



**Republic v Mwangi (Criminal Case 11 of 2017)
[2024] KEHC 10026 (KLR) (1 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL CASE 11 OF 2017
RM MWONGO, J
AUGUST 1, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

DUNCAN WAMBAKI MWANGI ACCUSED

RULING

1. The accused person was charged with Murder Contrary to Section 203 as read with Section 204 of the Kenyan *Penal Code*. The particulars of the offence were that on 2nd October, 2017 at Kwa-Mururi Market within Kirinyaga County he murdered Elphas Mwangi.
2. The prosecution presented seven (7) witnesses, and the ruling herein is for the purpose of determining whether the prosecution evidence makes out a prima facie case which the accused must answer in his defence.

Prosecution Case

3. PW1- Naftali Ndambiri Githome testified that on 2nd October, 2017 the accused’s wife, Emma Wanja, who is his sister-in-law, came to their home after quarreling with her husband. She said she had left her child (eight months old) with her husband at his place of work. He called the husband to confirm that fact.
4. At around 9.00 pm, the accused called him on phone, and told him that the deceased was missing. At 11.30 pm the accused came to their home with a boda boda rider to pick his wife. He said he wanted them to look for their child. She refused to accompany him, and they left.
5. The following day the accused was arrested as he could not produce his deceased child. PW1 was the one who identified the accused to the police.



6. In cross-examination, PW1 confirmed that the Accused and his wife had been living together in a rented house with their child. He was present when the police went to look for the child in some latrines built by the county council.
7. PW2 Emma Wanja Njeri, the accused's wife had been married to the accused in December, 2016. She testified that on the material day, they had exchanged harsh words with the accused after he denied her money for food. She left her deceased child with him, and went to her sister's home.
8. She testified on 2nd December, 2019 and disclosed to the Court her ordeal. She remained firm that the accused being the father to the minor took charge of him on the 2nd October, 2017. She produced the child's birth certificate as PExb1 showing his birth date as 21st January 2017. She also exhibited some of the child's clothes.
9. In cross-examination she confirmed that she lived with the accused in a plot with many people. On the material day at about 4.00 pm she and the accused exchanged harsh words. She then left for her sister's house leaving the child with the accused. She reached her sister's house at 6.00 pm.
10. She admitted that there were disagreements with her in laws before the birth of the child the accused mother did not want to be named. Subsequently, disagreements were about money not about the child.
11. PW3 Dennis Kinyua Wakuthie testified that he is a motor cycle repair man. He knew both the Accused and the Accused wife. He confirmed that he witnessed PW2 Emma Wanja Njeri leaving the minor with the accused. That he personally visited the accused shop where he saw the minor having been placed on the table. Later, he saw Emma leave.
12. In cross-examination, he explained that he had his repair stand outside the Accused's kiosk, about three (3) metres away. He saw Emma, accused's wife, come to the kiosk with the child. After Emma had left, he kept seeing the child at the kiosk.
13. PW4 Mercy Wambura Ndambiri the complainant's sister testified as PW4, she stated her sister came to her home on 2nd October, 2017 at about 5.00 pm. She told her that she had left her child with the accused. She further stated that her sister had indeed spent the night of 2nd October 2017 through the morning of 3rd October, 2017 at her house. She was there when the accused came to their house and told them where he had left the infant.
14. PW5 Haniel Murimi Gachoki testified that on 2.10.2017 at about 10.00 pm he was coming out of a butchery when he met the accused. He recalled that the accused told him of being stressed as the wife had left him with the baby, and that he had left the child at his veranda, that he went to toilet on returning the baby was missing. At the accused's request, he accompanied him to where the wife had taken shelter before the issue escalated to the Police.
15. In cross-examination, stated that he and the Accused are friends. Further he confirmed that the accused had told him about his missing child. He did not know if the child was ever found.
16. PW6 Sgt Julius Wanjohi testified that he was at Mururi Police Post on 3.10.2017 when one Naftaly Ndamberi (PW1) came at 8.00 pm to report a dispute between his siter-in-law and the Accused; and the missing child. He recorded the statements confirmed that the missing child was last in the company of the accused.
17. The accused told him that he had gone to his house with the child. He left the child at the verandah and when he returned, the child was missing. Since both were suspects he took the accused and his wife to the Police Station at Kianyaga.



