



**Republic v Sheir alias ‘Papa’ (Criminal Case E006 of 2023)
[2024] KEHC 6024 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE E006 OF 2023**

A. ONG’INJO, J

MAY 23, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

MOHAMMED SHEIR ALIAS ‘PAPA’ ACCUSED

JUDGMENT

Introduction

1. The accused Mohammed Sheir alias ‘Papa’ faces a charge of murder contrary to Section 203 as read together with Section 204 of the [Penal Code](#).
2. Particulars of the offence are that Mohammed Sheir alias ‘Papa’ on 16th day of January 2023 at Kibokoni Old Town area in Mvita Sub-County within Mombasa County murdered GM.
3. The prosecution called 9 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

Prosecution Case

4. PW1, PJ, aged 16 years said that she stays in Makadara Grounds and she left home when her child turned 2 years. That the deceased was her child and was born on 1st July 2021. She said that the Accused in the dock was well known to her and that he was also staying at Makadara Grounds as a street family. PW1 testified that the Accused’s home was at Maboksini but he would go to Makadara Grounds and in the evening he could go back home or sometimes he could stay overnight as they chewed miraa. PW1 testified that her child liked the accused and that the accused would carry him and sometimes buy him food. PW1 said that on 14.1.2023, she was at Makadara Grounds with her sister Mama Mishi, Mama Shakira, Amina together with the Accused. That the Accused told her that instead of staying



with the child at Makadara Grounds, PW1 should allow him to go with the child to his mother's place in Kibokoni and return him the next day.

5. PW1 informed court that she allowed the Accused to go with the child at 9.00 pm. That he did this on subsequent days until on 21.1.2023 at midday when the accused took the child to PW1 and that the child had injuries above the right eyebrow and hand. That PW1 was told the child sustained burns from a candle when lights went off. That the Accused told her that he had given him Calpol and also applied some cream to the burns. PW1 said that on 21.1.2023, the accused went away with the child again. That on 22.1.2023 at 11.00 am, the accused went with his uncle to PW1 and that they were not with the child and that the accused told her that he had left the child with his mother at home. That the Accused and his uncle stayed at Makadara as they chewed Miraa but his uncle left later.
6. PW1 said that the Accused told her that the child had flu and was sick and that she told him to return the child so that she can take him to hospital. That at 4.00 am, she slept and left the accused and others still chewing miraa. That at 5.00 am, PW1's friends, Amina and Mishi, woke her up and told her that the Accused had returned the child. That at 7.00 am when she woke up, her friend Mishi told her that they should move their bedding as there was football to be played in the field. That when she tried to carry the child, she realized he was unusually heavy. That she uncovered the sheet used to cover the child and found he was bleeding from the mouth. That she realized the child was not breathing and when she opened his shirt, he found the umbilical cord had turned green. That she took the child to Makadara and the doctor told her that her child had died. PW1 testified that she went to Central Police Station to record a statement and the police took the body of the child to Coast General Mortuary. That the Accused could not be found in his home and his mother's home.
7. PW2, Dr. Abdul Aziz Mohamed from Coast General Hospital produced the Postmortem Report prepared by Dr. Nuzla. That the body of the deceased was identified by Patience Jackline Kalunde Mwangangi. That on external appearance, there was deep peripheral and central cyanosis – blue colouration of the tongue signifying lack of oxygen, there was dislocation of the cervical spine- the neck was rotating, and there were multiple bruises on anterior neck. On internal appearance, the head had hematoma on anterior neck muscles, there was dislocation of the neck on C2 and C3, and there were multiple scalp hematoma. That as a result of the examination, Dr. Nuzla formed the opinion that the cause of death was asphyxiation secondary to manual strangulation. He produced the Postmortem Report as ExP5.
8. PW3, Mudadi Omar, the Government Analyst from the Government Chemist Mombasa said that on 31.1.2023, and 1.2.2023, exhibits were submitted to the laboratory for analysis by CPL Jackline of No 96053 of Urban DCI Mombasa. That DNA analysis was done and results showed that the hair and nail generated similar DNA profile generated by reference blood from the deceased.
9. PW4, Abdalla Mohamed, the Clinical Officer from Kondebhoi Dispensary Makadara Grounds said that on 23.1.2023 at around 8.00 am, the street family kids went to the facility with a child who was confirmed dead. That PW4 consulted the area chief and he was informed that it was a police case that needed to be reported, which advise was given to the people who went with the child.
10. PW5, Jackline Kalunde Mwangangi, the grandmother to the deceased said that on 25.1.2023, she received a phone call from DCI Urban who told him that the child had been killed and that she was required at Urban Police Station. That they then went to Makadara General Hospital and viewed the body and she saw there was blood on the nose and mouth. That on 27.1.2023, she identified the body of the deceased for postmortem.
11. PW6, Monica Muli, from Makadara Grounds said that she stays with the street family. She said that in January 2023, she saw the Accused carrying the child and the child's mother told her the Accused



