



**Republic v Muchira & another (Criminal Case 20 of 2019)
[2024] KEHC 6291 (KLR) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6291 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL CASE 20 OF 2019
RM MWONGO, J
MAY 28, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

CAROLINE MUTHONI MUCHIRA 1ST ACCUSED

MICHAEL MUREITHI IRERI 2ND ACCUSED

JUDGMENT

1. Caroline Muthoni and Michael Mureithi, the two accused persons, are charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on diverse dates between 25th August, 2019 and 29th August, 2019 at Mahigaini village, Mwea Sub- County within Kirinyaga County they jointly murdered Ann Njoki Githinji.

Brief Facts

2. The two accused persons, were living together as a couple bringing up a child aged 2 years. The biological father of the child was Danson Githinji Gatere who had separated with the child’s mother Caroline Muthoni, the 1st accused.
3. On 25th August 2019, both accused persons left the minor unattended and she could not be traced. When asked where the child was, the 1st accused said she had left him with the 2nd Accused. The 2nd Accused could not explain where the minor was.
4. On 29th August, 2019, the Assistant Chief, Mahigaini Location reported that there was a body of a child floating in a canal within his area and the body was moved to Kerugoya Mortuary by Police from Wang’uru Station. The body was positively identified by Eujenio Mithamo. The accused persons were arrested and arraigned in court. The accused persons were arrested and arraigned in court. The matter then went for hearing.



Prosecution Case

5. PW-1 Diana Mbeti Mbusi testified that on the on 2nd September 2019 the 1st accused Caroline Muthoni visited her and informed her that her minor child had been found floating at Mahigaini canal. She recalled that the accused had paid her a visit the previous day. She noticed the said child was not with her. The 1st accused explained that she had left the child with the 2nd accused.
6. In cross-examination she testified that the biological father of the child, Danson Githinji, was her brother-in-law. He separated from the 1st accused after 5 months. She could not explain what happened to the child. Further, she never saw the child with the 2nd accused.
7. PW-2 Danson Githinji Gatere testified that on 3rd September, 2019 at about 11 am, he received a call from the mother of Caroline Muthoni his ex-wife, informing him that Caroline's child was missing and she was unable to say where the child was. He testified that he visited the area and found the 1st accused surrounded by a group of people. When he asked her where the minor was, she only said she left her with the 2nd accused.
8. Upon asking the 2nd accused where the child was, he pointed at the 1st accused. Seeing that no one among them was owning up, PW2 decided to report the matter at the Wang'uru Police Station on the 4th of September 2019. On the 29th September 2019, he received a report that the minor had been found at Mahiga-ini floating in a canal.
9. In cross-examination, he testified that the 1st accused had been his wife for 3 years. She used to drink heavily and used to leave the child. The child died 6 months after they separated. Later he identified the child at the mortuary. The body did not have injuries, and he did not know the cause of the child's death.
10. John Kago Gichobi testified as PW3. He is the assistant Chief Mahiga-ini Sub-Location Mwea East. He recalled having been called on 29th August, 2019 at about 2:30 pm by one Ngeka Munyara. There was a female body of a minor found floating at a canal within his area. He visited the area and confirmed a minor girl had been found. He took initiative to inform the OCS Wang'uru Police Station who took the body to Kerugoya Mortuary.
11. In cross-examination, he testified that he did not know the accused persons or the child's cause of death.
12. PW-4 P.C George Mwaniki Kibebi testified that he was on duty at Wang'uru Police Station on 3rd September, 2019. At about 22 hours members of the public brought the two accused person to the station. The 1st accused said she had left the child with the 2nd accused who said knew nothing.
13. PW-5 Eujenio Mithamo Nyaga testified that he met the father of the deceased child on 4th September, 2019. He accompanied him to the mortuary to view the deceased's body. He did not know the accused persons but used to see them at Kimbimbi market. He did not know the cause of the child's death.
14. The investigating officer Cpl Risper Atieno No. 100296 testified as PW-6. She stated that she was assigned the duty to investigate the matter on the 4th September 2019.
15. On the 5th September, 2019 she recorded the statements of the witnesses and got to learn that the 1st accused had a history of abandoning the minor. Several reports had been made at the Children's Department with two cases having been registered at the Wang'uru Law Courts. She cited Criminal Case No. 347 of 2018 and Criminal Case No 97 of 2019 Wang'uru where the 1st accused was sentenced to serve community service for a day. PW-6 said that she learnt that the biological father to the deceased minor was PW-2 (Dunson Githinji Gatere). She did not produce evidence of the said cases at Wang'uru.



