



**Republic v Kunia (Criminal Case E001 of 2022)
[2024] KEHC 8207 (KLR) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE E001 OF 2022**

RB NGETICH, J

JULY 8, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

CHEPARSIP KUNIA ACCUSED

JUDGMENT

1. The accused person Cheparsip Kunia has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that the accused person on the 1st day of January, 2022 at around 0600Hours at Baringo County Referral Hospital – Kabarnet within Baringo Central Sub- County in Baringo County murdered Chepkopis Ling’ari.
2. The accused pleaded not guilty to the charge and the matter was set down for full trial with the prosecution availing 8 witnesses in support of the charge preferred against the accused. In her defence, the accused adduced sworn evidence.

Prosecution Evidence

3. PW 1 Vincent Kipchenger who is a nursing officer Baringo County Referral Hospital testified that on the night of 31st December,2021, he was on duty and in the morning of 1st January,2022 at 6:00 a.m he went to ward 2 (Gynecology and surgical room) to feed a lady one Chepokisang who was seriously ill. He said the accused herein Cheparsip was holding the patient’s baby. After feeding the patient, he went to another ward and while there, he heard noise and rushed to the ward.
4. He said on reaching the ward, he found the patient’s child down and the care taker who was violent was being held by others. He said that he got hold of the child who had urinated and had blood on the nose and ear. He placed the child on the bed and the caretaker wanted to pull the patient from the bed but the other caretakers helped. He said that he placed the child on the bed and went to call his boss



who went to the ward with him and got hold of the child and took to the nursery as he remained in the ward. He said he rushed to call the security who went and took the caretaker who is the accused herein to the office and then to the police station. The child was later x-rayed and the results showed that he sustained brain damage. He said he did not see the accused attack but he only heard noise. He said that the child a girl of around $\frac{3}{4}$ of weeks died as a result of internal bleeding.

5. PW2 Doctor Wangare Wambugu who works at Baringo Referral Hospital testified that she performed postmortem on the body of the deceased herein, a child aged 10 days on 5th January,2022. She said the body had signs of external injuries to the head and the skull at the back which was depressed. That there was massive bleeding on the inner scalp at the back of the head and the skull was crushed at the back side and the brain matter was coming out through the scalp and there was bleeding over the whole of the brain. She said there was subdural Hematoma and the cause of death was acute head injury due to blunt force trauma following assault. She produced postmortem report dated 5th January,2022 as P exhibit 1.
6. On cross examination, she stated that there is possibility that the injury could be caused by accidental fall from a bed but it is unlikely because the injury was mainly at the back since when one falls from a bed, injuries are likely to be on the front but in this case, injuries were at the back side and part of the front.
7. PW3 Stello Kiboino a nurse at Kabarnet County Referral Hospital testified that on 1st January,2022, she was at the nurse convent office and at around 6:20 a.m., when pw1 herein a nurse who was in ward 2 went and informed her that there was an emergency in ward 2 as a child had been thrown down and had fainted. She said she went there and found the child had been placed next to the mother who was also unconscious and the caretaker being held by other caretakers. She said she rushed the child who had head damaged and was bleeding from nose and ears to the emergency room for oxygen. She said the child was x-rayed to see the extent of the damage and at around 6:30 a.m, the child died. She decided to call the hospital administration who advised her to call security officers to arrest the accused.
8. Pw4 Evans Kiplimo Siror a security officer who works at Baringo County referral hospital testified that on the 1st January,2022, he was on duty at around 6:30 a.m. when pw1 who was the nurse on duty that night hand over to him a woman Cheparsip in the ward who had thrown a child on the ground found other caregivers were holding the accused and they took her to Kabarnet police station. He said that the accused was calm when he went to arrest her and the child had been taken for x-ray.
9. PW 5 Carol Lobar testified that on the 31st December,2021, she was at the Kabarnet Hospital taking care of her in-law's child and had slept when she heard screams and on waking up, she saw the accused hold the child and threw down. She said the people in the ward were screaming. She said they rushed to call the doctor who went to the ward and took the child.
10. She said the doctor found the child on the floor and requested them to hold the accused as she took the child and a man who was taking care of his wife held the accused and shortly watchmen arrived and took them to the police station to record their statements.
11. PW6 Collins Kipkoros Kipyegomen stated that on the 31st December,2021, he was at Kabarnet Hospital taking care of his sick wife and they were about 5 caretakers in the ward. He confirmed that the accused was taking care of a child of a patient by the name Chepokisang, when she started talking to herself in Pokot language as she gave milk to the child. He said the accused appeared to be complaining; that she undressed the child and the nurse would advise her to cover up the child but immediately the nurse left, she uncovered the child and at around 6: 00 a.m., they had slept a bit when he felt like she threw the child down. He said that he woke up and saw her pick the child from the floor and he saw



