



**Republic v Lololker (Criminal Case E023 of 2023)
[2024] KEMC 48 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEMC 48 (KLR)

**REPUBLIC OF KENYA
IN THE MARALAL LAW COURTS
CRIMINAL CASE E023 OF 2023
AT SITATI, SPM
OCTOBER 30, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

SANATEA LOLOLKER ACCUSED

JUDGMENT

1. The accused person denied the charge of abducting from lawful guardianship in order to murder contrary to section 255 as read with section 258 of the Penal Code. The particulars in support of the statement of the offence were that on 25th May, 2023 at around 1530hours at Ngokoiye village in Naimirimo location in Samburu Est Sub-County within Samburu County kidnapped a minor namely LOITALAK SAMALI aged 2 years from the guardianship of his mother SAMALI LOLOLKER without her consent in order for the said minor to be murdered or put in danger of being murdered.
2. DPP Moses Ndira prosecuted the case for the State while the accused person represented himself at the trial.

The DPP’S case

3. PW1 Samale Lololker told the court that the accused person was her husband from whom she had become estranged 5 years earlier causing her to leave the matrimonial home and return to her parents’ home in Nkokoi Naimirimo. When she returned to her parents’ home, she was with the 5 children of their marriage. She retained physical custody of the 5 children following the collapse of their marriage.



4. She recalled that on 2nd May, 2023 the accused person showed up at her parents' homestead and took the youngest infant from its sleep and carried him away. As he left with the infant, she questioned him why he was taking away the child whereupon he told her:

See him for the last time!”

5. In her account, the accused then vanished with the child who was asleep. She told the court that the accused person had been visiting her parents' home a number of time prior to this date.
6. The next day, PW1 and elders visited the accused person's home at Loisoya to take back the child but did not find the child. Lparemo informed PW1 that the child had probably been killed by the accused person. She conveyed this news of the missing child to Chief Lentoijoni. She also reported to the police about it. The infant was never found. PW1 stated that the child had been in good health at the time of the abduction. She told the court that afterwards the child's bones were found in the bush and this confirmed that the child had been killed.
7. In cross-examination, she affirmed that she saw him take the child from the house as it slept. She confirmed that she did not see the accused person killing the child. She denied that she killed the child by giving it chang'aa laced with poison.
8. In re-examination, she affirmed that the accused person told her to see the child for the last time before taking it away from her.
9. PW2 Renteya Lenawatop brother to PW1 and a brother-in-law to the accused person told the court that when his sister's marriage to the accused person collapsed, she returned to their parents' home and found him living with their parents. He added that she returned with the children of their marriage.
10. PW2 recalled that on 2nd May, 2023 he was in the compound when the accused person showed up and grabbed the youngest infant from the house and left with it. PW1 and PW2 tried to restrain him but he succeeded in carrying away the child. The following day, the sister and elders visited the home of the accused to recover the child but they found the child missing. PW12 only recovered the beads formerly worn by the missing child. This led to a police report being lodged against the accused person. Subsequently the child's skull was recovered and this confirmed to them that the child had been killed.
11. In cross-examination, PW2 stated that the accused did not take the child to hospital. He agreed that it was possible that the child could have been killed by a wild animal.
12. PW3 S/NO. 2012050365 Chief Daniel Lentoiyoni of Naimirimo Location told the court that a report was lodged with him by the Assistant Chief Lekochere about a missing child who was suspected to have been killed by its father. This caused PW3 and his Assistant Chief to call the accused person and interrogate him on the missing subject. The accused denied killing the child and explained that the child died due to sickness as he took it home.
14. In the further evidence, the Chief demanded the accused person to show them where the infant's body was at and the accused person took them to a spot in the thickets and showed them where he had allegedly left the body but on arrival at the spot the Chief and his team did not find the body. When questioned further, the accused suggested that the body might have been eaten up by wild animals. This turn of events caused the Chief and others to lodge a police report. The accused person was arrested by the DCIO.
15. In cross-examination, PW3 stated that he only visited the home of the accused person after the report of the missing child was filed. He confirmed that he did not effect the arrest of the accused person.



