



**Republic v JMW (Criminal Case 55 of 2018)  
[2024] KEHC 2542 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2542 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE 55 OF 2018**

**A. ONG'INJO, J  
MARCH 7, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JMW ..... ACCUSED**

**JUDGMENT**

1. The accused JMW is charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) in 2 counts.
2. The particulars to Count I are that JMW on the 6<sup>th</sup> day of December 2018 at Mshomoroni Calvery area in Kisauni Sub-county within Mombasa county murdered GW.
3. The particulars to Count II are that JMW on the 6<sup>th</sup> December 2018 at Mshomoroni Calvery area in Kisauni Sub-county within Mombasa County murdered AW.

**Prosecution's Case**

4. PW1, Dr. Ngali Mbuuko, examined the body of AW and found her head was deformed by a crushing injury on the right side. That there was midline cut on the forehead. That the conjunctiva was pale. There were also 2 more bruises below the right eye. He said there was fragmented fracture of the skull. He was of the opinion that cause of death was crushing head injury following traumatic injury to the head. When Dr. Mbuuko examined the body of GW he found small cuts on anterior of the chest, there were bruises on the neck and injuries to the lower chest. He concluded that cause of death was strangulation.
5. PW2, ANN, testified that she left the accused with the children when she went to school. That when she returned at 12.30 pm, she found the accused seated and he told her the children had gone to play. That when he went to prepare lunch she found a bucket that contained bloody water & the accused



- explained that he had cut his finger and showed PW2 a slight injury which he said he washed in the bucket and was the cause of the bloody water. That when she wanted to light meko/gas she knocked a stool that hit the curtain and she saw the body of AW lying behind the curtain in a pool of blood. She said the body was on a mattress. That she got shocked and got out of the house and called the landlady. That while outside the house, their 1<sup>st</sup> born daughter B came and held her. That she took B to Mama Mwakasia's house. She said while in Mama Mwakasia's bedroom she could hear a crowd had started forming at their house. That Mama Mwakasia came back to the house and told her, her 2 children were dead.
6. PW2 called the accused person's brother CK and informed her there was a problem at their house and he should go there immediately. PW2 said she also called her sister RK. The bodies of the 2 children were removed to the mortuary and PW2 was taken to Nyali Police Station. PW2 said the fruits she left for the children were not at the place she had left them in the morning. PW2 said she did not know if the accused went to drink in her absence.
  7. PW3, Irene Mwaringa the Government Analyst, examined exhibits forwarded to the lab by PC Onyango and found that the 2kg metal weighing stone – marked generated a partial female DNA profile matching with the blood sample of AW – Exhibit marked A. She produced the DNA Report as Exhibit 10. She said that the DNA profile of the accused confirmed he was related to the 2 deceased persons. She also told the court that the stains on the bedsheet, weighing scale & curtain tested positive for human blood.
  8. PW4, IP Billy Onyango testified that while he was attached at Nyali Police Station on 6<sup>th</sup> December 2018 he was on patrol with the Deputy OCS IP Bebroni, Cpl Kipkorir, PC Sebastian and the late PC Moroko when they received information that there was murder incident in Calvary area in Junda. They proceeded to the scene and found members of public had surrounded the accused person's house. That the house had been locked with a padlock. They got the key to the padlock from the landlady and they opened and found the accused seated on a yellow jerrican besides the door.
  9. That when PW4 asked the accused what was going on, he did not talk. He instead started wiping his hands on a curtain separating the bed from sitting area. That on searching the house they saw a bucket containing bloody water. That inside the bucket was 2 knives with brown and green handles respectively. That when they raised the curtain they saw a blue net that had blood stains. That when they raised the net they found 2 children who were covered by a bedsheet. That one of the children had a stab wound on the forehead. They established the child was A. That she also had a cut on right side of the head above the ear which was bleeding. That there were also bruises on the neck of the said child. That the 2<sup>nd</sup> child G had a deep cut on the forehead bruises on the neck and had 3 stab wounds on the chest. That the accused person did not respond when being interrogated at the scene. Scenes of crime officers were called to process and photograph the scene.
  10. That when accused realized irate members of public wanted to forcefully remove him from the house he said that he was fixing nail to hold the net on the wall using weighing stone and he fell and injured the 2 children. That he was able to identify the weighing stone which was where clothes were kept. PW4 said the weighing stone also had blood stains. That while OCS or Cpl Kipkorir remained at scene to wait for scenes of crime officers. PW4 removed accused from scene as members of public became more rowdy. PW4 said they even had to shoot in the air to scare members of public to scare them as they were being pelted with stones. PW4 said that exhibits were recovered and bodies removed to the mortuary to await postmortem. That postmortem was done on 10.12.2018 by Dr. Mbuuko – PW1. PW4 also testified that he took exhibits and blood samples from the deceased and buccal swabs from accused to Government Chemist for analysis.