18. In cross- examination, he admitted that he was not the investigating officer, he did not interrogate any one or investigate the matter. He however went to see the scene of crime, but did not interrogate anyone. He is not aware if the child was ever found.
19. PW7 CID Steven Kibagendi testified that on 5th October 2017 he was the Deputy CID Mwea East. He was approached by DCP OCS who recounted the incident of the Accused and his wife differing and the loss of the child.
20. He testified that the accused confessed to having killed the child and later throwing the body in a public latrine at Mururi Market. On 6th October 2017 they visited the public latrines. They retrieved some clothes produced as PExb 5 (a b and c) of the child.
21. The alleged body was not found from the latrine, even after the Fire Brigade were called to assist find the body. It was too toxic in the latrine and the exercise was called off. No body was retrieved.
22. PW7 assumed that the accused had killed the deceased. There was however no body or post-mortem report.
23. The prosecution closed its case with that evidence. Parties filed submissions.
24. The prosecution's submissions are that Section 203 of the Penal code places the burden of the Prosecution to prove that:
 1. The death of the deceased occurred.
 2. The death was through unlawful acts or omission of the accused.
 3. The accused person had malice aforethought.
25. The prosecution submits that the evidence tendered so far places the accused person at the scene of the crime squarely and the death of the deceased was due to the wrongful act of the accused persons. Section 206 of the Penal Code stipulates that malice aforethought shall be deemed to be established by evidence proving;
 - a. An Intention to cause the death or grievous harm.
 - b. Knowledge that the act or omission causing death will probably cause death of or grievous harm to the same person.
 - c. An intention to commit a felony.
26. The prosecution asserted that a case had been made out from the evidence, sufficient to require the accused to be put on his defence.
27. The Accused's submissions were that the prosecution brought witnesses to support the charges of murder of the child. It was clear from the witnesses that the ingredients of murder were not met.
28. The investigating officer did not confirm there was a body of the deceased that was found. Consequently no one can tell for a fact that the accused person murdered the deceased or whether the alleged child was stolen or is missing.
29. Further, there was no postmortem done as no body recovered. Nobody can ascertain what really happened to the child. It came out clearly from the witnesses that all the prosecution witnesses relied on is the accused person alleged confession.



30. The D.C.I.O, PW7, said the accused gave 2 versions of confession; The first version is that the accused killed the child and threw him inside a toilet; The other version is that the accused left the child outside at the veranda and when he came back, the child was missing. PW7 confirmed they checked inside the toilet they did not see anybody; therefore, it is not possible to tell if the accused killed the child or not.
31. Accordingly. the accused submits that if the prosecution says the accused person killed a child, then at least a body should be produced or even a post mortem report to prove death. The court does not act on suspicion.

Analysis and Determination

32. The only issue for determination at this stage is whether the prosecution evidence has laid out a prima facie case which warrants that the accused be placed on his defence.
33. Section 306 (1) of the [Criminal Procedure Code](#) provides as follows:

“When the evidence of the witnesses for the Prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of the several or any one of the several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”

The finding as to whether a prosecution’s evidence proves a charge is what is referred as a prima facie case.

34. In *Ramanlal Trambaklal Bhatt v R* [1957] E.A 332 at 335, the court stated as follows with regard to prima facie case:

“It may not be easy to define what is meant by a, “prima facie case”, but at least it must mean one on which a reasonable, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence” .

