

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL CASE NO. 19 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

KELVIN MUTUA ISAAC ACCUSED

JUDGMENT

A. INTRODUCTION

- 1.The accused person was charged with the offence of murder contrary to **section 203 as read with section 204 of the Penal Code (Cap 63)** of the Laws of Kenya. The particulars of the offence were that on the night of 21st /22nd day of April, 2020 at Kangundo Township in Kangundo Sub county, within Machakos county, murdered **GRACE KALUNGU**.
- 2.The accused person denied the charge faced and pleaded not guilty. The case proceeded to full trial with the prosecution calling nine (9) witnesses in support of their case.

B) PROSECUTION CASE

3. **PW1 Dr Erick Mburu** testified that he was a medical doctor, who was then based at Kangundo level 4 hospital and conducted the post mortem on the deceased body on 24.04.2020, after it was positively identified by Elizabeth Muia and Joseph Muia. The deceased was young girl aged 3years old and he did observe that she had multiple bruises and grazing on the chest and on her back (both interior and posterior trunk), that were in different stages of healing.
4. Further, the deceased had laceration/abrasion on the eye lobe, on the left foot dorsum measuring 2x 1cm and also on the right shoulder measuring 2x4cm. He also noticed moderate pallor and presence of petechie on the left and right eye, which he diagnosed as central cyanosis. The deceased had also suffered a fractured hyoid bone and spinal fracture at C5 – C6. He formed the opinion that the deceased had died due to asphyxia due to manual strangulation and signed the death certificate No 1768220. PW1 also produced the post mortem report as an Exhibit before court.

5. Under cross examination PW1 confirmed that the deceased did not suffer any head injury and had died as a result of manual strangulation. **PW2 Martha Mbesa**, confirmed that the deceased was her 2nd born child and that the accused was her husband, with whom they had cohabited for two years. On 21.04.2020, with the accused permission, she left Kangundo to go attend a job interview in Nairobi and arrived in Nairobi late thus was not able to make it back home. The following morning, she woke up and as she prepared to go for the interview the accused called her and informed her that the deceased was not feeling well.

6. The accused informed her that the deceased was vomiting and he was on the way to hospital to seek treatment. Shortly thereafter she received a second call, from a person who identified himself as the doctor attending to the child and after inquiring where she was, he informed her that her child was in critical condition, but he would try his best to assist her. PW2 panicked and repeatedly called the accused, who was not picking his phone.

7. Eventually the accused phone was answered by a person who identified himself as a security guard at the hospital and he

informed her that her child had unfortunately passed on and they had arrested the accused person. She travelled back home and later identified the daughter body before the post mortem was conducted. She identified the accused person on the dock. Under cross examination she confirmed that she had left the deceased in good health under the accused custody and was informed by “Baba Mark” that the deceased had been strangled and hit on the head.

8.PW3 Felicia Mbithe, aged 6 years undertook voir dire examination and was allowed to give unsworn statement. She stated that she was a PP2 student at Sama pre school and recalled that PW2 had travelled to Nairobi, and left them under the care of the accused, who late prepared for them supper, which they ate, but the deceased started to vomited. She finished her supper and left her under the care of the accused as she went to sleep.

9. At some point during the night, the accused woke her up and told her to go and inform her grandmother, who had her own house within their compound that her sister Grace, was unwell. She did so and ended up sleeping at her grandmother’s place until the following morning. He

grandmother too did not also leave her house that night. Under cross examination, PW3 confirmed that, when she went to call her grandmother, she did not see the deceased.

10. PW4 Joseph Muli Wambua, testified that on 22.04.2022 at about 10.00 am he got a call from his grandson, Alfred Muli who informed him of his great grand child death. He instructed Alfred to pick PW3 from their home while he proceeded to Kangundo level 4 hospital, where he found his great grandchild body being prepared for transfer to the mortuary. He viewed the body and noticed that she had suffered multiple scars all over the body, and fresh injury on the shoulder and ear lobe. Later he witnessed the post mortem examination and recorded his statement with the DCI. Under cross examination PW4 confirmed that PW2 was his granddaughter and as a family were not aware of any marital problems she was facing until after this incident occurred. He had also been informed that the accused would repeatedly assault his children.

11. PW5 Berneddatta Mumbua Peter, confirmed that the accused was her grandson but had raise him up from

childhood as her son. They were also immediate neighbours at home. On the material morning, PW3 had come to her house at dawn and informed her that she had been directed to do so by the accused. PW3 did not pass any information to her and she therefore welcomed her and they both went back to sleep. After a while the accused came to inquire if PW3 was safely with her and she confirmed the same.

