



**Republic v MWM (Criminal Case E023 of 2021)
[2025] KEHC 14434 (KLR) (14 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL CASE E023 OF 2021
LN MUTENDE, J
OCTOBER 14, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

MWM ACCUSED

JUDGMENT

1. M. W. M. a minor, was arraigned following the information of having murdered D.N.N. (deceased) contrary to Section 203 as read with Section 204 of the Penal Code. The offence was stated to have been committed jointly with another on 14/12/2021 at Mihango Sub-Location, Subukia Sub-County, within Nakuru County.
2. To prove the case the State called witnesses. PW1 Virginia Njeri Kamau, the maternal grandmother of the deceased, testified that on the fateful day, the deceased who was aged approximately 6 years old went to school but by 5.30pm she had not returned as was the routine. She called on Brenda who purportedly said that she saw the minor with the Subject abode a ‘bodaboda’ by the roadside. She went to the nearby homes and having not found her she reported (the loss of the child) to the Chief and subsequently to the police.
3. The following day one John Kariuki and another young woman said they had seen a child by the river side. They went to the scene and found the lifeless body of the child which had injuries on the head. There was some piece of clothe tied around the neck. The body was dressed up in uniform and the school bag was at the scene. The body was moved to the mortuary. She further stated that Michael, the father of the child had married the Subject. Both of them were arrested.
4. PW2 Brenda Achieng, knew the deceased as well as the Subject and Michael who were neighbours. It was her testimony that on 14th December, 2021, at 16.30hrs she saw the deceased who faced her direction and a lady and a ‘bodaboda’ operator whose face she did not see as she was facing a different



- direction. That the deceased was in uniform. The lady was in black and she did not see her face as she was some 50 meters away. Therefore, she told PW1 and other people about what she had seen. And, when the body of the deceased was found she went to the scene to witness. She denied knowing who occasioned the death of the child. On cross – examination, she stated that when Michael separated with deceased’s mother, Wambui, he married the Subject/Accused.
5. PW3 Wahome Mbuthia, testified that on 14th December, 2021 he woke up and went to irrigate the farm and he sprayed tomatoes. At about 3.00pm he asked a friend to take some meat to his wife, W. Then his child’s grandmother went looking for the child and left. Shortly thereafter the subject arrived and he asked her to warm for him some water for bathing. All over a sudden he heard screams. The following day the body of the child was found at Subukia river.
 6. PW4 Simon Ng’ang’a Kimani testified to have been with PW3 on the farm who sent him to the market to buy meat at about 4.00pm and while there he heard screams. He went towards the direction where the screams emanated from and encountered the grandmother of the deceased who told him that she was lost. They looked for the child in vain. The following day he got a report that the child was dead. He went to the scene and confirmed the fact of the child’s demise.
 7. PW5 Dr. Felix Masongo Nyasami performed a postmortem on the body of the deceased and established the cause of death to have been asphyxia secondary to neck pressure due to tight ligature strangulation and head injury with increased intracranial pressure due to head trauma.
 8. PW6 No. xxx Corporal Wilson Kiptum moved to the scene after information was received of a child having been found at Subukia river. Also present were the scene of crime officers. The child had visible injuries on the head and on the neck was a piece of cloth. The school bag was beside the body. Investigations conducted established that the child had been seen at 16.30hrs on 14th December, 2021 with a lady wearing black jeans and black top by the roadside with a person on a motorbike.
 9. They moved to Michael’s house and interrogated him as to the whereabouts of his wife. The lady he lived with left as soon as they arrived. They searched for her following the description and found her as she was the suspect following the information that they had, not far away from the homestead. They took her to the house, interrogated her regarding clothes she wore the previous day. A recovery was purportedly made of black jeans trousers and a black top from the house. They interrogated the subject further who led them to an alleged house of Richard Makasi stated to have been with her the previous day but they did not find her. Relevant arrangements were made for a postmortem to be conducted. It was his testimony that he suspected the Subject because she was married to Michael and knew that he was the father of the victim who lived with her maternal grandmother.
 10. On cross–examination the officer denied having recorded the issue of going to make a recovery in the investigation diary. He said that Brenda described the suspect but he did not conduct an identification parade for her to identify the person that the Subject led them to the house of her accomplice. He denied having qualified to record a confession being a corporal. He also denied having recorded a statement from the biological mother of the child.
 11. Upon being put on her defence, the Subject had turned 20 years old hence an adult, although at the time of being charged she was 17 years old. It was her sworn testimony that on 14th January, 2021 her husband went to spray tomatoes. That he sent her in the evening to take money to some individual to purchase meat which she did and returned home.
 12. That on 15th December, 2021 she woke up and prepared tea and her husband was called and informed of the child having been found. Her husband and the police went to collect the body while she had gone to purchase soap for washing clothes. People assaulted her saying she had killed the child hence



