



**Republic v SMM (Criminal Case E020 of 2021)  
[2023] KEHC 18574 (KLR) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18574 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL CASE E020 OF 2021  
TM MATHEKA, J  
JUNE 5, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**SMM ..... ACCUSED**

**RULING**

1. SMM is charged with murder contrary to section 203 as read with section 204 of the [Penal Code](#). It is alleged that on the 24<sup>th</sup> July, 2021 at [Particulars withheld] village, Kiboko location, Makindu sub-county within Makueni County he murdered MMM.
2. On 20<sup>th</sup> September 2021, the charge was read to him and he pleaded not guilty.
3. From the record, I noted that the accused was a minor aged 16 years old at the time of the alleged offence.
4. The matter was partly heard before Dulu J.
5. The case for the prosecution is that the accused person is the grandson of the deceased who was the step mother to his father.
6. His own parents had separated and he was living with his grandparents – his father lived in Nairobi – and the boy would come home to the grandparents during school holidays. According to the grandfather PW1 Joseph Munguti, the grandmother (deceased) had practically raised the boy. The three of them - accused, his grandmother and the PW1 lived together.
7. On the material day 24<sup>th</sup> July 2021, they all had breakfast together. According to PW1, his wife Milka was heading for a family meeting at her home, and would not be returning that day so he gave her fare of Kshs.1020/=. When he left for Makindu he left both the accused and his wife I the home.



8. He came back from Makindu at about 3:00pm. He met the accused emerging from a bush. On enquiry the accused told him he had gone to follow the cows. Accused left. Later PW1 requested another young man by the name Kyuli to assist with the cows as his wife would not be coming back. He then told Kyuli to call accused – but he did not find him. He and Kyuli had supper together. It was then that PW1 received a call from one Wavinya. She was asking for the deceased – saying that they had waited for her at the family function in vain.
9. PW1 told Wavinya that the deceased had already left. It was then that he opened the door to her bedroom only to see her lying on the bed. He touched her and found she was lifeless.
10. It was then that he asked the accused who had already come back what had killed the deceased yet he had left them together. He said the accused told him that he had strangled the deceased. That he described in detail what he had done; – that he had put a piece of cloth on her mouth and nose until she died. Then he asked him where her phone was. He said that accused told him he had left it in the bush. PW1 went out and rang the deceased’s phone. He saw its screen light and went and picked it.
11. He then hired a motor vehicle and took the accused to the police station where he was questioned.
12. PW1 then brought the police to where the body was – the police came back with the accused. That the accused pointed out the cloth he had used to kill the deceased, that the police also recovered gloves from the pit latrine which PW1 said accused had said he had used while killing the deceased. There was also some adhesive used in hospitals which was recovered in the house – all these items were marked for identification.
13. According to PW1, the accused killed the deceased out of a grudge – that, that morning the deceased reported to the PW1 that the accused had taken his (PW1’s) motorcycle and when he asked the accused about it, the accused went silent. According to PW1 this was the cause of the grudge that led accused to kill the deceased. Other than that, PW1 told the court that the accused and the deceased had a good relationship because the deceased raised him. He added that the accused had a habit of disappearing at night.
14. On cross examination, PW1 told the court that he held a panga against the accused to coerce him to say who had killed the deceased. He also said that the police threatened the accused – and that at that time he did not appear to be in a good mental state. On re-examination, he said that this was the first time the accused was appearing unwell mentally.
15. PW2 was 19-year-old KKK, also a grandson of the deceased and grandson of PW1, and a cousin to the accused. According to him, he was called by the grandfather on 24<sup>th</sup> July 2021 – at home there was on one – later the accused person arrived while together they, the grandfather received a phone call inquiring about the grandmother. That is when he went to check the room – and found the grandmother lying on the bed. He then went and informed his grandfather who went and checked on her and told him that she was dead. They phoned her other sons – Daniel Musyoka – who arrived. He said that the accused disappeared. Then when Daniel arrived accused came back. Some neighbours also came. Accused was asked what happened – he denied knowing anything about the death. The people around there including PW2 began to look around – then accused “admitted knowing what happened”. They took him to the police station where the police questioned him. He said he did not know why the accused killed the deceased because they had a good relationship. On cross examination he said he was present when the deceased’s phone was found. He told the court the accused person picked the phone and brought it to him (PW2).
16. PW3 Benard KM a son to the deceased and uncle to the accused told the court that on 24<sup>th</sup> July 2021 he was at home at night when PW1, his father phoned him because his mother was missing. He proceeded