11. PW5, Cpl Anthony Kinyanjui, processed scene of murder and took photographs which he produced as exhibit 10(a). He also produced Report & Certificate as exhibit – EXP 10(b). The prosecution closed its case when Gabriel Righa Mugasi then sent to landlady and CKW the brother of the accused refused to attend court to testify.

### **Defence Case**

12. When placed on defence the accused in sworn statement said that on 6.12.2018 his wife woke up and prepared breakfast which they had together. That the wife also prepared fruits for the children. That the wife left to go to school to interview children. He said it was not the 1<sup>st</sup> time she was going for such an exercise. That after the wife had left the children who were playing made the curtain to drop. That he told the children to go and play outside as he remained in the house to repair the curtain. He said as he tried to hit the nail on the wall his hand was shaking as he has had a drink the previous day. That he then decided to go to Mangweni for a drink where he ordered for a drink and took it. That he also bought 2 other bottles and carried home. That when he arrived at home he started watching TV. That while there, G went and said she was hungry. That he told G to go and call the rest so he could give them fruits.
13. That when the children came B asked what had happened to his hand and he explained that he had not cut his hand while making for them fruits. That he gave the children fruits and after they went to play he continued watching TV. That after 20 minutes there was a black out and he decided to go back to the Mangweni – palm wine den. That at around 12.30 pm lights returned and he decided to go back to the house. That when he arrived at home, some women who were washing clothes outside wondered why he had come back so early and he told them he was the one with the children. That when he entered the house his wife also arrived and asked how the day was. That he told her that the children were hungry. That the wife decided to prepare lunch. That when she went to the kitchen she saw blood and asked where the blood had come from and he told her he had cut his hand. She however told him the blood she had seen was a lot. That when the wife went in to change, she came out screaming and saying “ameua watoto wangu! ameua watoto wangu!”.
14. That when he went out to follow her, he met neighbours who asked what had happened and he told them they did not understand what was going on. That many members of public gathered and the landlord locked him in the house. That when he raised G from where she lay he confirmed she had died. That he got confused and he sat on a jerrycan until police arrived at the scene. He said when the police arrived they started beating him asking what he used to kill the children and he told them he did not understand what happened as he had come from Mangweni-palm wine den and he started watching TV. He said that police took 2 knives from among the ones he used to sell and a weighing stone which police suspected had been used to kill the children.
15. That his brother came and asked police why they were beating him. That he also told his brother he did not kill the children. He said he had no reason to kill the children. He said when his wife got a job in Mombasa he remained with the children to 6 months and he used to cook for them and take them to school. That when he was being taken away by police the landlady told him that he had hated her from the 1<sup>st</sup> time he occupied the rental room and that “leo umeingiliana”. That the police did not allow him to ask the landlady what she meant.
16. The accused in cross examination said that children were left in his custody and that by the time the wife returned he was in the house. He told the wife that the blood water in the bucket was from an injury he sustained on his hand.



## **Analysis and Determination**

17. In consideration of the evidence of 5 prosecution witnesses and in consideration of the defence witnesses' sworn statements, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
18. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya under which the accused person was charged provides as follows: -

'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'
19. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -
  - i. That the deceased died;
  - ii. That the death was caused by an unlawful act or omission;
  - iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
  - iv. That there was malice aforethought.