35. For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person:
 - The death of the deceased.
 - That the Accused person committed the unlawful act which caused the death of the deceased.
 - That the accused had malice aforethought.
36. The accused person has been charged with murder. The prosecution brought witnesses to support the charges. All the witnesses testified to the fact that the accused was last seen with the deceased. There is no evidence whatsoever that the victim died. The only thing shown from the evidence adduced is that the child is missing.
37. The accused submits that the investigating officer did confirm there was a body of the deceased that was found. No one can tell for a fact that the accused person murdered the deceased or the alleged child was stolen or is missing.
38. Most critically, no post-mortem report was filed with the result that the alleged death cannot be ascertained.



39. Even in cases where there is an assault medical evidence. *Republic v Joash Omal Juma* [2016] eKLR, the Court held inter alia that:

“... Having found that indeed the Accused assaulted the deceased which apparently caused his death, there was no medical evidence to suggest the above findings! From the record although Dr, Matilda Wendo PW7 marked the post-mortem report the author of the same Dr. Dickson Michana was not called to produce the same. Its trite law that for the offence of murder to be established the postmortem report ought to be produced...”

40. The prosecution submits that the evidence tendered so far places the accused persons at the scene of the crime squarely and the death of the deceased was due to the wrongful act of the accused persons. However, there was no scene of crime that was identified, no unlawful act has been identified.

41. The accused submitted that no postmortem done as there was no body recovered. Nobody can tell for a fact what really happened to the child. It came out clearly from the witnesses that the prosecution clearly relied on mostly the accused person’s alleged confession.

42. PW7, the DCIO, in cross- examination, admitted that he did not even investigate the matter as he was not the investigating officer. He said he went to the “scene of crime” and did not interrogate anyone and was not aware if the child was found. Since a scene of crime is a place where a crime occurs, in this case the crime of murder cannot be said to have occurred.

43. In this case the issue of the cause of death does not arise because no death has been established.

45. In the case of *Republic v EOA & another* [2018] eKLR

The referred to the case of *Republic v Cheya & Another* [1973] EA 500.

“The Court stated, “The position then appears to be that save in very exceptional Cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post mortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt. Accordingly, the judge erred in convicting the appellant.”

46. PW7 also testified that the accused gave two versions of confession. The first version is that he killed the child and threw him inside a toilet; and the other version is that he left the child outside and when he came, the child was missing. He therefore assumed that the accused had killed the deceased. However, in the absence of a body or post-mortem report there is no way to link the accused to the charge.

That the accused had malice aforethought

47. On the question of malice aforethought the same was defined in *Nzuki v Republic* [1993] KLR 171 where the Court of Appeal held that:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with;

- a) Intention to cause death.
- b) Intention to cause grievous harm.



- c) Where the accused know that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. "

48. PW1, he testified that on 2nd October, 2017 the child's mother came to their home after quarreling with her husband, the accused. She left the child (eight months old) with her husband at his place of work. Around 9.00 pm, the accused called him on his phone and informed him that his child was missing.
49. PW2 Emma Wanja Njeri testified that on the material day, they had exchanged harsh words with the accused after he denied her money for food. She left her deceased child with him and went to her sister's home.
50. The evidence of PW1 and PW2 concerning the quarrels between PW2 and the accused do not rise to threshold that would demonstrate that the accused had an intention to kill the child. Even if there was intention the prosecution has not produced evidence to show that the missing child had been killed by the accused.
51. Under section 211 of the Criminal Procedure Code, a prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person.

Conclusion and Disposition

52. This is not a case in which anyone can be persuaded that the accused has a case to answer on a murder charge.
53. I find and hold that none of the material ingredients of the offence of murder have been proved.
54. Accordingly, no prima facie case has been made out. I hereby dismiss the charges against the Accused and he is hereby acquitted.
55. The Accused shall be set free forthwith unless otherwise lawfully held.

DATED AT KERUGOYA THIS 1ST DAY OF AUGUST, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

1. Makazi for Accused
2. Accused present in Court
3. Mamba, for the State
4. Murage, Court Assistant