- there with his brother DM and another by the name M. They arrived at their father's place at 8:00pm. PW1 told them he had left deceased with the accused person. They called accused who told them that he had a disagreement with the deceased then accused strangled her with a piece of cloth using gloves – because she had denied him the use of the motor cycle. He said the police recovered the gloves.
17. On cross examination he told the court that the accused said that he was denied the motorbike – that he said this in front of the PW3, PW1 and PW4.
  18. PW4 DMM told the court that the deceased was his step mother. He testified that upon reaching home he confirmed that she was dead – lying in her bed in the bedroom covered with a blanket. They sent the neighbours away and called a family meeting to find out what had happened. He said, Stephen Wambua agreed that he had killed the deceased. That he said he had used gloves, masking tape and white cloth to kill her. He confirmed the items in court. He said he was not aware of any differences between the accused and the deceased.
  19. On cross examination he said it was not true that the accused was threatened with a beating if he did not confess – however, shown his statement to the police he confirmed that he had recorded that the accused was threatened with a beating. He said they were many family members when this happened and they took him to the police between 3:00am and 4:0-0am and he had not slept.
  20. I heard the other witness – PW5 SMK testified that deceased was his grandmother, accused his cousin. He said on 24<sup>th</sup> July 2021 about 8:30 he saw a message from his grandfather's (PW1) phone that he had tried to call him in vain – then a text followed – that there were sad news as M had passed on. He went there and found his grandfather PW1 – who showed him the grandmother lying on the bed covered with a blanket. They rang other relatives to tell them about it - then began to call the deceased's phone. It was ringing but it would not be found – when people came they began to ask who had been with the deceased “it was said that it was SMM ...” The deceased's phone was found in the shamba.”
  21. At that time, the accused was not at home and when he came he was asked where the deceased was he said he did not know. He also said he did not know where her mobile phone was when he was asked. The witness told the court that the suspect was put to task to say where the grandmother's phone was “Alikalishwa chini, akaguswaguswa kidogo ndio akasema pahali simu ilikuwa”.
  22. On cross examination, this witness told the court that there are people who beat the accused knowing he was a child. He said where the phone was found was a long a busy path used by many people.
  23. PW6 was Dr. Jane Njeri the pathologist. She said that the postmortem was conducted on 27<sup>th</sup> July 2021 – there was blood oozing from the nose and mouth, the neck was broken at cervical vertebrae 1, 2 and the base of the skull. The lungs had collapsed, she had chronic obstructer pulmonary decease. The head was swollen. The pathologist drew the conclusion that cause of death was strangulation – assault.
  24. On cross examination she told the court she did not find any physical mark signs of strangulation and that she drew her conclusion of the strangulation from broken C1 and C2.
  25. PW7 N. 86236 PC Mungai Moses from DCI Makindu was the Investigating Officer. He received directions to investigate the murder on 25<sup>th</sup> July 2021. He went to the police station. It was 4:00 am. He found the reporteets, and the accused. He testified that he sent the reporteets out of the office and spoke to the accused – he said the accused narrated that he had strangled his grandmother. He then consulted the OCPD who instructed him to book the suspect for further police action. He visited the scene and the scene was processed. He reiterated he evidence of PW1 – and further that the PW1 called his sons and grandsons into a meeting where they all investigated the accused who “agreed to what he had done, strangled her taken her mobile phone and some cash from her pouch”.