12. Later during the day, three guests came to her home and inquired about the accused, before informing her of the tragedy that had befallen her great granddaughter. The guest then picked PW3 and informed her that they were taking her to her maternal grandparents. Under cross examination, she confirmed that she was not aware of what happened to the deceased.

13. PW6 Beatrice Nyasuguta Nyazeo, stated that she was the children's officer Kangundo sub-county and her work involved taking care of children and ensuring that their rights are protected. On 22.04.2020 she was working from home during covid pandemic and at about 8.30 am received a call from Nurse Lucy Nyambura, who informed her of the deceased case. She called the OCS Kangundo police station

and briefed him of what had transpired and rushed to hospital where she observed that the deceased had physical injuries all over her body, some healed and others fresh.

14. She took photograph's and returned to the office where she opened a file for the child reference number CCO/16/77/5/29/900 of 2020. PW6 identify the photograph's taken and in cross examination confirmed that she did not visit the accused home nor did she know the circumstances that lead to the child's death.

15. PW7 Sammy Muema Kyalo, stated that he worked at Kangundo level 4 hospital as a customer care officer. On 22.04.2020, he reported on duty at around 7.30 am and was immediately called by the nurse in charge of outpatient department, one Lucy Nyambura. She informed him that there was a child who had been brought to the hospital for medical attention, but had been declared dead on arrival. She had asked the security officer to accompany the child's father to the police station to report the incident and requested him to keep an eye on him when they came back.

16. Once back, he helped in documentation (opening outpatient card) for the patient and escorted the accused

back to the police station, where they meet the OCS and after brief interrogation, they all returned to the hospital, while accompanied by DCI officers who took over the investigations. PW7 confirmed that he did not know the circumstances that lead to the child death.

17.PW9 Inp Hari Kamau, testified that he was based at DCI headquarters and was a crime scene investigator gazetted under Dpp Gazette notice number 217 dated 28.12.2012. On 22.04.2020 he accompanied the OCS Kangundo police station Chief Inspector Wagane to Kangundo level 4 hospital where they found a deceased child lying on the casualty bed. The child had wounds all over her body, some of which were partially healed and others were fresh. He proceeded to document the scene and took several photographs which he produced as exhibit 2(a) to (g) before court.

18. Under cross examination he confirmed that he did not know what led to the child's death, but she had wounds all over her body which in the opinion of the medics was caused by severe beatings.

19. **PW9 Cpr Domtila Nyaroso** confirmed that she was the investigating officer and recalled that on 22.04.20220, upon receiving information about the child's death, they visited the hospital and was assigned to investigate the said case. she recorded witness statements and PW2 confirmed to her that the accused was her children's step father and had a history of discipling/ caning her children for flimsy reasons.

20. Further PW3 had informed her that on the material evening, the accused had prepared supper and served them. The deceased was a slow eater and this infuriated the accused, who took a plastic pipe and started to cane the deceased, while also pinching her. This caused the deceased to cry and vomit. After PW3 had finished her food, the accused instructed her to retire to bed, while he remained behind with the deceased. Later at some point in the night, the accused woke her up and instructed her to go tell PW5 that her grandchild was unwell.

21. The following morning, the accused took the deceased to hospital, where she was pronounced dead on arrival. PW9 produced the outpatient card into evidence and concluded that the accused had a hand in his step daughter's death as

he was the last person with the child and ended up strangling her. Under cross examination PW9 confirmed that PW3 did not see the accused strangle her sister, but saw him beat her up. The accused was the last person who was with the child and thus had to explain what occurred, which led to her death.

22. The prosecution closed their case at that point and the accused was placed on his defence and opted to give sworn evidence.

C. DEFENCE CASE

23. The accused gave sworn evidence and stated that on 21.04.2020, PW2 was called to do an interview at a company known as Steel & Software Co Ltd based in Nairobi and she did ask for his permission to go and attend the said interview. He did not have any objection and on the following day she left for Nairobi, leaving behind their two children, Felisha Ndungu and Grace Kalungu (the deceased) under his care.

24. That evening he made supper for the children and while eating, the deceased started to vomit. He called PW2 and informed her of the obtaining position and they agreed that if

the vomiting reduced, he could let the girl sleep and seek medical attention the following morning.

25. At about 9.00 pm the deceased vomited again and this forced him to change her cloths. Later that night, at about 4.30 am, the deceased sickness increased and he decided to look for transport to enable him take her to Kangundo level 4 hospital. He reached the hospital at about 5.30 am and medical personnel immediately admitted the deceased and attended to her, while he waited at the reception. Later at about 7.00am he was shocked when the doctor came with two security personnel and had him escorted to Knagundo police station, where he was handed over to the OCS.

