



**Republic v Kisaka & another (Criminal Case E027 of 2023)
[2024] KEHC 6174 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E027 OF 2023**

DK KEMEL, J

MAY 30, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

CHRISTINE NABWIRE KISAKA 1ST ACCUSED

DOUGLAS KATILA KISAKA 2ND ACCUSED

RULING

1. The accused herein Christine Nabwire Kisaka and Douglas Katila Kisaka have been charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 17th Day of July, 2023 at Munyofwe village, Miendo Sub- Location in Webuye West Sub- County within Bungoma County, they murdered Elvis Katila Kisaka.
2. The Prosecution called six (6) witnesses in support of it case which is as follows:-
3. Liliian Nafula Simiyu (PWI) testified that she is the mother of the deceased and that the 2nd accused had been her husband before he teamed up with his mother (1st accused) and kicked her out of her matrimonial home. That she later returned back and gave birth to the deceased but she left with the baby due to mistreatment by the 1st accused who is her mother in-law. That she came back with the child after life became unbearable only for the 1st accused to snatch the baby and chase her away. That she later learnt that the baby had died.

On cross examination, she stated inter alia; that the deceased was breast feeding at the time she left him with the accused persons; that her uncle advised her to leave the child with the accused persons; that she did not come back to check on the child until he died ; that she had no provision and thus opted to leave the child with the 1st accused; that the child was in good condition when she handed him to the 1st accused; that she did not abandon her child. On re-examination, she stated that the 1st accused



claimed that she would place the child on the roof of their house. That both accused did not call her to go and fetch the child.

4. Obadiah Wamoto Khamala (PW2) testified that he is the village manager of Miendo village. He stated that while on his routine walk within the village, he came across the deceased who looked sickly and malnourished. That he alerted the community health volunteer to go and check on the said child. That he later learnt that the child had died.

On cross examination, he stated that the mother of the child did not report to him about the issue of her child being snatched by the 1st accused.

On re-examination, he stated that he was briefed that the child had been taken for treatment.

5. Loice Ednah Kilongi (PW3) testified that she is a community health volunteer. That she was alerted by the clan elder about the situation of the deceased. That she visited the home of both accused and found the deceased in bad shape. She established that the child had not completed taking immunization drugs and was then malnourished. She directed them to take the child to hospital. She later established that the child had been taken to hospital. That the child was not getting proper feeding and that the hospital gave some multivitamins. She added that she later made an impromptu visit and found the child had been placed inside a sugarcane plantation nearby and that she alerted the area chief about it.

On cross examination, she stated *inter alia*; that she established that the child was being fed with porridge; that she had known the mother of the child; that the child was given multivitamins.

6. Caroline Nekesa Lwiki (PW4) testified that she is the chief of Miendo Location. She stated that she received a report from the clan elder to the effect that there was an infant who was undergoing hardship as his guardians were irresponsible. That she directed the community health volunteer to visit the said child. That she later learnt the child had died and that she declined to issue a burial permit and alerted the police over the matter. That she saw the body of the deceased which was emaciated due to lack of feeding. She added that she did not get a report from the accused persons on their inability to provide for the deceased. She also stated that the child had been attacked by malaria.

On cross examination, she stated that she was informed that the child suffered from malaria

7. Patrick Simiyu Wasilwa (PW5) testified that he is the father to the mother of the deceased. He stated that his daughter had some disagreement with her husband and was forced to reside at her uncle's place where she delivered a baby boy. He finally added that he learnt the child had died.

8. No. xxxx Carolyne Chepkoech (PW6) testified that she is the investigating officer and who stated that upon receipt of a report by the area chief, she rushed to the scene where she found mourners preparing to bury a deceased infant. She added that they stopped the burial and took the body to the mortuary for investigations. She organized for an autopsy whereupon the pathologist established that the infant had been denied food and that the infant suffered from cold. She recovered some drugs and treatment notes for the deceased from the 1st accused herein. She further produced the autopsy report on behalf of the pathologist. This was with the consent of the defence and prosecution. The report indicated that the cause of death was chronic starvation due to severe dehydration.

On cross examination, she stated *inter alia*; that she confirms that the mother of the deceased was unable to provide for the deceased and hence opted to take the child to the 2nd accused; that the child was unable to feed due to being abandoned; that the 2nd accused ran a motorcycle taxi business.

9. At the close of the prosecution's case, learned counsels for prosecution and defence opted not to file submissions regarding the issue of whether the prosecution has established a *prima facie* case against the accused persons to require them to be called upon to make a defence.



