



REPUBLIC OF KENYA



**Republic v AMK (Criminal Case 24 of 2019)
[2024] KEHC 17238 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 17238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 24 OF 2019
TM MATHEKA, J
NOVEMBER 8, 2024**

BETWEEN

THE REPUBLIC PROSECUTOR

AND

AMK ACCUSED

JUDGMENT

1. AMK is charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. It is alleged that on the night of 20th/21st August 2019 at [Particulars withheld] village Nzau sub county Makueni County with others not before court, he murdered PKM.
2. The accused pleaded not guilty on 23/10/2019 and the matter proceeded before Hon. Dulu J on 15/11/2021. He was represented by Mr. Hassan while the State was represented by Mr. Tanui.
3. The case for the prosecution was that the deceased was the step son of the accused. When the accused married his mother she had come into the marriage with two children – the deceased and MM, his elder sister.
4. After the marriage, their mother at some time – (the record is not clear) fell sick and died. The accused buried her.
5. It was after him that one PM, and his mother one N showed up in the children’s office Makindu with a letter from Makadara (it does not say when).
6. According to PW1 Jedidah Wayua Musyoki – the children’s officer, Makindu at the material time, these two came claiming that PM was the biological father of the two children, and he wanted custody.
7. They told her that the mother of the two children was previously married to the said PM, that they disagreed, parted ways, and she went and married the accused person. They filed a complaint in



- Makadara children's office, the accused was summoned and he refused to go and that is when they were referred to the Makindu office.
8. She proceeded to summon the accused to her office and he attended. She heard both sides. The accused person's position was that his wife (the mother of the children) had died while they were married and he was not willing to release the children to someone else as they were left in his custody.
 9. The Children officer advised PM and his mother to file a case in court.
 10. In August 2019, the said N – mother to PM went to her office and said that one of the children had died in the custody of the stepfather. She now wanted custody of the girl. She (PW1) wrote to OCS Emali seeking assistance for the said N. (the letter was MFI1 but was not produced.)
 11. On cross examination PW1 told the court she had not recorded any report of complaint against the accused with regard to the children – that the accused considered the children to be his children. It is not clear from the record what the outcome of the report to the OCS Emali was.
 12. PW3 OKK, brother to accused testified that the deceased was son of accused, that on 17/8/2019, he went to see his mother – SK – who told him that a person not known to her had come twice to her compound asking about PM. Later, that night the accused also came to the mother's house – and he PW3 asked him whether he was aware that a person had entered his compound at night and roamed about and left. He (accused) told them that PKM , the deceased, had told him about the alleged interlude, PW3 testified that he asked accused to permit him to go and conduct investigations to see/ confirm the position – accused said he would do that later.
 13. Three days later – on 20/8/2019 at 9:30pm the accused again went to their mother's house – he found PW3 there – he asked them whether they had seen his son PKM. He wanted them to start looking for the boy. PW3 told him to wait till morning. Accused left.
 14. The next morning – 21/8/2019 PW3 left his house for accused's house. He met the accused person heading towards their mother's house – accused asked him (PW3) what they had done to his son – they went, fetched their mother and came back to accused's home. It was then that accused opened the deceased's house – which was padlocked from outside when the door opened PW3 said he saw that the child had used a shirt to hang himself. That he was hanging but had feet were touching he floor. He asked the accused how he had known that the deceased was inside there- he told him that he had wanted to check whether the child had taken his clothes and gone to visit the neighbours and that is when he found the child there having hanged himself. That the deceased had one key to the padlock and the accused had the other keys.
 15. PW3 then went to call the assistant chief who went with him to the scene, they called the police who came, removed the body to Emali mortuary. He and his mother recorded statements. (By the time of hearing she had passed on). He identified in court – two pieces of timber that were at the feet of the body of the deceased. He testified that the accused loved his children. They had been living with his mother, but accused had picked them three months earlier.
 16. On cross examination he said the accused took good care of his children. He told the court that the padlock to the deceased's house had three keys. One was recovered in the pocket of the deceased; the other two keys were with the accused. He said that the biological father of the deceased was a neighbour and one time came to their home and uttered insults. He testified that his brother loved his children and could not have harmed them.