- her throw the child down for the second time after picking her from the floor. He said the 3rd time she bent down to hold the child, he got hold of her. He said she pulled him and she wanted to pull the patient she was taking care of from the bed.
12. He stated that the nurse on duty went to call the watchmen who came and took her to Kabarnet Police station and they gave out their names and phone numbers and went back to Kabarnet Hospital and later the nurse informed them that the child had died. He said that he cannot tell why the accused was throwing the child on the floor.
 13. PW 7 Loice Cherutoi who was also taking care of a patient in hospital testified that she heard screams and a bang on the floor and on checking, she saw a child down on the floor and the accused picked her and threw her down again head down and that accused wanted to hold the child the third time when pw6 who was also taking care of a patient held her .she confirmed that a doctor went to the ward and took the child who was still at the floor from the ward and the accused was arrested and taken to police station.
 14. On cross examination, she said that she arrived at the ward at 1:00 a.m and realized the child accused was carrying kept crying as women in the wad advised her how to hold the child. She confirmed that the child's mother was seriously ill. She said accused fed the child as she spoke in her language. She confirmed the woman who threw the child to the floor was accused herein.
 15. PW8 No. 78351 PC Kipkorir Ngeno Michael who is attached to DCI Baringo Central Sub- County testified that on 1st January,2022, at around 10:00 a.m, he was called by sub-county Criminal Investigations Officer CIP Chege who informed him there was an incident at Baringo County Referral Hospital and directed him to visit the site. On reaching the hospital they found the 3 witnesses, Caroline Lobat, Collins Kipyegomen and Loice Cherutoi and recorded their statements. He said they all saw accused hold the deceased child and threw her down on the floor and Collins Kipyegomen held her when she tried to pick the child from the floor to throw her down the third time. He stated that the infant died from injuries inflicted and accused was arrested and taken to the police station and booked by OB No.8 of January,2022.
 16. He stated that on 5th January,2022, autopsy of the infant was done by the doctor Wangare who ascertained that the death was caused by acute head injury and on 10th January,2022, they escorted the accused to Moi Teaching and Referral Hospital for mental assessment and she was found to be fit to stand trial and was charged with the present offence.
 17. Upon the closure of the prosecution case, the court delivered a ruling on the 14th day of March,2024 finding that prima facie case had been established to warrant accused be placed on her defence and was placed on her defence in accordance with Section 306(2) of the *Criminal Procedure Code*.

Accused's Defence Case

18. The accused in her defence gave sworn statement. She denied killing the child herein Chepokopis Lingari at Baringo County Hospital. She said that the mother of the child was his brother's wife and she delivered at home with the assistance of a midwife and developed complication. She was taken to Tangulbei Hospital by a neighbor who was a medical officer. She was treated at Tangulbei and referred to Marigat Sub-County Hospital. She said she accompanied the sister-in-law as she was taking care of her and the child. She said blood was transfused to her and after being discharged, she stayed home for 3 days then at night, the patients young children went to inform her that she had fallen sick again. she went to her house and found her vomiting.



