



**Republic v Obado & 2 others (Criminal Case 46 of 2018)  
[2025] KEHC 2436 (KLR) (Crim) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 2436 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE 46 OF 2018  
CW GITHUA, J  
JANUARY 30, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ZACHARIA OKOTH OBADO ..... 1<sup>ST</sup> ACCUSED**

**MICHAEL JUMA OYAMO ..... 2<sup>ND</sup> ACCUSED**

**CASPER OJWANG OBIERO ..... 3<sup>RD</sup> ACCUSED**

**RULING**

1. The three accused persons herein namely, Zacharia Okoth Obado; Michael Juma Oyamo and Casper Ojwang Obiero are jointly charged in two counts with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. In the first count, it is alleged that on diverse dates between 3<sup>rd</sup> and 4<sup>th</sup> September 2018 at Owande area in Rachuonyo Sub-County within Homa Bay County, jointly with others not before the court, the accused persons murdered Sharon Belyne Otieno.  
The particulars in the second count are that on the same dates and place, jointly with others not before the court, the accused persons murdered Baby Sharon.
3. Upon being arraigned in court, each accused person denied the charge preferred in each count. The trial subsequently commenced and in support of its case, the prosecution called a total of forty two (42) witnesses.
4. After close of the prosecution case, the parties filed written submissions under Section 306 of the *Criminal Procedure Code* (CPC) which their learned counsel highlighted before me on 8<sup>th</sup> November



2024. Learned prosecution counsel, Ms. Gikui Gichuhi filed her submissions on behalf of the State on 19<sup>th</sup> September 2024. Those of the first accused were filed on 8<sup>th</sup> November 2024 while those of the 2<sup>nd</sup> accused were filed on 7<sup>th</sup> November 2024. The 3<sup>rd</sup> accused filed his submissions on 5<sup>th</sup> November 2024.
5. It is important to state at this juncture that in this ruling, this court is not required to make a determination on the guilt or innocence of the accused persons as charged. This is because at this stage of the trial, the prosecution's burden is limited to adducing credible evidence sufficient to establish a prima facie case against the accused persons and not to prove the charges against them beyond any reasonable doubt.
  6. A prima facie case was defined in the celebrated case of Ramanlal Trambaklal Bhatt V Republic [1957] EA 332 in the following terms;

“...It may not be easy to define what is meant by a prima facie case but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence ....”
  7. Given the foregoing, the question that I am called upon to answer at this stage is whether, based on the evidence presented before this court, after properly directing its mind to the law and the evidence, this court may convict any of the accused persons if they chose not to give any evidence in their defence. I use the word may deliberately because at conclusion of the trial, the court will be required to evaluate the evidence adduced by both the prosecution and the defence in its entirety alongside any submissions made by the parties and thereafter make a finding whether on the facts and the law, the prosecution had proved its case against the accused persons beyond any reasonable doubt. Needless to say, this is a much higher standard of proof than the one applicable to the determination of whether or not the prosecution had established a prima facie case requiring an accused person to be put on his defence.
  8. In her submissions, learned prosecution counsel Ms. Gikui urged this court to find that through its forty two witnesses, the prosecution had adduced credible and cogent evidence which left no room for doubt that the three accused persons jointly planned and acted in concert to execute connected and strategic roles which eventually culminated in the abduction and subsequent murder of the late Sharon Belyne Otieno (Sharon) and her unborn baby.
  9. Counsel further submitted that in the light of Article 26 of *the Constitution* which provides that life begins at conception, the prosecution had established through the evidence of PW1, PW7, PW9, PW16, PW30 and other related testimonies as well as documentary evidence that there was a direct linkage between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons and the death of the two victims in this case; that therefore, the prosecution had established a prima facie case to warrant each accused to be put on his defence in each count.
  10. On behalf of the 1<sup>st</sup> accused, learned counsel Mr. Kioko Kilukumi SC who appeared together with learned counsel Mr. Roger Sagana chose to submit first on the charge preferred against the accused persons in count 2. Counsel submitted that as a matter of law, the evidence adduced by the prosecution in support of count 2 did not disclose the offence of murder.
  11. Relying on the persuasive authorities of Elizabeth Mwelu Mwau V Republic [2015] ekLR and Republic V John Nyamu & 2 others [2005] ekLR, learned counsel for the 1<sup>st</sup> accused in their submissions referred me to the born alive principle which basically stipulates that for a charge of murdering a child to be established, the child must be born alive from its mother's womb.
  12. Counsel further submitted that the offence of murder can only be committed against a person and that by virtue of the born alive principle which was also applicable in Kenya by virtue of Section 214



of the Penal Code, an unborn child otherwise known as a foetus in medical terms was not a person for purposes of Section 203 of the Penal Code, the penal provision that creates the offence of murder.

