



**Republic v Yohana (Criminal Case E033 of 2021)
[2024] KEHC 259 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 259 (KLR)

FORMERLY CRIMINAL CASE NO. 15 OF 2021

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE E033 OF 2021
AC MRIMA, J
JANUARY 25, 2024**

BETWEEN

REPUBLIC STATE

AND

JUSTUS JUMA YOHANA ACCUSED

JUDGMENT

1. The accused herein, Justus Juma Yohana, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on May 3, 2021 at Ukingoni village in Kapkoi Sub-Location, Kwanza Sub-County within Trans Nzoia County, the accused murdered Maximilla Emanman (hereinafter referred to as ‘the deceased’).
2. When the accused was arraigned in Court, he pleaded not guilty to the offence. He was tried. The hearing of the prosecution’s case began before Hon. Kimaru, J (as he then was) where the first 4 witnesses testified. The rest of the witnesses testified before Yours truly.
3. After the close of the prosecution’s case, this Court found that a prima facie case had been established to place the accused on his defence.
4. The accused gave a sworn defence and did not call any witness.

The Trial:

5. The prosecution lined up 8 witnesses to prove that the accused committed the offence. They were Sharon Etopan Edong who testified as PW1, Patro Emasa (PW2), Samson Etukwan (PW3), MC(a minor, PW4), Dr. Dennis Nanyingi (PW5), No. 58905 Sgt. David Rop (PW6), No. 236139 Insp. Fredrick Simiyu Sirengo (PW7) and No. 65207 Cpl. Nicholas Onyango (PW8).



6. After close of the prosecution's case, the Court found that the accused had a case to answer. He was placed on his defence. He gave a sworn defence.

Analysis:

7. In criminal cases, for the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 *Anthony Ndegwa Ngari v Republic* [2014] eKLR, summed up the elements of the offence of murder as follows: -

- (a) the death of the deceased occurred;
- (b) that the accused committed the unlawful act which caused the death of the deceased; and
- (c) that the accused had malice aforethought.

8. One of the cardinal duties of this Court, especially after taking over a partly-heard case, is to ensure the propriety of the record.

9. Having carefully considered the evidence recorded before Hon. Kimaru, J (as he then was), this Court's attention was drawn to the evidence of PW4 who was a minor. According to the record, PW4 testified on 20th April 2022. The record stated as follows: -

PW4 - MC (Unsworn) (11 years old).

10. The witness then proceeded to give her evidence.

11. This Court has weighed the manner in which voir dire examinations are to be conducted against the above record. In *Japheth Mwambire Mbittha v Republic* [2019] eKLR, the Court of Appeal discussed the essence of a voir dire examination, the manner in which the examination ought to be conducted and the effect of non-compliance.

12. This is what the Court stated: -

[13] As regards the second issue, the appellant has contended that the evidence placed before the trial court was not only contradictory, but that no voir dire examination was ever conducted on the minors (PW 2 and PW 3). Voir dire examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror (See Duhaime, Lloyd. "Voir Dire definition" Duhaime's Legal Dictionary).

With specific regard to the testimony of children, voir dire examination is essential to enable the court satisfy itself that the child is conscious of the truth. The purpose of voir dire was explained by this court in *Johnson Muiruri v Republic* [1983] KLR 445 as follows: -

- 1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voir dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.



2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.
 3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.
 4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.
 5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction.
13. The above procedure was not complied with. As such, no conviction can be sustained, just in case this Court is of such a position. PW4 was the only eye-witness. She candidly testified on the events that preceded the death of her mother that night. Her evidence, coupled with the rest of the evidence on record is likely to lead to a conviction, but for the aspect of the manner the voir dire examination was handled.
 14. Having ascertained as much, this Court is to now consider whether the Accused be released or be retried.
 15. The Court draws from several decisions of the Court of Appeal including *Samuel Wabini Ngugi v R* (2012) eKLR on the way forward.
 16. The Court in *Samuel Wabini Ngugi case* (supra) stated as follows: -

The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of *Ahmed Sumar v R* (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person

That decision was echoed in the case of *Lolimo Ekimat v R*, Criminal Appeal No. 151 of 2004 (unreported) when this Court stated as follows:

... the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.



17. The error on the record was occasioned by the trial Court. This Court has carefully considered and reviewed the evidence on record and without going into the merits thereof, a conviction is likely to be achieved. The offence allegedly committed is not only very serious but also beastly and indeed inhuman especially the manner it was occasioned on a helpless and vulnerable victim.
18. The accused was charged in June 2021. The Accused was in remand until when he was released on bond on February 1, 2023. That period is not inordinately long considering the seriousness of the offence at hand.
19. The witnesses in the case are within the family of the deceased and the neighbourhood and as such it will not be difficult to trace them. The rest are Government servants who are readily available.
20. This Court is, therefore, of the considered view that the ends of justice will be served by an order of retrial instead of discharging the Accused.
21. Consequently, the following orders do hereby issue: -
 - (a) The Accused herein shall be retried.
 - (b) As the Accused is absent, a Warrant of Arrest is hereby issued against him. Once arrested, the Accused shall be presented before any other Court competent to try him except myself for purposes of plea-taking.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF JANUARY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:-

Mr. Kimani, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

