Republic v Epiding (Criminal Case E008 of 2023)
[2025] KEHC 11955 (KLR) (15 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11955 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL CASE E008 OF 2023

RN NYAKUNDI, J

AUGUST 15, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

EKAMAIS EPIDING ..... ACCUSED

JUDGMENT

1. Before this Court is an Accused Person charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars are the on the night of 25th day of March 2023 at Kakuma Township in Turkana County murdered Eyanae Epiding.

2. The Accused pleaded not guilty to the offence and it was mandate of the Prosecution to proof his guilty beyond reasonable doubt. The basis of it is Article 50 2 (a) of *the Constitution* on the right of presumption of innocence until the contrary is proved, a right protected and guaranteed for every citizen suspected on an offence. The lead counsel for the state was Mr. Kakoi whereas Mr. Karanja Advocate appeared on behalf of the offence. In discharging the standard and the burden of proof the Prosecution summoned the following Witnesses; PW1 Rebecca Edung, told the Court that the Accused is her husband whereas the Deceased was their biological child. She recalled that on 25th March 2023at about 7.00pm she was generally around their homestead when the Accused inquired why the child was crying and shedding tears. In answer to that question she replied that the child was hungry. In little while the Accused decided to step outside with the child to go and purchase milk to quench the hunger. According to PW1 the Accused never came back nor returned the child that's when she decided to trace and search for the two of them around the village. In the course of the search of this missing members PW1 met the Accused and on inquiry on the whereabouts of the child she was told that he had left in the custody of the sister. On further inquiry the Witness told the court that the Accused declined to accompany her to the home of the sister so that she can pick her child. Nevertheless, she decided to go it alone to the mother-in-law's house but her child was not in that

homestead. She therefore decided to take assistance by reporting the incidence to the police station. The police mounted a mission of search and find the child only to discover his body already buried next to the channel of the river. It was decided by the police in her presence that his body be exhumed and on quick observation the deceased has been buried with full clothes covering his body. The Accused was therefore arrested, investigated and charged with murder contrary Section203 of the Penal Code.

3. The next Witness summoned by the state was chief inspector, Peter Naburu who was attached to the DCI office at Kakuma. PW2 explained to the court that during his tenure a murder incident had been reported to the police station and he was asked to record a confession statement of the Accused. He confirmed to the court that all protocols on confession statement recording were followed and finally the Accused voluntarily agreed to make a confession. The confession statement was presented to this court annexed as Exh 1 a and b in support of the prosecution case.

4. Finally, to take the Witness votes was Dr. Ekiru who gave evidence and the post mortem report concerning the report. The post mortem examination report was produced before this court as Exh 2. There aforesaid post mortem report captured the following features in reference to the deceased body;

> - Generally decomposed body with right forearm amputated and missing.- skull cracked with lonified brain tissue flowing out though separated suture.- eyes decomposed and orbital cavities appeared empty.- lungs decomposed and collapsed, diaphragm decomposed, ribs intact.- decomposed pencardium and heart tissue.- liver decomposed but intestines are normal.- decomposed female genitalia and urinary bladder, kidney intact but decomposed.- brain tissue decomposed and liquified. Skull sutures separated leaving an empty cranial cavity.- decomposed spinal processes.- spinal column unremarkable.- spinal column unremarkable.- decomposed body- no cause of death could be ascertained.- As a result of the examination the pathologist formed the opinion that the cause of death was not ascertained due to the decomposition of the body"

5. Besides the above cluster of evidence, the prosecution also relied on the statement under inquiry of the Accused admitted in evidence during the trial of his case. The features of the statement under inquiry can be summarized as follows;

> "I do remember very well on the 25th day of March 2023 at about 2100hrs I was at home at Awornaparan village, sleeping with Edung Lobui my wife. We disagreed with her on babysitting arrangement and she started fighting me and got out of the homestead with the baby Eyanae Epiding aimlessly towards the town. And stood at Kabokorit-Nayanae antira laga, and threw the baby at a ditch in the laga and buried the baby and headed to Kakuma town during the night at about 0200hrs.
>
> And spent my night sleep at Nabek village up to the following morning when I proceeded to my manual work at Kakuma one refugee camp. I continued with my duties up to the evening and proceeded to spent my other night at Kiwanja ndege area at a friend's house, where I routinely proceeded with his manual works at the refugee spending the nights at friend's home.
>
> Up to the 29th day of March 2023 that my wife Edung followed looking and searching at Kakuma one for my whereabouts and met me at former slaughter area, asking for the baby that I told her that she had given the baby to me because she was not interested with the child. She should leave me alone and go back to where she came from. I remained back doing my duties up to the evening where I proceeded to spend my night at Nabek village and

continued with my work up to the 2nd day of April 2023. That my wife's father one Akou Lobuin came to pick me at my work place.