10. I have considered the evidence adduced by the prosecution at this stage of the proceedings and find that the only issue for determination is whether the prosecution has established a prima facie case against the accused persons so as to warrant them to be called upon to make a defence
11. It is trite that prior to placing an accused on his/her defence, the prosecution is required to have established a prima facie case against such accused person. A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal properly directing its mind to the law and evidence placed before it can convict an accused if no explanation is offered by the defence to the contrary. See *Bhatt v Republic* 1957 EA 332.
12. The Prosecution in order to sustain a conviction in a charge of murder must prove ingredients of the offence which are *inter alia*; that there was death ; that the death was unlawfully caused and with malice aforethought ; that the accused directly or indirectly participated in the commission of the crime.
13. As to the fact of death, the evidence of the pathologist presented by the investigating officer who produced an autopsy report is quite sufficient and that the cause of death was established to be chronic starvation due to severe dehydration.
14. As to the unlawful nature of the death, it is trite that all homicides are deemed unlawful unless caused accidentally or authorized by law. The deceased was an infant at the time of his death and was then aged about ten months old and hence he cannot have contributed to his own death in any way as he was still young and vulnerable. The autopsy report indicated the cause of death as chronic starvation and severe dehydration. These circumstances could not in any way be attributed to the deceased who was then a hapless vulnerable infant. Had these circumstances been addressed by the deceased's guardians, or minders, the death could have been avoided. Hence, I find the death was unlawful.
15. As to the issue of malice aforethought, the evidence adduced herein reveals that the deceased who was then an infant had been left under the care of the 1st accused who is his grandmother while the 2nd accused is his father. Apparently, the mother of the deceased had a disagreement with her husband (2nd accused) and her mother in law (1st accused) and left the child with them and went in search of a job. It was the evidence of the village elder Obadiah Wamoto Khamala (PW2) That while on his routine visit in the village, he came across the deceased herein lying on the ground and who looked malnourished. He alerted the community health volunteer Loice Ednah Kilongi (PW3) who visited the home and noted that the deceased had not completed taking immunization drugs. She directed the 1st accused to take the child to hospital and that she later confirmed that the child was indeed attended to and that it was noticed that the child was not getting proper feeding and that the hospital gave some multivitamins. The said volunteer stated that the 1st accused used to place the child inside a sugarcane plantation nearby . It was due to poor management that the child died. The community health volunteer confirmed on cross examination that the child was being fed with porridge. Again, the mother of the deceased (PW1) confirmed on cross examination that an infant is required to take breast milk for about two years before being weaned. She also confirmed that she left the child when he was only ten months old. She also confirmed that she managed to get some job but did not send money for the child's upkeep. She also informed that she had no provisions and thus opted to leave the child with the 1st accused. Looking at the entire evidence herein, it emerges that the deceased died due to lack of food. The duty to provide the food was upon the guardians/ minders. The persons responsible were the mother (PW1) and the two accused persons herein. This would then lead to a suggestion that the three guardians neglected to take care and provide for the deceased. It emerged from the evidence of the mother of the deceased (PW1) that due to challenges in providing for the child, she opted to leave him with the accused persons. It turns out that the child was neglected which led to his demise. The mother of the deceased ought to have ensured that the child continues with breast milk. The lack



of breast milk and nutritious food obviously contributed to the death of the deceased. The question to be asked is : Did the conduct of the accused persons in failing to provide for the deceased impute malice aforethought on their part?'. Upon analyzing the entire evidence, I find that the ingredient of malice aforethought has not been proved by the prosecution. It is clear that the accused persons and likewise the mother of the deceased had some economic challenges which did not give rise to a situation that they conjured up an intention to kill the deceased. The circumstances of the case raises issues of neglect to provide for a child and that the prosecution should have taken that route and preferred the appropriate charges against the accused persons as well as the mother of the deceased under the relevant provisions of the Children Act 2001. I am therefore satisfied that the ingredient of malice aforethought has not been proved by the prosecution beyond the requisite threshold of proof.

16. As regards the identity of the accused persons as the perpetrators of the crime, it is not in doubt that the child had been left with them by its mother (PWI) in good health. Throughout the evidence, the child was always with them until his demise. Hence, they are the ones to be responsible as guardians of the deceased. As noted *vide* paragraph 15 above, the issue of malice aforethought cannot be attributed to them in the circumstances and hence the identity of the accused persons is only to the extent of being guardians to the deceased. They are the ones who were with the deceased prior to this demise. However, as noted above, the accused persons are not perpetrators of murder. The evidence tendered does not support an offence of murder and that the accused persons are not perpetrators of the same but possibly responsible for neglecting to provide for the deceased. the prosecution ought to have preferred other charges than murder as herein. If the accused persons elect to remain island in defence, the evidence tendered is not sufficient to sustain a conviction against them.
17. In view of the foregoing observations, it is my finding that the prosecution has not established a *prima facie* case against each of the accused herein Christine Nabwire Kisaka and Douglas Katila Kisaka. I find the accused persons have no case to answer and are acquitted of the charge of murder under section 306 (1) of the Criminal Procedure Code. They are ordered to be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF MAY 2024

D KEMEI

Judge

In the presence of :-

Christine Nabwire Kisaka 1st Accused

Douglas Katila Kisaka 2nd Accused

Natwati for Wattangah for Accused

Miss Kibet for Prosecution

Kizito Court Assistant