- said he could take care of the child at their home instead of the child living in the open. That after 2 weeks, the Accused went looking for Patience while carrying the child but he did not find her. At 10.00 pm, he went back home and did not return with the child he next day. PW6 asked the Accused where the child was and he said the child was sick and that he had informed the mother. That the next day at 5.00 am, PW6 saw the Accused carrying the child and he had wrapped him in white sheets. That he went where Patience and Mishi were sleeping and put the child between them. That PW6 later heard screams and when she went to where Patience and Mishi were, they told her the child was not moving. That they rushed to the dispensary where they were told the child had died.
12. PW7, No 235210, CIP Kleen Kulicha in charge Crime Scene Investigations Coast Region based at DCI regional headquarters said that on 31.1.2023 at around 8.30 am together with CPL Jackline of DCI Urban went to Old Town and documented the area where the Accused had been living with the deceased for a period of one month. That PW7 documented the area through photographs and prepared a report dated 1.2.2023 and a certificate. PW7 also processed a CD under cover letter CR 341/19/2023 dated 6.2.2023 and produced photographic prints therefrom. PW7 produced 3 photographs as ExP3(a)(i), (ii) & (iii), the forwarding letter dated 6.2.2023 as ExP3(b), the Certificate dated 6.2.2023 as ExP3(c), photographic evidence and certificate by CIP Kulicha dated 1.2.2023 as ExP8(a), and a bundle of 14 photographs as ExP8(b).
 13. PW8, No 120144 PC. Robert Kipchirchir Rop from Central Police Station Mombasa said that on 23.2.2023 in the company of PC Mutinda and CPL Banilwa effected arrest of the Accused who was sleeping on a bench in a cemetery in Bondeni. That the sister of the Accused identified him and that the Accused was taken to the police station where he was handed over to IP Muli. PW8 identified the Accused in the dock.
 14. PW9, No 96053 CPL Jackline Orioki attached at DCI Urban Mombasa and the Investigation Officer herein testified that the matter was minuted to her on 23.1.2023 and that she met the Deputy OCS Mr. Makumi who briefed her on a matter that was reported of an alleged murder of a child. That she was shown the body of the child which was lying on a wooden bench adjacent to the report office. That PW9 called the scenes of crime officer, CIP Kulechia, who went and took photographs of the body of the child. That the duty officer then escorted the body to Coast General Hospital Mortuary for preservation.
 15. PW9 testified that he interrogated the mother of the deceased child. That on 27.1.2023, PW9 accompanied the mother and grandmother of the deceased to the mortuary where they identified the body of the deceased for postmortem. That PW9 also took samples of the deceased's hair, nail and blood to the Government Chemist for DNA sampling. That on 2.2.2023, PW9 recorded statement of the suspect and his fingerprints were taken.

Defence Case

16. The Accused, Mohamed Sheir, said he used to stay near Makadara Grounds and Patience, the mother of the deceased, was known to him since 2021. He said that on 13.1.2023 in the evening while at Makadara Grounds, the deceased saw him and started crying wanting the Accused to take him. That the child did not have any clothes on and that the mother told the Accused to take the child but the Accused told her he could not take a naked child. That Patience dressed the child in a shirt only and said the other clothes were dirty. That the Accused bought diapers from a kiosk which was put on the child and that the Accused left with the child.
17. The Accused said that Patience promised that she would later go for the child, which she did but told the Accused that she wanted to go somewhere to look for money in the company of other fellow girls.