19. She said that she rushed to inform their neighbor Mangir who treated her and advised them to take her to hospital and they took her to Tangelbei hospital where she was referred to Kabarnet Hospital where they stayed for three days and she was taking care of the child and also the sick mother.
20. She said she was given a bed adjacent to the patient's bed and the child was sleeping with her. she said the patient started vomiting in the morning and when she woke up to give her a bucket, the child who had been wrapped with a leso fell down. She said she woke up very fast and her hand pulled part of the leso and as she pushed the basin with vomit she was wrestled up by people in the ward. She said that there was commotion and shouts by the caregivers in the hospital who said she threw the child down. She denied taking the child and throwing her down. she said she woke up fast and the child fell down and the fall by the child was accidental.
21. She further stated that the incident occurred early in the morning and people in the ward were asleep and no one saw the child falling. She said the child's mother saw what happened as she was vomiting and was awake. She said the child's mother was unable to wake up and was vomiting from the bed. She further said she was feeding the child while singing for her to sleep and that she was wrestled by two people and the other person picked the child and was wondering what was happening. She denied the charge and said she had taken care of the child and the mother all through and she had no intention of killing the child. She said that the child's mother is at home.

Submissions By Accused

22. The accused filed submissions through defence counsel Mr. Chebii. He submits that the prosecution did not present sufficient evidence to prove that the accused murdered the deceased and argued that the accused was the care-giver of the deceased and her mother and had done so for approximately 3 weeks both at Marigat Sub County Hospital and Kabarnet Referral Hospital.
23. The defence counsel further submit that on 1st January 2022 at about 1:00 a.m. the accused was seen feeding the deceased and singing lullabies to her and the act alone of feeding and singing to her goes to show that the accused had no intention and/or mens rea whatsoever to kill the deceased. That the other care-givers watched football until early in the morning of the said date and therefore they slept late and by 6 a.m. none of the caregiver was awake including the witnesses who purported to have seen the accused throwing the deceased down; further that none of the nurses on duty in the said ward and/or the nurse in charge was present at the time of the alleged incident hence they did not witness the incident.
24. Counsel submit that it is the deceased's cries which woke up the other care givers from their sleep and noticed the accused picking up the deceased from the floor and the contention that the accused threw the deceased to the ground for a second time is unfounded and a pigment of their imagination as they did not see the accused throw the deceased down in the first instance; and the fact that none of the caregivers and/or the nurses was able to speak to the accused cannot be the basis of inferring that she had malice aforethought of killing the deceased.
25. Counsel submit that the allegation that the accused was singing lullabies to the deceased in her mother tongue was in preparation to murder the deceased is unfounded in that the witnesses did not understand and/or could not comprehend the language of the accused and/or the song she was singing and it cannot be assumed that her singing to the deceased was in preparation to kill her.
26. Further that the contention that the accused was agitated on the said date and/or that she killed the deceased to gain freedom is unfounded as the witnesses did not understand her language and could not tell whether she was agitated or not and the killing of the deceased could not have afforded her



freedom as alleged; that there is no cogent reason advanced by the prosecution as having made the accused contemplate killing the deceased as alleged.

27. Counsel submit that the demise of the deceased was purely accidental and was substantially contributed to by the hospital management's negligence by failing to provide the deceased child a bed with guard rails leading to her accidental fall and shifted the blame to the accused; that the accused gave a chronology of events and/or what transpired leading to the demise of the deceased.
28. Counsel further submits that the doctor who performed the autopsy stated that the deceased died due to an injury to the head which is consistent with an injury resulting from a fall whether accidental or intentional and therefore, the contention that the accused assaulted her is unfounded as the accidental fall of the deceased was not premeditated.
29. The defence counsel relied on the case of *Republic v Chizi Kombo* Mombasa High Court Crm Case No 17 of 2020 where the accused was charged with the murder of her infant son through throwing him into a dam thereby leading to his death by drowning but acquitted in the face of alleged eye witnesses and urged this court to arrive at the same finding in the present case.