26. He said he was at the scene when the accused who told them he had strangled her using a piece of cloth and a pillow to cover her while strangling her – that he had used gloves which he had thrown in the toilet which PW7 recovered together with some “masking tape”.
27. He said the next day he took the accused to the DCIO one Mr. Jimmy Kimani superintendent of police who summoned the father of the accused together with the LSK representative one Madam Edith Onyango – to witness the confession by the accused. He said the accused confessed to having strangled the grandmother for the reason that he was fed up with her ongoing accusations that he was fond of drinking, chewing miraa and misuse of the motor bike of the grandfather.
28. He testified further that the accused told him he had broken into a local dispensary where he stole the gloves and the masking tape in readiness to commit the act – the witness produced the gloves, the masking tape meant to tie the deceased on the mouth. He testified further that when the incident happened the deceased was from the bathroom. He testified further that the accused told him that on the material day he was leaving for the cousin’s home when a voice told him that that was the right time to kill the grandmother – that he went, found the grandmother leaving the bathroom, strangled her, took her phone and cash, and went away – till evening. he said he used the money for lunch.
29. On cross examination, he denied that the accused had been assaulted. However, he confirmed that the accused had complained that the grandfather had slapped him. Asked about the testimony of witnesses that the accused was assaulted his response was that that was their evidence –and maybe just one witness said he was assaulted
30. He took the accused for mental assessment, the Doctor did not find anything wrong with him. He said that he did not have the accused examined for the alleged assault. Asked about the alleged break in the local dispensary, he said that no report had been made of the alleged break in because of the distance from the police station. He said it was 25km away.
31. He said when the accused was brought the first time Ms. Edith Onyango was not present and the interrogation was conducted in the presence of PW1 and PW2. He stated that the advocate and the father of the accused were not required during the initial investigation though he was very aware that the accused was a child. He had never met the deceased but said he would tell she was frail because he carried her body.
32. He confirmed that at the time of the alleged offence the accused was aged 15 years old. He said he was not aware of the statutory requirements for who should be present during the investigation of a murder. He said he had warned the minor about his right to remain silent. He said he told the psychiatrist about the accused’s “confession” that he investigated the accused’s mental health status but did not record it in his statement.
33. That he went to investigate the accused’s truancy but the head teacher of Nthia secondary School told him that the accused was no longer his student. He confirmed that he interrogated the accused in the presence of PW1 and a cousin who was also a minor.
34. At this point, Ms. Nyakibia Prosecuting Counsel further told the court that the State, exercising its duty of disclosure did not intend to rely on the alleged confession by the accused for the reason that it fell short of statutory requirements for a confession. She told the court for that reason the State would not be calling the maker and proceeded to close the case for the prosecution.
35. The issue now is whether or not the prosecution has established a prima facie case to warrant the accused person to be put on his defence.



36. The guiding provision of the law is section 306 of the *Criminal Procedure Code* and numerous provisions including the Classic *Bhatt v R*. The point is that this court has a duty, upon close of the prosecution's case, to make a ruling or a decision on whether an accused person has a case to answer or not.
37. Section 306 of the *Criminal Procedure Code* provides for what should happen at the close of the case for prosecution
- (1) 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 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.
  - (2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.
38. Evidently the evidence against the subject is the evidence of last seen with. No one saw him commit the crime. The I.O simply followed what the members of the family told him but crucial is the fact that he did not know what to do to safe guard the rights of the minor as the suspect in the case. He interrogated him in the presence of the accusers and formed the view that the minor had a confession to make. He believed the story that the minor had broken into a dispensary within the locality to steal gloves, 'masking tape' in preparation of committing the crime yet he did not visit the said dispensary to confirm for himself the said allegation. No report of nay break in was made to the police station and the excuse that it was too far from the dispensary was untenable as he as the I.O had the obligation to visit the dispensary and verify whether indeed there had been a break inn effort was made to investigate in case there were other suspects
39. The testimony of the grandfather, that one of Kyuli and other family members on how the deceased's phone was recovered was doubtful. The grandfather said accused pointed to the place in the bushes and he PW1 went out called it and recovered it by its light, others said the accused found the phone and brought it yet there was also the evidence that the accused denied any involvement in the death of the grandmother.
40. There is sufficient evidence that the accused was tortured to get the confession. A panga(machete) was held against him, he was slapped, other people beat him up, and the whole family accused him of committing the offence. In fact, one said aliguswaguswa (they touched him) literally that they beat him up.
41. The Prosecution in withdrawing the confession were alive to the provisions of Article 50(4) of the *Constitution* which provides;
- Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice



42. Without the alleged confession the case for the prosecution was left bare. It is for this reason that I find that the prosecution failed to establish primacies case against the accused person for the offence of murder c/s 203 as read with 204 of the Penal Code. I proceed under section 306(1) of the Criminal Procedure Code to make a finding of not guilty.
43. Taking into consideration that the accused as a child in conflict with the law is a child in need of care and protection I directed the opening of a P& C file and P&C no. E20 of 2021 was opened.
44. I sought reports from Probation and Children Department which confirm that the accused person requires protection and care even for reintegration after spending time in remand custody.
45. It is in this file that I will proceed to make the appropriate orders.
46. Otherwise the subject is to be released to the father in accordance with the orders in the P&C file.
47. Orders Accordingly

**DATED, SIGNED & DELIVERED VIRTUALLY THIS 5<sup>TH</sup> JUNE 2023.**

.....  
**MUMBUA T. MATHEKA**  
**JUDGE**

