



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL CASE NUMBER 26 OF 2019**

**REPUBLIC .....**

**ODPP**

**VERSUS**

**MARY WANJIKU MUIRURI.....**

**ACCUSED**

**JUDGEMENT**

1. The accused is charged with **Murder Contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the information relating to the charge state that on 17<sup>th</sup> May 2019 at Gatimu in Mau Narok Division, Njoro Subcounty, within Nakuru County she murdered Evans Ngugi. The accused entered plea of “Not Guilty” to the offence.

## **The Prosecution Case**

2. This court got seized of this matter after recording of part of the evidence by two other Judges who have since left this jurisdiction. When I took over the case on 15<sup>th</sup> October 2024, I directed hearing to continue from the point the immediate former trial court had left off.
3. PW1 testified that on 17<sup>th</sup> May 2019 at around 10:00 a.m. he was working on the land of his sister called Esther Wanjiru at Gatimu, Mau Narok. A girl came crying and reported that the deceased who was a child aged 3 years or thereabouts had been hung in their house. PW1 rushed to see what was happening but found no one in the house where the deceased was found hanging. Upon searching the house which belonged to the Accused who was the deceased's mother, he found the victim behind a curtain hanging. A nylon rope was tied around the child's neck while the other end of the rope had been tied to a pole in the house. PW1 untied the rope and tried to resuscitate the child. Other residents arrived, and it was discovered that the child was dead. The deceased's mother who is

the accused herein was among those present at the homestead. The accused denied having strangled the child when she was asked about the matter.

4. PW3 told the court that she is the Accused's mother. On the material date she was on the same farm with PW1 and others. The deceased had earlier gone to her home and the Accused picked him up and took him to her homestead nearby. PW3 further testified that after a while, her neighbour informed them of the deceased's death. She also went to the Accused's home and confirmed the fact. The Accused was present and stood at a distance sobbing.
5. According to PW3, the Accused had a history of mental illness. She would sometimes faint, with the condition lasting for hours causing her to be violent and chase away children. The Accused was under medication. On the fateful day, the Accused's husband is said to have related to PW3 that the Accused was sick.
6. PW4 told the court that the deceased was his grandson. Saying that he was also working on the farm other

witnesses have referred to, he confirmed the testimony of PW1 and PW3.

7. PW5, a Police Officer, confirmed lodgement of the complaint at Mau Narok Police Station by one Benard Mburu. Together with other officers he proceeded to the scene and found the body of the deceased having been placed on a sofa in a house. Injuries were noted on the deceased's neck and there was a nylon rope near the body. The Accused's neighbours allegedly told the officers that the Accused strangled the deceased to death. She was found at her home and was arrested. PW5 further testified that the body was removed to Egerton University Funeral Home for preservation and autopsy.
8. PW6 was the case Investigating Officer. He testified to taking over the police file and the rope suspected to have been used to kill the deceased, from his retired colleague. Investigations into the case were complete at the time he was handed the file and exhibit. The officer exhibited the rope in question in support of the Prosecution case. He did not, however, know the

circumstances surrounding the death of the deceased and recovery for the rope.

9. Post-mortem examination of the deceased's body was conducted on 20<sup>th</sup> May 2019 by Dr. Wangari Wambugu (PW2) at Egerton University Funeral Home. She noted injuries on the neck and back. There were no other remarkable injuries observed. The cause of death was opined to be "neck compression by hanging (by another person)". The autopsy report dated 20<sup>th</sup> May 2019 was tendered and admitted in evidence.

#### **The Defence Case**

10. The Accused was put on his defence at the close of the Prosecution case. While affirming that the deceased was her child by brief sworn evidence, she stated that she was not conscious at the time of her child's death and she couldn't therefore explain the circumstances in which he died. She confirmed PW3's evidence that she had picked the deceased from PW3's home earlier that day and took him to their home nearby. The Accused added that she had thereafter left for the river.