26. The appellant denied harming the deceased in any manner on that material night and urged the court to acquit him of the charge he faced. Under cross examination he reiterated his earlier evidence and confirmed that they were the three of them on the material evening. He further denied caning the deceased on the material night and also confirmed that he had seen the scars all over the deceased body but denied being responsible for the same.

27. The accused also confirmed that he sent PW3 to go to her grandmother, as he was rushing the deceased to hospital and did not want her to remain alone in the house. It was also his further evidence that the deceased was alive when he admitted her in hospital, but died while receiving treatment. He reiterated that he did not cane the deceased and pointed out that the prosecution had failed to produce the pipe, which he allegedly used to cane his child. He thus urged the court to acquit him of the charge faced.

C. DETERMINATION

28. I have considered the evidence adduced by both parties and given due consideration to the submissions by the parties' respective Counsel. The question that arises before this court is whether the prosecution has proved beyond reasonable doubt that the accused person herein participated in the murder of **GRACE KALINGI**, the deceased herein.

29. **Section 203 of the [Penal Code](#)** defines the offence of murder as follows:

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

50. In ***Joseph Kimani Njau vs Republic (2014) eKLR***, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in ***Nzuki vs Republic (1993) KLR 171***, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

- i) The intention to cause death;***
- ii) The intention to cause grievous bodily harm;***
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.***

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge

that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55”.

30. The Court of Appeal at Nyeri in **Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari vs. Republic [2014] eKLR**, summed up the elements of the offence of murder as follows: -

- a. the death of the deceased and its cause;***
- b. that the accused committed the unlawful act which caused the death of the deceased; and***
- c. that the accused had malice aforethought.***

31. I will now proceed to interrogate each issue.

(i) The death of the deceased and its cause.

32. It is common ground that **GRACE KALUNGU**, died on the night of 21st/22nd April 2020 and PW1 who conducted the post mortem examination did confirm that the deceased had old and fresh assault scars all over her body, which was symptomatic of the physical abuse she had gone through. She had also suffered a fracture of the hyoid bone and spinal fracture at C5-C6 which caused haematoma of the neck

muscles posteriorly. He certified the cause of death to be asphyxia due to manual strangulation.

33. This court therefore finds as a fact that the deceased died as a result of asphyxia due to manual strangulation

(ii) Whether it has been proved that the accused committed the unlawful act which caused the death of the deceased:

34. PW2, PW3, and the accused himself confirmed that on the material night he was alone with his two daughters as PW2, their mother had travelled to Nairobi to attend a job interview. He cooked for his daughters and at some point, the deceased started to vomit. After eating, the accused directed PW3 to go sleep and she left the accused with the deceased. Later during the night/early morning the accused woke PW3 up and directed her to go tell PW5 (her grandmother), that the deceased was unwell. She went as directed but ended up not passing this information and proceeded to sleep at her grandmother's place.

35. PW9, the investigating officer on the other hand testified that during investigation, PW2 had confirmed that the accused was the step father of the girls and would melt out

unproportional punishment on them on any flimsy ground. PW3 had also informed her that on the material evening the deceased was eating slowly, which infuriated the accused and he took a plastic pipe and started to cane the deceased, which caused her to cry and vomit. The accused later instructed PW3 to go sleep and she left the deceased and the accused together.

36. Later during the said night, the accused woke PW3 up and instructed her to go inform her grandmother (PW5) that the deceased was not feeling well, a fact confirmed by PW5. The following morning at about 7.30 am, the accused arrived at Kangundo level 4 hospital seeking emergency treatment for the deceased but she was pronounced dead on arrival, after which the accused was arrested.

37. The accused in defence more or less affirmed the neutral facts that he was alone with his step daughters, cooked for them and at some point, the deceased started to vomit. He sought help and rushed her to hospital at about 5.30am and she was later pronounced dead while on the treatment table at about 7.30am. He vehemently denied caning the

deceased on the material night nor did he do anything that contributed to her death.

38. PW9 evidence, regarding the abuse the deceased suffered under the care of the accused, as narrated to her by PW2 & PW3 during investigations depicts an accurate assessment of the suffering the deceased underwent and is corroborated by the doctors finding during post mortem that the deceased had physical scar wounds all over her body. This was also confirmed by the photographs produced as Exhibit 2.

39. From the evidence adduced, nobody saw the accused harm the deceased but the circumstantial evidence gathered laid a strong basis to support an inference of his involvement in the said crime. Circumstantial evidence is admissible only where the said evidence meets the legal threshold, and may well be a basis for finding the accused person culpable of the offence charged.

40. In **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of

surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

41. The threshold to be established if a conviction is to be based on circumstantial evidence was also discussed In **Sawe -vs- Rep [2003] KLR 364,** where the Court of Appeal held.