16. PW4 Government Analyst Margaret Wahu Maina produced the DNA Analyst Report dated 26/04/2024 as P.Ex.1 together with the infant's skull as P.Ex.2. In her testimony, she told the court that on 01/03/2024 she received from CPL Anthony Ndegwa the following exhibits for analysis: A skull marked "A" Buccal swabs marked "B" from the infant's mother Blood samples marked "C" from the infant's mother
17. PW4 told the court that she was asked to conduct DNA testing to confirm whether the skull suspected to be that of the deceased infant had any biological links with the mother's buccal swab or blood samples. She told the court that biologically, a child inherits 50% DNA from her father and 50% DNA from her mother. She told the court further that after conducting the necessary tests, the generated DNA profiles showed that the skull was 99.99% a biological child of the mother Samale Loloker.
18. In cross-examination, she told the court that she did not receive any samples from the infant's father to confirm paternity but only received the DNA samples from the mother to confirm maternity.
19. PW5 S/NO. 75825 Corporal Anthony Ndegwa of Wamba Police Station testified as the Investigating Officer. He told the court that on 11/05/2023 he received a complaint from Samali Lololker about her missing child. She told the police that her estranged husband had visited her parents' homestead on 02/05/2023 at 3pm where she lived with the child and grabbed it before leaving with it against her will. She affirmed to him that the distance between her parents' home and the accused person's home was 30kms. She added that the next day while in the company of others she visited the accused person's home to recover the infant but did not file the child. The accused person told her that the child had died on the way due to sickness and that he had dumped the body in the bush.
20. CPL Ndegwa recorded the complaint and launched investigations. He visited the spot in the bush where the accused had allegedly dumped the body but the body was not found. They only found a skull which he suspected belonged to the child. CPL Ndegwa collected it and prepared an exhibit memo form. He collected DNA samples from PW1 and forwarded the same to the government chemist for analysis to confirm if there was any biological relation between the skull and the mother.
21. After due analysis, the government chemist ascertained that the skull belonged to the complainant as its mother. He thus had the accused person charged and arraigned in court with the present charges. In support of the evidence, the witness produced the following as evidence: inventory of the recovered skull Exhibit Memo form. investigation diary
22. In cross-examination, he told the court that he did not find any bloodstains at the scene of the recovery of the skull and that there was no eyewitness to the actual killing of the infant.
23. At the end of his testimony, the DPP closed their case. The court then ruled that a prima facie case had been made out against the accused person and he was put to his defence.

The Defence Case

24. Sanatea Lololker gave an unsworn statement. He admitted that he took the child who was his own son as stated but defended himself saying that he did not kill the infant.
25. In his further statement, he told the court that he wanted to take the child to the hospital but knew that the hospital had no medicine so he went all the way home with it. The next day, he hired a bodaboda rider to take him and the child to hospital but the child died on the way due to sickness and buried it in the bush since he could not reach the hospital. He told the court that he did so because in the Samburu culture a person who died in the bush is not buried at home and so he left the child's body in the bush. He affirmed that 24 hours prior to its demise the child's mother had taken the



infant to Endonyo Nashipa clinic for medical attention and this proved the child was sick. He lodged handwritten submissions wherein he argued that no weapon used in the alleged killing of the child was ever recovered to link him to the crime.

26. He submitted further that the child's beads were not produced to prove their recovery as alleged. He added that the chief allegedly received the report on 29/04/2023 which proved it was a rumour but again stated in his statement that he received the report on 7th May, 2023 which was further contradiction. He submitted that the child had health deformities and the clinic records ought to have been produced to exonerate him from the alleged killing. He termed this case fabricated due to the bitter separation that arose between himself and the complainant herein.
27. He closed his defence at that stage.
28. The duty of this honourable court is to determine whether or not the DPP had proved the charges beyond any reasonable doubt.