11. Apparently because of the state of her mental health at the time, the Accused wants the case to be withdrawn.

### **Analysis and Determination**

12. I have perused the evidence proffered and written submissions of the Prosecution and Defence Counsel in relation to the charge facing the Accused. The sole issue for determination is whether the prosecution has proved beyond reasonable doubt that the accused murdered the deceased, actuated by malice aforethought.

13. There is no direct evidence linking the accused to the death as none of the witnesses testified to seeing the accused commit the offence. Determination of the case therefore wholly depends on circumstantial evidence. In **Mwangi vs Republic (Criminal Appeal No. E054 of 2023) [2024] KEHC 3113 (KLR) 15 March 2023 (Judgment)** this court explained that for circumstantial evidence to be reliable it must be inconsistent with the accused person's innocence.

14. In the case of **Ahamad Abolfathi & Another vs Republic (2018) eKLR** also cited by the Prosecution and Defence Counsel, it was elaborated 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 a strong basis for proving the guilt of an accused person just as direct evidence.”**

15. In a much older case (**Republic vs Taylor, Weaver & Donoram** (1928) Cr. Application R 21), it was observed that;

**“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that is circumstantial.”**

20. In the often quoted case of **Sawe vs. Republic** (2003) **KLR 364**, it was stated that circumstantial evidence must satisfy three tests, namely;-

**“the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; the circumstances taken cumulatively should form**

**a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

21. As in the case of **R vs Kipkering Arap Koskei (1949)** **EACA 135**, the prosecution must also show that there existed in-culpatory facts that were incompatible with the innocence of the accused and incapable of any explanation upon any other reasonable hypothesis other than that of guilt.
22. **Section 206 of the Penal Code** provides that malice aforethought is proven by one or more of the following circumstances;-
- a. **Intention to cause death or do grievous harm whether the death actually occurs or not.**
  - b. **Knowledge that the act or omission causing death will probably cause the death or grievous harm to a person, whether the death is actually caused or not.**
  - c. **An intention to commit a felony.**
  - d. **An intention by an act or omission to facilitate flight or escape from custody of**

**any person who attempts to commit a felony.**

**23.** The prosecution does not have to prove the motive for commission of any crime, and neither is the evidence of motive sufficient by itself to prove commission of a crime by a person who possesses the motive {(see Case law in Robert Onchiri Ogeto vs Republic (2004) KLR (1a)}.

### **Determination**

**24.** No eye witness testified to seeing the Accused commit the murder as already observed. The Accused, however, confirmed the evidence of her mother (PW3) that she had taken the deceased from her home before he was later found dead in her house. According to PW3, the Accused's husband told her that day that the Accused was unwell but no medical evidence has been offered to show her health condition at the time. The spouse of the Accused was not called to testify, perhaps because he is not a compellable witness in law. It is not clear on the evidence if he was himself at home on the fateful day.

25. It is not further shown why none of the Accused's neighbours was called to state how they came to learn of the deceased's demise, yet they are said to have told police officers, as per PW4's evidence, that the Accused strangled the deceased.
26. In the circumstances I agree with the defence that whereas there is strong suspicion that the Accused was the killer, this is not sufficient to found a conviction. The police poorly investigated the case, for instance failing to call the Accused's neighbours who were the ones who first responded to the alarm, as witnesses.
27. In the premises, the circumstantial evidence attendant to the case is insufficient evidence to convict the Accused, the prosecution evidence largely being based on mere suspicion. The Accused is acquitted of the charge under **Section 215 of the Criminal Procedure Code.**

**J. M. NANG'EA, JUDGE.**

**Judgement delivered virtually this 10<sup>th</sup> day of March ,  
2026.**

**In the presence of:**

**The Prosecution Counsel, Mr Wakasyaka.**

**The Defence Counsel, Ms Esang for Mr Mong'eri .**

**Accused, present.**

**The Court Assistant, Jeniffer.**

**J. M. NANG'EA, JUDGE.**

ORIGINAL