- she was arrested alongside her husband but her husband was later released. She denied having admitted killing the child. That Brenda Achieng was known to her as she would go to do some work at home. She denied having disagreed with her husband because of the child. That the child would go buy vegetables from her and would even play with her child hence she loved her.
13. The defence called the mother of the Subject as a witness who testified to her having some challenges. That in August 2008 she almost drowned as she attempted to cross the river. Although she was taken to hospital for treatment she is retarded hence could not do well in school and she has a problem of understanding and is usually forgetful. Further, that she has never seen her wear trousers as she only wears skirts.
 14. At the close of the defence case, the learned defence counsel, Mr. Maina Kairo, submitted that the prosecution failed to prove beyond reasonable doubt that the accused killed or caused an unlawful act that caused the death of the deceased. That Brenda Achieng whose statement formed a basis to charge the accused, was an assumption as she did not identify the strangers who were with the child in uniform who may not have been the deceased. That although the investigation officer purport to allege that the Accused confessed to have killed the victim, there was no valid confession on record.
 15. On the purported recovery of the clothes alleged to be for the Accused, it is urged that no scientific analysis was done to connect her or even the deceased's DNA to the clothes. That anybody could own a black trouser and black top. And, that the manner in which the search was conducted was alleged to have violated the law.
 16. I have considered evidence adduced, submissions and the authorities cited. Section 203 of the Penal Code provides thus;

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
 17. In Anthony Ndegwa Ngari v Republic [2014] KECA 424 (KLR) the court held that;

“For the offence of murder, there are three elements 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 that 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.”
 18. Issues to be determined are;
 - i. Whether death occurred.
 - ii. Whether the death was caused by an unlawful act and of malice aforethought.
 - iii. Whether the Subject was the perpetrator of the act that caused death.
 19. The lifeless body of the victim was found at the banks of Subukia river. A postmortem was conducted by PW5 Dr. Masongo Nyasami who concluded that the cause of death was asphyxia due to strangulation and head injury resulting from head trauma. Thus, was proof of death having occurred.



20. The victim was a child aged about six (6) years, hence a child of tender age. She was strangled and a piece of cloth used found around her neck. The act committed was foreseeable and not justifiable legally. She was defenseless, the act committed violated the law therefore the act was unlawful.
21. Malice aforethought is defined by Section 206 of the Penal Code as;
- 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.
22. In *Chesakit v Uganda*, Criminal Appeal No. 95 of 2004 the Court of Appeal of Uganda stated that;
- “in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”
23. The victim was strangled with a piece of cloth which was found still tied around the neck, and, also hit on the left side of the face on the frontal region. No doubt the aggressor clearly had an intent to kill and accomplished that fact.
24. The Subject was the main suspect herein. There was no direct evidence adduced against her hence circumstantial in nature. In *Ahamad Abolfathi Mohammed & Another v Republic* [2018] KECA 743 (KLR) the court stated that;
- “Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence. Way back in 1928 Lord Heward, CJ, stated as follows on circumstantial evidence in *R v. Taylor, Weaver & Donovan* [1928] CR. App. R. 21:
- “It has been said that the evidence against applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that is circumstantial.”
25. According to PW1 she was told by Brenda Achieng PW2 that she saw the Accused with the victim and another. PW2 who gave evidence under oath testified to have known the victim who used to play with



her children very well. Further, she went on to state that she knew the Subject who was married at the neighbourhood by one Muriithi Michael who was the father of the victim. That she saw the victim standing facing her direction and she was with a lady whose face she did not see but she was in black. That she told PW1 about seeing the victim with 2 other people. Her evidence contradicts what PW1 stated as having been told.

26. PW6 alleged that they recovered a black jean trouser and top from the house of Michael which he believed belonged to the culprit. PW2 identified the school uniform the victim was wearing on the fateful date and the bag that she was carrying. Surprisingly, she was not led to identify the alleged clothes so that she could confirm if that is what she wore. Secondly, it is not clear how the clothes and where exactly in the house they were allegedly recovered and if it was in the presence of either Michael or the Subject. I say so because the State availed Michael as a witness who did not identify the clothes. An inventory of recovery would have sufficed.
27. The Subject denied knowing the items produced in evidence. The obligation to prove the guilt of the Subject who is presumed innocent was upon the State/Prosecution. They were required to prove each and every element of the charge. The accused had no responsibility of proving her innocence.
28. There was nothing peculiar on the clothes the investigating officer availed that connected the Subject to the offence. The investigating officer stated that he suspected the Subject because she was married to Michael knowing that he had a child who lived with her grandmother and she was not the biological mother of the child.
29. In *Joan Chebichii Sawe v Republic* [2003] KECA 182 (KLR) the court held that;

“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 guilt which must be proved by evidence. We disagree with the learned judge’s view that the prosecution had proved its case against the appellant beyond any reasonable doubt”
30. This was suspicion, even if it had been strong it could not prove the offence and hence a basis for founding a conviction. (Also see *Sausi v Republic* [2023] KEHC 1940 (KLR).
31. The upshot of the above is that I find the State/Prosecution having failed to prove the case against the Subject beyond reasonable doubt. She is not guilty, hence acquitted of the charge, accordingly.
32. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF OCTOBER, 2025.

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L.N. MUTENDE

JUDGE