Determination

30. The undisputed facts of this case were that the complainant and the accused person were the mother and father respectively of the now deceased infant who was then 2 years old. The parents had separated and lived apart following the breakdown of their marriage but the accused person was a regular visitor to the complainant's home where she was living with the children of their marriage. The mother then retained physical custody of the children but it appears that there were no court proceedings or proceedings before the Children's officer to determine custody.
31. Before going to the factual and legal depths of the case, the court now notes that the nature of the charges were of concern.
32. First, the accused person has been charged with under sections 255 and 258 of the Penal Code which provide as follows:
 255. Definition of kidnapping from lawful guardianship
Any person who takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of a lawful guardian of the minor or person of unsound mind, without the consent of the guardian, is said to kidnap the minor or person from lawful guardianship.
 258. Kidnapping or abducting in order to murder
Any person who kidnaps or abducts any person in order that the person may be murdered, or may be so disposed of as to be put in danger of being murdered, is guilty of a felony and is liable to imprisonment for ten years.
33. From the above provisions, it is clear to the court that the statement of the offence in the charge-sheet is defective because section 255 of the Penal Code does not contain the charge of "abduction from lawful guardianship" but it contains the charge of "kidnap from lawful guardianship." The question that follows is whether this defect would lead to a dismissal of the charges.
34. In the court's considered view, the statement of the offence saying "abduction from lawful guardianship" amounted to charging the accused with an offence that does not exist in section 255 since section 255 speaks of kidnap from lawful guardianship as opposed to abduction. The particulars, however, speak of kidnap from the lawful guardianship and this somewhat cured the defect in the



statement of the offence and the accused was not prejudiced in any way since both offences are cognate being offences against liberty.

35. The second and most important issue on legality was the question of whether a parent can kidnap his/her own child. It was held in the authority of *Margaret Wangechi Nyokabi –v- Republic (2006)eKLR (Criminal Revision M. Koome J. (as she then was and now Chief Justice)* that a parent cannot in law kidnap his own child:
36. This matter coming up for revision under section 364 of the CPC and upon considering the charge against the applicant, the evidence on record and the provisions of the section 24 of the *children Act* 2001, the trial magistrate was in error by finding the applicant guilty of kidnapping her own minor children when the Act gives her equal rights as the complainant over the children.
37. Accordingly, I hereby quash the conviction and sentence passed against the applicant and order the applicant to be released forthwith unless otherwise lawfully held.”
38. This ruling on revision was delivered in the old Children’s Act of 2001. This principle in the 2001 Act that a parent has equal right to custody of a child and therefore cannot kidnap his own child was replicated in the new Children’s Act 2022. This principle was carried forward to the new *Children Act* 2022 as is reflected in section 32:

32. Equal parental responsibility.

- (1) Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis, and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside wedlock.”

39. In the result, on the law taking the clear guidance from the above authority of *Margaret Wangechi Nyokabi* the court finds that the accused person as a parent to the now deceased child should not have been charged with the offence of kidnap of his own child since there was no court order preventing him from physical custody of the child. If there was a court order or parental responsibility agreement under section 33(5) of the *Children Act* 2022 he could have lawfully been charged with kidnap or abduction contrary to that Parental Responsibility Agreement or Court Order. Section 33(1) and section 33 (5) (b) aforesaid provides:

33. Parental responsibility agreement.

- (1) Parents of a child and who are not married to each other may enter into a parental responsibility agreement, in the prescribed form, whereby both, in the best interests of the child, designate and agree on clear individual responsibilities towards the child.
...
- (5) A person who, in breach of a parental responsibility agreement or any order of the Court—
 - (a) hinders another person who has access to a child, or who has parental responsibility in respect of that child in accordance with such order or agreement, from exercising such access or responsibilities; or
 - (b) abducts the child or otherwise prevents that other person from exercising such access or responsibilities in respect of the child, commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding one



year or to a fine not exceeding five hundred thousand shillings, or to both.
(underlining mine)

40. In the result the court dismisses the charges as untenable and bad in law and acquits the accused person for in law a parent cannot kidnap his own child unless there is an express court order or parental responsibility agreement prohibiting or restricting his physical custody. In the present case, there was no court order or parental responsibility agreement preventing him from taking custody. With these findings, the court is satisfied that the DPP's case cannot stand the legality test.
42. He shall be set at liberty after 24hours to enable the DPP exercise the Decision To Charge him with the offence of infanticide or murder or manslaughter as the case may be because in law a parent can be charged with the murder or unlawful killing of his/her own child but not kidnapping his own child as explained in the body of this judgement. If the DPP opts not to charge him with any offence, he shall be set at liberty unless otherwise lawfully held. Right of appeal is 14 days.

DATED, READ AND SIGNED AT WAMBA MOBILE COURT THIS 30TH DAY OF OCTOBER, 2024

HON.T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS – WAMBA MOBILE COURT

Present

Accused Person

DPP Moses Ndira

Leparsanti Court Assistant (samburu Interpreter)

Magisterial Note: The accused person was subsequently charged with murder before the Maralal High Court vide HCCR E002 OF 2024