13. In addition, counsel contended that the Penal Code did not contradict Article 26 (2) of the Constitution which decrees that life begins at conception because although the killing of an unborn child did not constitute the offence of murder, the life of an unborn child was protected under Section 228 of the Penal Code which creates the offence of killing an unborn child; that this was the offence that was disclosed by the evidence presented in support of count 2 and since none of the accused persons was charged with that offence, each accused should be acquitted of the charge preferred in count 2 at this stage.
14. In respect of count 1, the defence team for the 1<sup>st</sup> accused; learned counsel Mr. Oganda Messo and Ms. Msando instructed by the firm of Prof. Tom Ojienda & Associates for the 2<sup>nd</sup> accused and learned counsel for the 3<sup>rd</sup> accused, Mr. Jack Oronga all submitted that the evidence adduced by the prosecution in support of count 1 had many discrepancies and was neither credible nor sufficient to meet the threshold of a prima facie case.  
  
They urged me to find that each accused did not have a case to answer and should be acquitted in each count without further ado.
15. Having carefully considered the evidence on record in its entirety alongside the rival written and oral submissions made on behalf of the prosecution and each accused person as well as all the authorities cited, I wish to deal first with the 1<sup>st</sup> accused's submission that the evidence availed by the prosecution in support of count 2 did not disclose the offence of murder and that as a matter of law, the accused persons cannot be placed on their defence in respect of that count.
16. As stated earlier, the main reason advanced in support of the above submission is that the offence of murder can only be committed against a person and that by virtue of the born alive principle, an unborn child or a foetus was not a person for purposes of Section 203 of the Penal Code.
17. Section 203 of the penal Code provides as follows;

“ Any person who of malice aforethought causes death of  
another person by an unlawful act or omission is guilty of murder.” (Emphasis Mine)

As correctly submitted by Mr. Kilukumi SC, a plain reading of this provision makes it clear that the offence of murder can only be committed against a person.

18. Having found as I have above, the question that I must now answer is whether the prosecution had proved that the victim in count 2 christened as Baby Sharon, was in fact a person within the meaning of Section 203 of the Penal Code. The starting point in answering this question is a consideration of Section 214 of the Penal code which elucidates when a child is deemed to be a person capable of being killed. The provision is in the following terms;  
  
“ A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not.”
19. From the above provision, it is abundantly clear that for a child to be a person capable of being killed or murdered, it must be born from its mother's womb alive. Put differently, it must have its own independent existence separate from its mother's body. As pointed out earlier, Section 214 above



incorporates the born alive principle into our penal system. This principle has been the subject of judicial pronouncements both in Kenya and other jurisdictions.

20. In the South African case of *S v Ludwe Mashumpa & Another* (CC 27 [2007] [2007] ZAECH 23 whose facts were almost on all fours with the facts in this case save for the circumstances in which the victim and her unborn child were murdered, the court grappled with the question whether the killing of a baby which medical evidence confirmed was alive in its mother's womb before it was killed constituted the offence of murder. When answering this question, the court applied the born alive principle and held as follows;

(53) The present definition of the crime of murder is that it consists in the unlawful and intentional killing of another person (Burchell, *Principles of Criminal Law* 3<sup>rd</sup> ed., at 667; Snyman, *Strafreg*, 5<sup>th</sup> ed., at 423 (“die wederregtelike en opsetlike veroorsaking van die dood van ‘n ander mens”)). That has always been understood as requiring that the person killed had to be born alive. In terms of the present application of the definition of murder, the killing of an unborn child by a third party thus does not amount to murder.

21. In Kenya, the born alive principle was recognized and applied in two decisions which were cited in the submissions made on behalf of the 1<sup>st</sup> accused. These are the cases of *Republic V John Nyamu & 2 others* [2005] eKLR ( the John Nyamu case) in which the accused persons were charged with the offence of murdering two fetuses and the case of *Elizabeth Mwelu Mwau vs Republic* [2015] eKLR ( the Elizabeth Mwelu case) which was an appeal challenging the appellant's conviction and sentence for the offence of killing an unborn child.

22. In the John Nyamu case (*Supra*), the court pronounced itself as follows;

“Section 214 of *Penal Code* (Cap.63) stipulates when a child becomes a person capable of being killed. I have carefully analyzed the wordings of the Section and submissions by the Learned State Counsel. In all humility I cannot accept the contentions from the Learned State Counsel that the last portion of the Section is the operative part thereof, i.e. whether it has breathed or not, and whether it has an independent circulation or not....

I am of an opinion that for a child to become a person the most important ingredient is when it has completely proceeded in a living state from the body of its mother. That ingredient is not present in this case. Without that the fetuses in two counts were not persons capable of being killed. There is no murder...”