Analysis and Determination

30. The accused person is charged with the offence of murder. Section 203 defines the offence of murder and provide the ingredients for the offence of murder are as follows: -
 - a. The death of the deceased.
 - b. That the accused's unlawfully act caused the death of the deceased and.
 - c. That in the causing death of the deceased, the Accused had malice aforethought.
31. This was also upheld in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR where the court listed the ingredients of defilement as captured above. Similarly, in the case of *Republic v Andrew Omwenga* (2009) eKLR the court stated as follows:-

“It is clear from this definition that for an Accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission - there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) The death of the deceased and the cause of the death, (b) That the Accused committed the unlawful act which caused the death of the deceased and (c) That the Accused had the malice aforethought”.
32. Accordingly this being a murder charge, the prosecution must prove mens rea and actus reus. It is trite law that the burden of proof in criminal cases rests on the prosecution and the burden never shifts. The Accused has no burden to prove his innocence. In the case of *Joseph Kimani Njau v Republic* [2014] eKLR the Court of Appeal stated:

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution.



(a)The death of the deceased

33. The death of the deceased infant is not disputed. All the prosecution witnesses testified that the deceased died on the morning of 1st January,2022 and their evidence was confirmed by PW2 Doctor Wangare Wambugu who carried out postmortem on the body of the deceased and formed the opinion that the cause of death was acute head injury due to blunt force trauma following assault. She produced a copy of the Postmortem report signed on the 5th January,2022 as exhibit 1. The accused also confirmed that the infant herein died on 1st January 2022. There is therefore no doubt that the child herein died.

That the Accused committed the unlawful act which caused the death of the deceased

34. The accused confirmed that she was taking care of the deceased child together with the children's mother in hospital. She said the child's mother was her sister-in-law being her brother's wife. The witnesses who were also taking care of patients in the same ward testified that the accused threw the child down causing serious damage to the child's head. PW6 who was taking care of his wife in the same ward with accused said he heard the child fall and on checking, he saw accused pick the child from the floor and threw her to the ground the second time and when she wanted to remove the child to throw for the third time, he got hold her. Pw5 and pw7 confirmed seeing accused throw the child down and pw6 intervened to stop her throwing the child down for the third time. They called for help and by the time the nurse Pw3 arrived the child was down and the accused was being held by the other caretakers.
35. The accused's argument is that she pulled a leso as she tried to help the child's mother who was vomiting and the child who was wrapped with the leso fell from the bed and sustained injuries. From the doctor's evidence, the child sustained massive injury to the head what caused instant death. I doubt if an accidental fall resulting a leso being pulled could have caused such serious injuries. Further, the doctor said the injuries from such accidental fall would have been to the forehead and not the back of the head as was the case herein. From the foregoing, I find that the fall by the child was not accidental but the death was unlawfully caused by the accused herein.

That the Accused had malice aforethought

36. Section 206 of the [Penal Code](#) on Malice aforethought provides that:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances 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.”

37. From evidence adduced as captured above, the accused forcefully threw the child to the ground, repeated the second time and wanted to throw the child again the third time. The nature of the injuries



inflicted on the innocent infant clearly show the intention of the accused was to kill the child for reasons best known to her. The evidence adduced by prosecution witnesses prove beyond reasonable doubt malice aforethought on part of the accused. From the foregoing, I find that the prosecution proved all the 3 ingredients for the offence of murder against the accused herein. I proceed to find her guilty and convict her according for the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#).

Final Orders: -

38.

1. Accused is hereby found guilty and convicted of the offence of murder contrary to section 203 as read with section 204 of the penal code.
2. Right of Appeal 14 days.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET HIGH THIS 8TH DAY OF JULY 2024.

RACHEL NGETICH

JUDGE

In the presence of:

-CA Elvis.

-Ms. Ratemo for State.

-Ms Kogo holding brief for Mr. Chebii for Accused.

-Accused present.