17. PW4 NO. 97393 PC James Kariuki took over the investigations of the matter from one No. 38954 Sgt Richard Kimeu – who had “exited the service upon attaining the mandatory retirement age” the file was handed over to him on 15/7/2020.
18. He testified that he had accompanied sgt Kimeu to the scene - on 21/8/2019 after 6:30pm. They found one roomed house, one door, locked from outside with a padlock, one window permanently fastened with cement. The area chief had taken possession of two keys from the accused and handed over to sgt Kimeu who opened the door. Inside they found the boy PKM hanging from the beams of the roof on a shirt with his feet touching some pieces of timber. He was dead. One arm of the shirt had created a noose tied round his neck and the other arm was tied to the beam. He said the boy’s body was normal – his eyes were closed, his mouth was closed. The neck had a bruise. They arrested the accused’s wife, the biological father of the deceased one PM and the accused. He also recovered the padlock and the keys.
19. On cross examination, he told the court that the accused was catering for the food and education needs of the children. There was no evidence of violence between the accused and the children; that the said PM wanted to take the children from the accused; that earlier the boy had told the family that there were people who were going round his house and three days he was found dead. The Investigating Officer told the court that the accused did not do anything about the report. He testified that it was the accused who had constructed the house for the child. The biological mother of the boy was deceased; the accused’s wife and the biological father of the child were released. He said that accused’s wife was no longer a suspect because she was at her parents’ home having disagreed with accused; he said accused was the suspect because he was found in possession of the two other keys of the padlock that had locked the house of the deceased. He said the window was permanently closed with cement. He said that the deceased could not have hanged himself and proceeded to lock himself inside from outside. He said it was either the accused or deceased who had locked the door he also said that it was possible that a person could find the unopened padlock and lock the door as the keys were not required to lock the padlock. He confirmed that it was the accused who had found the deceased dead in the house. He said the pieces of wood connected the accused to the death – and that it was the spare keys that connected the accused to the death. He said the knot round the neck was not tight. He confirmed that the accused, his mother and the biological father of the child gave him information through written statements.
20. He said he did not speak to any neighbours or the school – and that there was no way of forcing people to testify if they did not want to.
21. PW5, John Mutua Ndunda, the area assistant chief Kyemundu sub location received the report from PW3 – brother of accused that the son to accused PKM had hanged himself.
22. He went to scene – upon arrival he found the house locked with a padlock and it was the accused who had the keys. Accused opened the door – PW5 saw the boy, then called his chief. He formed the view that the boy had not hanged himself because the father had the keys, and the window and door were locked. To him the hanging appeared to have been a set up. He further claimed that the mother of the accused told him that accused was disciplining the child at night when he died. He stated that the accused, the child had a good relationship he had known the family for 20 years. On cross examination he said that accused had two keys – to the padlock and none was found on the deceased – only to change and say that one key was found on the boy. He said the window in the boy’s house could not open. He claimed that the accused was disciplining the child when he died. He said the child was strangled – he said he could not imagine that accused killed the child. He said accused took care of the child despite Mathenge claiming the child was his.
23. PW2 – Dr. Pauline Kingoo told the court that he examined the child’s body on 2/9/2019, 11 year old good nutrition, well built. He said there was a line around the neck - and lungs had begun to show loss



of air – cause of death was asphyxiation. she explained that asphyxiation was the cutting off of supply of blood to the head, oxygen to the lungs. She said in this case he could not tell whether death was by suicide or strangulation.

24. In his defence the accused made a sworn statement. He spoke about his arrest together with his wife and one PM who was claiming the child as his. He said his 1st wife passed on 2011 i.e. the mother of the deceased and his sister. He remarried in 2013. This one came with three children and they had one child together. He said he noted at some point that the room for the children was too small for the deceased to share with his sisters. He paid for the construction of a house for him. He explained that the padlock had three keys – one kept by PM, one in the family key holder the other on his own key holder. He said he was 11 years at that time in class 6 at [Particulars withheld] Primary School.
25. He testified that the boy had told him on 18/8/2019 he had heard a person jump into the compound near his house – accused said he checked out the place where the person was alleged to have jumped.
26. On 20/8/2019 he went to work and came home at 8:30 pm. The other children told him that they had left him at home when they went to church. When they came home at 2:00pm he was not at home and his door was locked – that their grandmother had told them that he had gone to her home for water and had left. Accused went to his mother and found PW3 – and the rest was what PW3 told the court.
27. On 21/8/2019 he decided to check in his house – he said when he opened the door he was surprised to see the boy hanging from the roof rafters. He said he thought that the boy had left the home and wanted to find out what he had left with. He asked the children, his mother and brother whether anything had happened to the child – all said there was nothing. He spoke about the arrival of the police – and what they did. He told the court where he was on 20/8/2019.
28. He told the court that he was suspicious of the PM – who sued him in 2016 at the children’s office who claimed the two children. He explained that PM did not have certificates of birth, he said the mother of the children left PM in 2009, he had not paid dowry. That PM was told to sue in court. However, PM threatened to put him in a place where he would not remove himself - that PM knew his home in 2019.
29. On cross examination he told the court that he had lived with the boy for 9 years together with the sister. On the 20/8/2019, the other children had some practice at work but the deceased was not part of the team that had church practice. He told the court he did not know what happened.
30. At the close of the case for the defence the issue for determination is whether the prosecution proved the case against the accused beyond a reasonable doubt to warrant a conviction.
31. The ingredient for murder are set out in section 203 and section 206 of the [Penal Code](#): Section 203 [Penal Code](#) states:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

Section 206 of the [Penal Code](#)

Malice aforethought shall be deemed to be established by evidence proving any one 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 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.

32. The onus is upon the prosecution to prove their case beyond a reasonable doubt – see *Ramanlal Trambaklal Bhatt v R* (1957) EA.