We walked on foot up to Hash petrol station and took a motor cycle up to Napinyes area where I was tied with a rope on both hands and beaten by the mob using stones, sticks and rungus. And frog-marched to the place where we were living with my wife Edung. I fainted and fell down due to the beatings, I was dropped on a motor bike to the police station by the members of the public and put in the Kakuma police station for custody. I was taken to seek medical attention for the injuries, I was taken to the court by the DCI on 4th of April 2023 for custodial orders of 14 days to finalize the investigations and to be brought before on the 26th April 2023 for plea taking.

That today I record this statement to that effect. That is all I can state. I am remorseful and beg for leniency."

6. It is with this evidence the prosecution closed its case and on evaluation of it by this Court a prima facie case was med out by the prosecution under Section 306 as read with 307 of the Criminal Procedure Code to call upon the Accused to state his defense.

The Defense Case

7. The Accused Person to give unsworn statement in answer to the charge of murder contrary to Section 203 of the Penal Code. In his brief remarks he gave the chronology of the events surrounding the material day he is alleged of committed the offence. He denied knowing or getting involved with the death of the deceased. In his statement actually, he was emphatic that he was not aware of the case before this Court.

Analysis and determination

8. The Accused is presumed innocent until the contrary is proved by the prosecution. The burden of proof is on the state as stated by William Musyoka-J in his book on criminal law at Page 71;

> " The burden of proof rests always with the prosecution, and there is never a burden on the accused to disprove the charge.62 In Kioko v Republic [1983] KLR 289 [1982-88] KAR 157 (Madan, Kneller and Hancox JJA) it was held that the law does not require the accused to prove his innocence and therefore it is erroneous for a court to refer to certain acts and omissions of the accused as being inconsistent with his innocence. It is only in a few exceptional cases that the accused is burdened with prof. The standard of proof where the burden of proof is on the accused is on a balance probability. It was stated in Mwakima and three others v Republic [1989] KIR 530 (Bosire J), that where the law places the burden of proof on the accused person, the standard of proof is never, unless the law clearly says so, as high as that on the prosecution to prove a charge beyond reasonable doubt. In that case, the trial court had erroneously held that the duty on the accused to explain the circumstances of his possession of the item in question was beyond reasonable doubt."

9. The position under our Law therefore for the offence of murder is that the prosecution must proof the following elements beyond reasonable doubt:

> " a. The death of the deceased.
>
> b. That her death was through unlawful acts or omission of the accused.

c. That the accused had malice aforethought.

d. As such, the quality of the evidence placed the accused person at the scene of the murder."

10. What is the law regarding appreciation of the evidence and the application of it to the facts of the case to proof existence or non-existence of a fact in issue as stated in Section 107, 108 and 109 of the *Evidence Act*. It is trite law that proper appraisal of evidence (oral & documentary) is the most important part of judicial function of a trial judge or magistrate during the course of trial of a criminal case. The correctness of findings of facts and the quality of judgment depends upon whether or not the trial judge or magistrate is familiar with the law applicable to different sorts of evidence.

11. This case is purely based on circumstantial evidence as decided by the Court of Appeal in the case of Ernest Asami Bwire alias Onyango v Republic Nairobi CACRA No. 32 of 1990. The principles behind circumstantial evidence include inter alia that;

"(1) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established,

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

12. Similarly, in the case of R v Hillier {2007} 233 A.L.R 63, Shepherd v R {1991} LRC CRM 332 the Courts observed that:

"The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence."

13. The evidence of PW 1 who happens to be the spouse to the accused and the mother to the deceased who is also their biological child set also in motion the last seen together which is one of the critical features under the doctrine of circumstantial evidence. The doctrine of last seen together shifts the burden of proof on the accused requiring him to explain how the incident had occurred. Further, on the part of the accused in this regard will give rise to a very strong presumption against him in the case at bar the accused the deceased and PW1 were together in the material day in their homestead. The court was informed by PW1 that the deceased who is a minor started wailing and crying seeking some kind of attention from their parents. The accused person who happens to be her father got concerned and moved swiftly to inquire from PW1 why the minor was crying. The evidence revealed by PW1

was to the effect that the child was hungry. As a sign of parental responsibility at the time the accused picked the child stepped out of the house and the basis he was going to buy some milk to mitigate the problem of hunger. For the story to be told another day more clearly, this same child right to life under Article 26 of *the Constitution* had been violated and his body buried together with his clothes in a grave without the knowledge of the mother (PW1). As at the time the body was discovered by PW1, PW2 and as confirmed by PW3 the body had decomposed. The post mortem report by PW4 corroborated this chain of evidence. This last seen theory in this case comes in to play when I analyze and evaluate the evidence of PW1 which illuminates the chain of events when the accused in company of the deceased stepped out of the house and when they went missing and the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is so small that the possibility that any person other than the accused being the author of the crime becomes impossible (see Niranjan Panja Vs. State of W.B,(2010) 6 SCC 525, Vithal Eknath Adlinge Vs. State of Maharashtra, AIR 2009 SC 2067, Ramreddy Vs. State of A.P., (2006) 10 SCC 172 and State of U.P. Vs. Satish, (2005) 3 SCC 114)