16. In cross-examination- PW-6 testified that she had not visited the scene where the deceased was found, and that there was no eye-witness to the death. The accused witness statement was recorded by the inspector at the station.
17. PW-6 further testified that she blamed the 1st accused for the death of the child as she had her full custody. During investigations she did not visit the accused's home. She stated that the deceased was killed before being thrown in the canal but did not have a witness to the same.
18. In cross-examination she testified that no fingerprint dusting was done to ascertain whether the accused persons fingerprints were on the victim's body.
19. PW-7 Doctor Ndirangu Karomo was the Pathologist who performed the postmortem of the deceased at Kerugoya County Hospital Mortuary. He opined that the minor died of Asphyxia caused by wet drowning. The doctor confirmed that the deceased's lungs were soaked with fluid that the child had inhaled.

Defence case

20. The 1st Accused- Caroline Muthoni Muchira gave a sworn statement. She stated she did odd jobs like washing clothes. She said that the deceased is her daughter and that Danson Githinji is her former husband and the father of the deceased. She said she thought the deceased was with Danson as he used to pick her. She did not know what happened to the child.
21. She said that one morning she woke up and left the child asleep to look for work. When she returned at 2.00 pm the child was not there. She assumed the child was with the father.
22. In cross-examination Accused 1 said that Danson Githinji frequently took the child and on 26th August she thought he had taken her. She confirmed that she was living alone with the child.
23. Michael Muriithi Ileri, the 2nd Accused, stated that he worked as a matatu tout at Kimbimbi. He testified that he saw the child with her mother at the stage. He testified that he has never taken the deceased and has never lived with the deceased. He said that he went to the Chief after he was told by someone that the Chief wanted him.
24. He added that he used to see the mother and the deceased mostly at the stage. He was arrested when he went to the Chief's. He said no one saw him with the deceased child.
25. In cross-examination he said any witness who stated he was with the child were lying.
26. Parties filed written submissions as directed by the court.
27. The Prosecution submitted that to secure a conviction on the charge of murder, it has to prove four main elements against an accused person as stated in Anthony Ndegwa Ngari v Republic [2014] eKLR:
The elements of the offence of murder were listed as follows:
 1. That the death of the deceased occurred;
 2. That the death was due to an unlawful act or omission;
 3. That the accused had malice aforethought.
 4. That it was the accused who committed the unlawful act or omission which caused the death of the deceased.



28. In this case, the prosecution urges that the deceased's death was due to Asphyxia caused by drowning. The prosecution submits that from the evidence, it is clear that the accused persons drowned the deceased. Malice was also apparent in the conduct of the accused persons after the incident. It is the evidence of PW-1 and PW-2 that the two accused persons did not know where the deceased was despite the fact that the minor was under their custody as parents. Secondly, the accused persons swiftly left the home of 2nd accused where the minor was left and were unbothered with the wellbeing of the minor. The minor was the responsibility of both accused.
29. In this case none of the witnesses testified that they saw the accused persons inflict any injuries to the deceased. The prosecution, therefore seeks to prove identification of the accused by circumstantial evidence and the doctrine of "last seen alive." They cited the case of Mohamed & 3 Others v Republic (2005 eKLR) where Osiemo J (as he then was) explained circumstantial evidence as evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact at issue.
30. The 1st accused in her defence testified that on 25th day of August, 2019 she left the deceased in the house and went to look for casual jobs; and that she did not find the deceased when she came back to the house. Similarly, the 2nd accused in his defence testified that he never saw the deceased on the dates between 25th - 29th August, 2019.
31. In R v ECK, Lessit J (as she then was) in an analysis of the doctrine of the last seen with deceased alive stated:

"Regarding the doctrine of the last seen with the deceased. I will quote from the Nigeria: Court case of Moses Jua vs the state (2007) (PELR-CA/1142/2006.)"

The court while considering the last seen doctrine held:

"Even though the onus proofing criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased."

32. The prosecution submits that the two accused persons were the last people seen with the deceased and that the deceased died in a manner that could only be explained by the accused persons. The people last seen with the deceased before her death are responsible for the death and the two accused persons are therefore expected to provide an explanation as to what happened.
33. Parties filed submissions as directed by the court

1st Accused's Submissions

34. The 1st Accused's submission focused on whether the 1st accused caused the death of the deceased and whether she had malice aforethought.
35. The 1st accused testified that on 25th August 2019, she woke up at around 6.00 a.m and left the child asleep to look for some casual work since she did odd jobs like washing clothes. She testified that upon returning at 7.00 a.m she found the deceased was not at home and she called Danson Githinji Gatere the child's father and who sometimes used to take the child. The call was picked up by one Lucy who was unable to inform her about the whereabouts of the child.