“Remember that the legal onus is always on the prosecution to prove its case beyond reasonable doubt...”

33. The prosecution’s case was grounded in circumstantial evidence. The parameters for circumstantial evidence are set out in precedent. In *R.v Kipkering Arap Koske & Another* 16 EACA 135 it was inter alia held that:”

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

Suspicion cannot suffice to infer guilt. The Court of Appeal in the *Joan Chebichii Sawe v Republic* [2003] eKLR had this say about suspicion in a criminal case:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No. 17 of 1998 (unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.”

34. I have carefully considered the evidence on record

35. There is no doubt that the child PKM died. According to the prosecution the circumstances that draw the conclusion that he was killed and the hanging was set up.

36. The prosecution’s case was that the accused is the only other person who had the key to the house in which the body was found and he must have killed the boy and locked his body in that room. It is also the PW1’s theory that the child told the family that there was someone moving around his house yet the accused did nothing about the boy’s fears. It is further the prosecution’s theory- through the PW5 the assistant chief that the accused was disciplining the child on the night of 20/8/2019 and that is how the boy died.

37. Considering these circumstances and that the victim was a child allegedly caught in the mix of a custody dispute it was necessary to hear the accused person’s explanation.

38. The prosecution witnesses presented an accused person who married the mother of the deceased when she already had the two children. When she died he buried her and continued to take care of his children and even fought to keep the children – and no one had a single complaint against him with regard to how he took care of them. The evidence was that he loved the children, he maintained them, paid their fees when he married again, and his new wife came with more daughters he saw it fit to build the deceased – his eldest son a separate house. Why would he then kill the same son?



39. The case for the prosecution appears to be that because the biological father of the deceased wanted him then the accused killed him.
40. However, their own evidence does not support this theory because in the same breath they presented a loving father who did everything to maintain his children.
41. The prosecution was also of the position that since the accused is the only other person who had the keys to the boy's house he must have known who killed the boy and locked him inside, and the connection to this were the two pieces of timber found at the feet of the boy.
42. First they did not demonstrate how the two pieces of timber connected the accused to the killing.
43. Secondly, the accused person clearly explained how he came to be in possession of the keys – when he bought the padlock – he gave the boy one key – kept one himself and kept the other on the family key holder. He also explained that when they could not find the boy, he went to open the door to check out whether the boy could have taken his clothes and left and that is when he discovered the body.
44. The accused person is the one who discovered the body of his son. Why would that render him a suspect yet that was his son, living in the same homestead and accessing his house was always an option available to him. Despite giving his son some privacy by providing him with a separate accommodation did not remove his right to parental responsibility which included going to check his room. On this date, the boy had been missing there was nothing suspicious about his checking out the boy's room.
45. There is no evidence to support the theory that the accused killed the boy and locked the body in the house and pretended to discover it, No evidence that he had beaten the child on the night of 20/8/2019. His elder sister was there and his other siblings – the Investigating Officer did not speak to the children or any neighbour to support this claim. There were no other bodily injuries on the boy's body other than the strangulation mark on the neck. Hence this theory did not have a leg to stand on.
46. The accused in his defence clearly explained what happened those two days – and debunked the prosecution theory that he killed his child and then hid the body in the boy's room.
47. He told the court that the alleged biological father of the child was the other suspect – the accused person told the court that there was the person he suspected because of the tussle they had over the children. The police did not investigate this person and the circumstances under which he was released from custody were not explained.
48. The expert evidence, of the pathologist was not conclusive. She told the court that the report it was not clear whether death was by suicide or strangulation. This brings apart the prosecution's case was against the the accused that it was a murder through strangulation.
49. In the totality of the case for the prosecution, and the explanation by the accused in his defence, there is the possibility that the child died by suicide or another person could have committed this murder.
50. The investigating officer did not follow up on all the other leads; the angry Mathenge and his mother, the person alleged to have jumped over the fence into the boy's compound, the stepmother of the boy. No sufficient explanation was given as to why these were ruled out in the face of evidence that the accused person was a good father. His having the keys to the boy's room was natural and not a basis for suspicion. The padlock was a simple one that anyone finding it unlocked could lock it without the key. the suspicions of the accused against the disgruntled alleged biological father was not ruled out.
51. The investigator did not follow up as to whether the boy could have been killed elsewhere and brought home. It is not known whose shirt was used, whether any other forensic evidence could have been



found on the shirt, the scene or the body of the child. In a case such as this the investigation needed to go beyond the mere visit to the scene.

52. As it is the explanation given by the accused weighed against the case for the prosecution clearly shows that the state failed to prove the charge of murder c/s 203 as read with s. 204 of the *Penal Code* against the accused beyond a reasonable doubt, to warrant a conviction.
53. The charge is dismissed, the accused is found not guilty of the charge and is hereby acquitted. He is to be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY NOVEMBER 2024

MUMBUA T MATHEKA

JUDGE

Accused: Present

Ms Nelima/Ms Elizabeth Mr Kazungu for State

Counsel for the Accused: Mr. Hassan

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-11-08 13:22:45