14. How does this evidence seat with the facts of this case? There is no dispute PW1 and the deceased as at a time were cohabiting together as husband and wife. By the grace of the giver of life they were blessed with a child who also happens to live with them. The history and the motive of this homicide remains un the closet of secrecy however what we do know on the night of 25th day of March 2023 the wife PW1, the deceased and the accused shared some time together in their residence. Then the trigger of the deceased crying emerged and as a responsible aren't it was their duty and responsibility to find out what was happening to the child and take remedy or step to either provide medication or as it ultimately occurred from the mother's perspective it was absence of food or children milk. The accused as the head of the family took the first step and told the mother PW1 that he was going to buy some milk. That was the last time her child was seen alive. What followed was emotional psychological and mental cruelty to search and find the deceased. As the events revealed themselves the deceased child had since been buried and the body completely decomposed.

15. In the breath and width, the evidence and the facts of this case squarely fit the manifestation on malice aforethought under Section 206 of the Penal Code. This provision provides briefly as follows in context and structure that for one to be held malice afore thought the prosecution have established any of the following elements;

> "(a) An intention to cause the death or grievous harm to another person.
>
> (b) Knowledge that the Act its omission will cause death
>
> (c) An intention to commit a felony
>
> (d) An intention to facilitate the escape from custody of a person who has committed a felony."

16. The locus classicus case of Tubere son of Ochien v the Republic 1945 12 EACA 63 there is prima facie evidence on malice afore thought although the evidence of the nature of the injuries inflicted, the weapon used had been concealed by virtue of the conduct of the accused person who was with the deceased few hours and followed with a day or so had already buried the body on a grave and at the time of discovery the body had decomposed.

17. Malice aforethought in Kenya is a key concept in determining murder in homicide cases specifically those within the ambit of Section 203 of the Penal Code. Its not simply premeditation or spite, but rather a legal term encompassing various mental states that demonstrate a wicked and depraved intent to kill or cause grievous harm.

18. This killing by the accused person of his own child is what can be described as fist degree murder. If our Penal Code had purposed to legislate that language this was deliberate and premeditated design to effect o the death of his own child and he did it with ill-will, malice and spite he did not even care the emotional distress which will be occasioned by the carrier of the pregnancy who happened to be PW1 of these proceedings.

19. In my evaluation of the facts of this case on the actus reus combined with the manifestation of malice aforethought under Section 206 of the Penal Code the existence of it on the part of the accused fits squarely on tis quote from the former Chief Justice of Connecticut in which he observed;

> " Malice in this definition is used in a technical sense including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will toward one or more individuals, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo aninio. where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief, and therefore malice is implied from any deliberate or cruel act against another, however sudden."

20. What does the evidence establish that the prosecution has established beyond reasonable doubt the threshold of beyond reasonable doubt that the deceased is dead, and he was killed by his own father unlawfully so without excuse or justification, that the accused did so with malice aforethought under Section 206 (a) (b) of the Penal Code and the last seen theory positively identifies the accused as the perpetrator of the crime. The accused in his defense never discharged the burden placed upon him under Section 111 of the Evidence Acton matters in his position and knowledge as to how his own child he stepped out with could be found having been buried and his body completely decomposed. In this respect the evidence by the prosecution remains truthful, credible, convincing, honest with no pieces from the defense deconstructing it to create a doubt in the mind of the court.

21. I am tempted to conclude this decision with the following remarks, that in deciding the question of the accused's main intent one will have to decide whether he did intend or foresee that result in which he stepped out with his own child alive as he was but soon thereafter the body was recovered having decomposed inside the grave. It should be observed from this evidence that the foresight of the probable consequences as an alternative to intend has become mere foresight. It cannot be said that the accused did not have the foresight that when he may have suffocated the deceased and buried him without even the knowledge and consent of the biological mother he did not harbour the necessary intention to commit the crime of homicide.

22. For those reasons I find the accused guilty of the offence of murder contrary to Section 203 of the Penal Code which I hereby convict him having satisfied myself that each element of the offence has been proven beyond reasonable doubt.