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

40. In summation, of the aforestated case law, it is thus required that before any conviction based on circumstantial

evidence is reached, the said evidence adduced must be adequate to prove the case to the required standard of beyond reasonable doubt. In that regard, the court will admit circumstantial evidence if it meets the following criteria;

a) Evidence that is logically connected to the case.

b) The evidence must prove or disapprove a fact relevant to the case.

c) The evidence should be reliable, and trustworthy with minimal chance of falsehood.

d) Its potential to influence a decision should not outweigh the probative value.

e) The evidence should not be hearsay.

42. The deceased was the last person seen with the deceased, a fact confirmed by PW3 and in defence the accused did not deny the same, nor did he allege any intrusion into his house by any third party. The deceased had severe body scars, which was symptomatic of a child who found herself in an unsafe environment and who had faced unchecked physical punishment, which had gone undetected for a period of time. Given this history, and the allegations that he had punished the deceased on the material night, he could be held

responsible for the death of “**Grace Kalungu**” unless he provided cogent explanation to extricate himself from the accusation of having had a hand in her death.

43. This is based on the ***doctrine of last seen alive***, which prescribes that the person last seen with the deceased before his/her death could be held responsible for his/her death unless he/she could provide any explanation as to what may have occurred that contributed to the said death.

44. In the Nigerian case of **Stephen Haruna v The Attorney-General of The Federation (2010) 1 iLAW/CA/A/86/C/2009** the Court opined thus:

"The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death.

Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate

court will be justified in drawing the inference that the accused person killed the deceased.

45. The above proposition is supported by. **Sections 111(1) and 119 of the Evidence Act** both of which provide as follows:

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact, especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

46. The accused denied harming the deceased, but his explanation offered in defense was hollow, for the reason that, he did not explain how the deceased suffered fresh caning scars and/or in particular how she fractured the hyoid bone on the neck and spinal fracture at C5-C6, while under his care on the material night. It would have been expected that the deceased probably choked on her vomit, but that was not the case.
47. Given the history of child neglect and assault the deceased suffered under the accused hands, which fact is proven by the post mortem examination, the inculpatory facts proved herein are incompatible with his innocence and incapable of any other explanation/ reasonable hypotheses other than that of his guilt as the person who without doubt assaulted his step daughter on the night of 21st/22nd April 2020 and ended up strangling her to death.

(iii) Malice Aforethought

48. Having found that the prosecution has proved ***actus reus***, the other issue for determination is whether malice aforethought can be inferred from the prosecution's evidence presented. The offence of murder is complete when "***malice aforethought***" is established. **Section 206** of the **Penal Code**, provides that:

"(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."

49. It is sufficient to say that the mental element required by **section 206 of the Penal Code** can be equated to broad

guidelines set out in the case of Tubere s/o Ochen vs. Republic [1945] 12 EACA 63:

“The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one off blow or violent multiple blows, the conduct of the accused in fleeing from the scene afterwards, the permanency or dangerous severity of the bodily harm and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted.”

131. In assessing the weight to be given to intention as an element of murder, the relevant circumstances must be considered as to whether the appellant foresaw the real or substantial risk and the consequences of targeting the part of the body that may result in the fatal injuries suffered by the deceased.

132. A similar statement of Law was made in the persuasive authority of S. vs. Sigwahla 1967 4 SA 566 in which the court stated:

“The expression intention to kill does not in Law, necessarily require that the accused should have applied his will to compassing the

death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such a result. This form of intention is known as a dolus eventualis as distinct from dolus directus.”

133. The deceased was a child aged 3 years and was manually strangled by the accused person. From the analysis of the injuries inflicted, it is clear that the accused did not have any other intention other than to inflict grievous harm upon the deceased. It is my finding that the accused person knew or ought to have known that his action would result in death, and it can be safely inferred from the nature of injury inflicted on the deceased that the accused person's action was premeditated.

55. In the circumstances I am persuaded beyond reasonable doubt that the prosecution has proved their case and specifically the presence of malice aforethought on the part of the accused too has been proved.

D. DISPOSITION

56. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the Information of murder against the subject herein, **KELVIN**

MUTUA ISAAC beyond reasonable doubt and convicted her accordingly under section 215 of the Criminal Procedure Code.

57. Sentencing will await the filing of a pre-sentence report by the probation and aftercare services department, within the next 21 days.

58. It is so Ordered.

Judgment, signed at MACHAKOS this 29th day of MAY, 2025.

**FRANCIS RAYOLA OLEL
JUDGE**

Judgment read and delivered in open court on this 29th day of MAY 2025.

**FRANCIS RAYOLA OLEL
JUDGE**

In the presence of:-

.....Accused

.....For O.D.P.P

.....Court Assistant

ORIGINAL