23. In the Elizabeth Mwelu case (*Supra*), the court held that the appellant had been wrongly charged with the offence of killing an unborn child and ought to have been charged with the offence of infanticide considering that there was evidence that the child had been born alive. In reaching this decision, the court expressed itself thus;

“...The offence of killing an unborn child makes it a criminal offence for a person to intend to destroy the life of an unborn child capable of being born alive by unlawfully using any means to achieve this result. Section 214 of the *Penal Code* in this regard provides as follows as to when a child is deemed to be a person capable of being killed:

A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navelstring is severed or not.



The offence of killing an unborn baby therefore only deals with acts intentionally performed before or during childbirth where the entire body of the child has not left the body of the mother, and there is thus an overlap of this offence with abortion related offences. .... However, if a child is born alive and is independent of the body of the mother and is then killed, then a person can only be charged with the offence of murder, manslaughter, or infanticide. In the present appeal the facts indicate that the child was indeed born and left the body of the mother, and was then strangled by the Appellant.....”

24. In this case, there is undisputed evidence that at the time Sharon met her death, she was pregnant and the foetus was by then 28 weeks old; that the foetus was viable since it could have been born alive but with premature lungs. There’s also evidence from Dr. Johansen Odour (PW1), the pathologist who conducted an autopsy on the body of both Sharon and her baby that the foetus had been killed while in its mother’s womb. PW1 testified that when conducting the postmortem on Sharon’s body, he found a foetus in her uterus which he removed for purposes of conducting the autopsy.
25. From the above uncontested evidence, it is clear that Baby Sharon was a foetus which had not proceeded from its mother’s body in a living state at the time it was killed. Baby Sharon did not therefore fit the definition of a person capable of being killed within the meaning of Section 203 as read with Section 214 of the *Penal Code*.
26. In making the above finding, it is not lost on me that *the Constitution* at Article 26 (1) guarantees to every person the right to life and proceeds to declare at Sub Article 2 thereof that life begins at conception. In my view, this constitutional provision is given effect by the creation of criminal sanctions which protects life right from conception all the way through its development in the womb to the time it was born and became a person capable of being killed.
27. As demonstrated hereinabove, the unlawful killing of an unborn child does not constitute the offence of murder but is protected by the law through various abortion related offences as well as under Section 228 of the *Penal Code* which expressly creates the offence of killing an unborn child. Section 228 of the *Penal Code* stipulates as follows;

“ Any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a felony and is liable to imprisonment for life.”
28. Having carefully analysed all the evidence adduced by the prosecution in this case, I have come to the conclusion that the evidence offered in support the charge preferred against the accused persons in count 2 does not disclose the offence of murder as defined in Section 203 of the *Penal Code*. Instead, the evidence supports the offence of killing Sharon’s unborn child but none of the accused persons has been charged with that offence.
29. I must state at this juncture that I find it difficult to understand why the prosecution who obviously had possession of the evidence gathered by the investigating officers in this case and must have analysed it before making the decision to charge chose to charge the accused persons with the offence of murder in count 2 knowing full well that the evidence in their possession supported a different offence. In addition, it is not clear why in the course of the hearing, the prosecution did not find it necessary to apply for amendment of the charge in Count 2 under Section 214 of the *Criminal Procedure Code* to align the charge with the evidence on record before closing it’s case.



30. For all the foregoing reasons, I have come to the conclusion that the prosecution has failed to establish a prima facie case against the accused persons sufficient to place them on their defence in Count 2. I therefore find that each accused person does not have a case to answer in count 2 and I consequently enter a finding of not guilty for each accused in Count 2 under Section 306 (1) of the *Criminal Procedure Code*. Each accused is accordingly acquitted of the charge of murder in respect of Count 2.
31. That said, I now turn to consider whether the prosecution has made out a case sufficient to warrant each accused to be put on his defence in count 1. Having carefully considered the evidence presented by the prosecution in its totality and all the material placed before me as well as the submissions made on behalf of each accused person, I am persuaded to find that the prosecution has established a prima facie case requiring each accused to be put on his defence in count 1. In the premises, I find that each accused has a case to answer and is hereby placed on his defence in count 1 under Section 306 (2) of the *Criminal Procedure Code*.
32. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 30<sup>TH</sup> DAY OF JANUARY 2025.**

**HON. C. W. GITHUA**

**JUDGE**

In the Presence of:

Mr. Kilukumi SC and Mr. Roger Sagana for the 1<sup>st</sup> accused.

Mr. Oganda Messo and Ms. Msando for the 2<sup>nd</sup> accused

Mr. Jack Oronga for the 3<sup>rd</sup> accused.

Ms. Ogwenyo holding brief for Ms. Gikui Gichuhi for the state

Mr. Ezekiel Awour for the victim's family.