Sentence

23. The convict has already been found guilty of the offence of murder contrary to Section 203 of the Penal Code and punishable with death as prescribed by the Legislature under Section 204 of the Penal Code. Given the Supreme Court decision in Francis Muruatetu versus Republic [2017] eKLR the mandatory sentence of death for the offence of murder is no longer applicable in Kenya. The Apex Court drew the country's attention that it is now a constitutional democracy with an enforceable Bill of Rights, which is seemingly an important reference when dealing with the sentencing discretion of

Judges and Magistrates. The comparative court in S V Toms; S V Bruce 1990 2 SA 802 (A) faced with the same circumstances like in the instant case made the following relevant remarks as follows:

> " The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court (cf R v Mapumulo and Others AD 56 at 57). The fact that courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law.

24. For me it has been a long journey having found myself in this space of determining our brothers' and sister's fate those who find themselves in conflict with the law and I have to perform this solemn duty bestowed upon me by *the Constitution* and enabling penal statutes. It is in this respect I make this statement that sentencing is one of the most difficult aspect of a criminal trial not least because of the competing interest as between the victim's family, the larger public interest constituency and more fundamentally the interests and rights of the convict already found guilty for having committed a serious offence like manslaughter contrary to Section 202 and murder contrary to Section 203 of the Penal Code. A crucial task that I find myself faced with is determining the purpose to be served by a sentence going by each individual case by case basis. That is whether the sentence I am about to impose whether it should aim at the deterrence, retribution, public interest, victim interest or rehabilitation of the offender. In a constitutional democracy like ours a general question is how punishment should be applied or imposed in a way that is consistent with the 2010 Constitution. *The Constitution* in Article 25(A) provides as follows on the fundamental rights and freedoms that may not be limited;

> " Freedom from torture and cruel, inhuman or degrading treatment or punishment"

25. *The Constitution* does not even stope there. There is the Bill of Rights and human dignity in particular which have created a new Blueprint for the administration of criminal justice. This same Constitution guarantees an array of rights to every person including those being prosecuted in our criminal courts. So when one talks about Article 25A which prohibits punishment which brings in the ingredient of torture, cruelty, inhuman and degrading treatment the trial Court then must ask the question, what do those words actually mean in the context of *the Constitution* and the scheme of sentencing?

26. That as it may be there are very clear guidelines on what factors to consider when exercising discretion to impose a fair and appropriate sentence. In addition the Supreme Court in Muruatetu Case has invited trial courts to incorporate mitigation and other tools when it comes to sentencing. It is for this reason learned Counsel Ebenyo made his contribution on mitigation in reference to the convict in the following language:

> The accused person is a young person of age. The accused person young age does make him a great candidate for a non-custodial sentence. He has the capacity and the advantage of time to be able to build his life once more and make better decisions for the benefit of his future. He further desires to go back to school and pursue further education. My Lords, it is against this upshot that we pray for this Honourable Court to consider a non-custodial sentence. My Lords, the accused person herein has been in custody for more than two (2) years. My Lords this time the accused has been able to relate with his fellow remandees at the Lodwar Prison and we pray that such behavior does not go unrewarded. We pray that this Honourable Court considers this time in custody as sufficient sentence served and if

need be, we pray for this Honourable Court to consider a non-custodial sentence. My Lords, the accused person in the course of this matter has expressed remorse for his actions and regretful for the life lost and prays that this Honourable Court sentences him to a non-custodial sentence. He is now a reformed and responsible citizen ready to reintegrate back to his community in Kakuma who are ready for him to be part of it. Lastly my Lords, the family of the accused is fully dependent on him. For the period that the accused person has been incarcerated at the Lodwar Prisons, the family has been exposed to untold suffering that continues to date. It is therefore our humbly prayer that this Honourable Court commit the accused person to serve a non-custodial sentence as he reintegrates back to his community an serving his family.

27. Despite the level of inconsistency described above and perhaps somewhat counterintuitively further analysis of judicial sentencing outcomes duly supported by the various decisions in our Kenya Law Repository, Judicial sentencing rationale showed that there was also a considerable degree of consistency in the sentencing approaches.

28. In the case at bar after taking into account the mitigation, the circumstances surrounding the offence, the personal antecedents of the convict and the metrics on aggravating factors it is quite significant to rule that this is not one such case in which non-custodial sentences are applicable. As noted above, this offence was in violation with *the Constitution* under Article 26 and the death of the deceased was not justifiable or excusable within our Legislative scheme. It is with this in mind I sentence the convict to 26 years imprisonment. 14 days right of appeal explained.

DATED, SIGNED AND DELIVERED VIRTUALLLY AT ELDORET THIS 15TH AUGUST 2025

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Otieno for ODPP

Mr. Karanja Advocate

The Accused