. The scene was not visited because the child was taken to hospital and died there. Post mortem was then done. Finally, failure to call Fatuma the sister is not prejudicial to the prosecution case , as her role was merely to assist take the child to hospital.
56. Based on the afore I hold the view that the accused had malice aforethought. Consequently, I find the accused guilty as charged and accordingly convict him.

**DATED, DELIVERED AND SIGNED THIS 23<sup>RD</sup> DAY OF JULY 2025.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Wanga H/B for Ms. Chepkonga for the State

Mr. Karanja for the accused



Accused present virtually

Ms. Hannah: court assistant.