- That she said she would not take long and asked the Accused to remain with the child. That Patience returned at 4.00 am when she was too drunk and that she just lay on the ground and slept. That at 6.00 am, the Accused woke her up but she still had a hangover and told him she was not able to stay with the child as she was still feeling sleepy, and that she went back to sleep. The Accused said that he tried to leave the child with other residents of Makadara Grounds but none accepted. That he decided to go with the child home as the child would have suffered if he left him.
18. The Accused said that it became a habit that whenever Patience saw the Accused, he would abandon the child with him. That on 19.1.2023, Patience left the child with the Accused and he did not see her again until on Friday 20.1.2023. That he asked her why she left the child with him when the child was unwell. That the child had flu as Patience used to expose him to the cold by laying him on bare tiles. That at around 8.00 pm, the Accused took the child to Patience who stayed with the child and on Saturday Patience again left the Accused with the child. That at around 8.00 pm, Patience had not returned and the Accused went home with the child. That at around 10.00 pm, the Accused's mother told the Accused to take the child as he had woken up and was crying as he was unwell.
 19. The Accused said that he took the child and went to look for his mother but the mother was not there. That he spread a carton box on the ground and made the child to sleep. That Patience returned very late in the night and as usual she was very drunk. That after 10 minutes she again left with another young man and returned after an hour and found the child awake. That the child had not eaten because he was sick. That he bought him food from a kiosk and the mother tried to feed him but he did not want food. That Patience became angry and wanted to beat the child and that the Accused told her the child was sick and very small to be beaten. That on the said date, 22.1.2023, at around 4.00 am to 5.00 am, the Accused told Patience that he wanted to go home and Patience told him to go with the child as it was drizzling, and that the accused went with the child.
 20. The Accused further testified that the child slept up to 2.00 pm and when he woke up, the Accused gave him tea and chapati which he ate. That he left the child sleeping and went to Makadara Grounds at around 5.00 pm to meet his uncle where they watched football together. That the child was at home with the Accused's mother and when he saw Patience, he told her about the child. That Patience said someone had promised her money on Sunday so she could take the child to hospital. That at around 10.00 pm, the Accused went home to get his jacket as it was cold and to also check on the child. That he found the child had fever and took him to his mother's room and told her to keep an eye on him as he went to look for the mother. That Patience returned late in the night chewing miraa and had a bottle of alcohol but the Accused said he could not disturb his mother at that time of the night to pick the child.
 21. The Accused said that he was chewing miraa with Mama Shakira and another friend as Patience, Mishi and Vero lay on carton boxes at the field. That at around 6.30 am, the Accused's mother called him and informed him that the child was awake, crying and had fever. That the Accused went home and found the child shivering. That he wrapped him in a bedsheet and took him to where the mother was. That Patience was sleeping and the Accused woke her up and told her that the child was not feeling well. That Patience told him to leave the child where she was sleeping and that she would take him to hospital. The Accused said the child did not have any physical injuries.
 22. The Accused informed court that he later went home where he took tea and some painkillers. That he then decided to go see his father who works in a cemetery in Bondeni. That he lay on a bench in the cemetery and slept as he was tired. He said that after a while, he was woken up by four men who handcuffed him and that he learnt they were police officers. The Accused said the cemetery is a public place and he had informed his mother that he was going to the cemetery.
 23. Counsel for the Accused Person filed submissions dated 5th March 2024.



Analysis and Determination

24. In consideration of the evidence of 9 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.
25. 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.'
26. 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

27. There is no dispute as to the death of the deceased.

Death was caused by an unlawful act or omission

28. From the evidence of Dr. Nuzla who examined the body of the deceased, there was a dislocation of the cervical spine and the neck was rotating. There were multiple bruises on anterior neck. There were also multiple scalp hematoma and she formed that the cause of death was asphyxiation secondary to manual strangulation. The opinion of the doctor and the observations made on the body of the child by the mother PW1 and PW5 the grandmother that the child was bleeding from the nose and mouth confirms that the child died as a result of an unlawful act.

Participation of the accused in the commission of the alleged offence

29. From the evidence of the complainant, the Accused Person was with the child and he brought him back at 5.00 am and placed him where the mother was sleeping at Makadara Grounds. When the Accused returned the child, PW6, Monica Muli saw him and she said that the accused had wrapped the child in a white sheet and he laid him between the mother, Patience, and Mishi who were still asleep and walked away. When PW1 woke up, she found the child was motionless and when they took him to the clinic within Makadara Grounds, they were told that the child looked like he had been strangled. Since the Accused Person was the one who was in custody of the child, he was arrested and charged with the offence of murder. Although there is no direct evidence or eye witness of what transpired, the only inference that can be made from the surrounding circumstances is that the Accused Person caused the unlawful act that led to the death of the deceased.



Malice aforethought

30. 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”.

31. 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.”

32. 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.”

33. The deceased was only one year and 2 months by the time that he died and the injuries inflicted on him could only have been meant to terminate his fragile life. There was therefore evidence of express intention to kill the deceased by the accused person and that proves the extent of malice on the part of the Accused Person.

34. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused person is found guilty of the offence of murder and convicted accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 23RD DAY OF MAY 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -



Etropia- Court Assistant

Ms. Maina for the State

Ms. Nyawira Advocate for the Accused

Accused person present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Ms. Maina: No previous records have been availed. He may be treated as a 1st offender.

Ms. Nyawira Advocate: I pray for time to file written mitigation.

Order: Mention on 6.6.2024 for mitigation, Victim Impact Statement and Sentence.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

23.5.2024