## **Death of the deceased**

20. There is no dispute as to the death of the deceased persons GW and AW.

## **Death was caused by an unlawful act or omission**

21. The two deceased girls aged 4 years and 6 years were found lying dead on a mattress in their parents' house, both had stab wounds and deep cuts from a sharp object as evidenced by the photographs taken by Corporal Anthony Kinyanjui, PW5, the Scenes of Crime Officer.
22. The mother of the two girls, ANN, also testified that when she returned home from school, she saw the body of AW lying down on a mattress behind the curtain on a lot of blood. She got shocked and ran out of the house, raising alarm and calling the landlady. She said that her neighbor Mama Mwakasia went to the house and confirmed both children were dead.
23. Dr. Mbuuko examined the bodies of the two girls and on AW's body, he found the head was deformed due to a crushing injury on the right side. There was also a midline forehead cut which was 3 cm long with conjunctival parlor. He also observed two more bruises below the right eye. He concluded that cause of death of AW was crushing head injury following traumatic injury to the head. For GW, he said that there was deep cyanosis which was an indication of lack of oxygen in the body. There were 3 small cuts on anterior chest which were approximately 2 cm, there were bruises on the neck and some injuries on the lower chest. He concluded that GW died as a result of strangulation.
24. The injuries that were observed on the bodies of the two girls were not self-inflicted and they were also not accidental. It is not in doubt that the cause of death of the two girls was through an unlawful act.



## Participation of the accused in the commission of the alleged offence

25. The two children and their elder sister B were left under the care of the accused person as their mother PW2 went to school to mark exams for children who had done interview for new admissions. When she returned, she found the accused person in the house and he told her that the children were playing outside. When she went to light gas to prepare lunch for her family, she found a bucket containing water that looked bloody and the accused told her that he had injured himself and washed his bleeding hand in the bucket. He showed her a slight injury on the hand. However, she knocked a shoe that was near the curtain that separated their sleeping area and the sitting room and saw her daughter AW lying in a pool of blood on the mattress. It turned out that GW had also been murdered and was lying on the same mattress.
26. When police officers arrived at the scene and found the accused had been locked inside the house, they asked him what was going on, he did not talk and only wiped his hands on a curtain that was separating the bedroom from the sitting room. Later, the accused person told PW4 that the weighing stone he was using to fix a nail on the wall fell and injured the two children. The accused identified where the weighing stone was and it was found to be having blood stains.
27. The accused person's defence that he did not know what happened when he was found seated inside the same house with the dead bodies is outweighed by the evidence of PW2 and PW4 as well as the circumstances of the case which point to the fact that he inflicted the fatal injuries on the two girls. It is therefore the accused person who committed the unlawful act that caused the death of the deceased persons.

## Malice aforethought

28. Section 206 of the *Penal Code* defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

29. On the element of malice aforethought in respect to Section 206 of the *Penal Code*, the court held as follows in the case of *Isaac Kimathi Kanuachobi v R* (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing



lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

30. The elements to prove malice aforethought were settled in the case of *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No 32 of 1990) where the Court held:

“ the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

31. The accused person used a weighing stone to crush the head of AW and he strangled GW. He also stabbed them on the forehead, inflicted bruises below the right eye of A and inflicted three cuts on the chest of Wangui. The weapons used, the parts of the body that suffered injuries and the nature of execution of the injuries makes this court infer that his intentions were to kill or do grievous harm on the deceased persons and he achieved his intentions. There is evidence of express malice on the part of the accused person and this court finds that the prosecution proved all the ingredients of murder beyond reasonable doubt.

32. The accused person is found guilty of the offence of murder and convicted accordingly pursuant to Section 322(1) of the *Criminal Procedure Code*.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 7<sup>TH</sup> DAY OF MARCH 2024.**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Mr. Ochieng' Advocate for the Accused

Accused person present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

Mr. Ngiri: I do not have previous records.

Mr. Ochieng': We pray for a pre-sentence report

Order: Mention on 30.5.2024 for Pre-Sentence Report, Victim Impact Statement, mitigation and sentence.

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**7.3.2024**