36. The 1st accused testified that later she went to Ngurubani where after some days, PW2, Danson Githinji Gatere came and asked her where the child was, he told her to get into the vehicle where she was taken to Kimbimbi Police Station and later to Ngurubani Police Station where she was informed that the child's body was found in a water canal. The 1st Accused testified that she did not know what happened to the child.
37. The 1st Accused submitted that none of the prosecution witnesses was able to testify as to what happened to the child and whether the 1st accused was the one who caused the death of the deceased. Although the Investigation Officer testified that she placed the 1st accused at the scene because the 1st accused had been given full custody, there was no evidence that the 1st accused had caused the deceased's death.
38. Further, the 1st accused submits that the prosecution did not produce any concrete evidence that she had any malice aforethought and that she caused the death of the deceased child. She submitted that the case established against the 1st Accused is purely circumstantial and does not meet the threshold set out in the case of: *Victor Owich Mbogo versus Republic* [2020] eKLR where the Court held as follows:

“To secure a conviction based on circumstantial evidence the circumstances surrounding the death should be cogent and well established, so that when all the evidence is considered in totality, it points to the accused's guilt. The circumstances should form a chain so tight that the inescapable conclusion is that the appellant caused the deceased's death.”

2nd Accused's Submissions

39. The 2nd Accused's submissions were two pronged: Whether there was proof that he committed the unlawful act which caused the deceased's death; and whether the 2nd Accused was the last person to be seen with the deceased.
40. On the issue of proof that the accused persons committed the unlawful act which caused the death of the deceased, the 2nd Accused submitted as follows.
41. PW1 on cross examination by counsel for the 2nd accused person testified that she heard from people that the 2nd accused used to live with the 1st accused. This was hearsay as she never saw the child with the 2nd accused person.
42. PW2 who was the father to the deceased stated that the 1st Accused told him that she had left the child with her father (2nd accused). He further stated that he was accompanied with others who went to Murithi's (the 2nd accused person's home). There was no evidence of the 2nd Accused being with the child.
43. PW4 stated that the 1st accused person said she had left the child with the 2nd accused person, but did not provide evidence of that fact.
44. PW5, Eujenio, on cross examination said that he knew nothing about the accused persons, that he didn't even know the mother of the child and was only shown the mother by his father (PW2).
45. PW6 stated that the 1st accused person had been charged twice with child neglect, and at the time of her disappearance she was the one with the custody of the child. She further stated that the evidence pointed at the 1st accused person, yet he was also charged. In cross examination PW6 stated that she neither visited the house of the 1st accused person nor of the 2nd accused.



46. PW7-The doctor said that the deceased died due to wet drowning and explained that the child was thrown in the water while alive. He did not point a finger at the 2nd Accused.
47. In concluding the submissions on this point the 2nd Accused stated that none of the prosecution witnesses placed the 2nd accused person at the scene of crime or even remotely allude that he had something to do with the death of the deceased.
48. On the issue as to whether the 2nd accused was the last person to be seen with the child, the 2nd Accused submitted as follows.
49. No concrete evidence was led to the effect that the 2nd accused person has ever been seen with the child. In addition, there was no evidence that he was the last person seen with the child before she went missing, and being found dead at the canal, so that an inference can be drawn to his guilt. The failure of the prosecution to prove the last seen doctrine means that the burden squarely falls upon it to prove the elements of murder against the accused.

Issues for Determination

50. The real issue for determination is whether the 1st and 2nd accused killed the deceased or caused the deceased's death.

Analysis and Determination

51. The 1st accused Caroline Muthoni and the 2nd accused Michael Mureithi are charged with murder contrary to section 203 as read with section 204 of the Penal Code.
52. In a case like this the prosecution is required to prove that:
 - a. The death of the minor occurred;
 - b. That the accused persons committed the unlawful act which caused the death of the minor; and
 - c. That the accused persons had Malice aforethought.

The death of the minor occurred

53. This is not a disputed issue. PW-2 Danson Githinji Gatere, is the deceased's biological father. He testified that on 3rd September, 2019 at about 11 am, he received a call from the mother of his ex-wife 1st Caroline Muthoni. She informed him that Caroline's child was missing and she was unable to say where the child was. Later he went to identify the deceased child at the mortuary. He did not know the cause of the child's death.
54. The death of the minor was also confirmed by PW3, PW4, PW5 and PW6. PW5- the investigating officer recorded statements from the witnesses and the accused persons. She did not visit the scene of the incident.
55. PW-7 Doctor Ndirangu Karomo. He performed the postmortem of the deceased at Kerugoya County Hospital Mortuary.

That the accused persons caused the death

56. In this case, both of the accused persons have denied causing the death of the minor. They could not explain the whereabouts of the minor on the material day. The 1st Accused admits that she was with



the minor, her daughter, and that she woke up early to look for a job and left her in the house. When she returned later the child was not there. Thus, the 1st Accused assumed the 2nd Accused had taken her as he often did.

57. The evidence of PW1 merely recollects that the Accused visited her and relayed the information that the deceased had been found floating in a canal. This was on 2nd September 2019, five days after the deceased's body was found. Nothing in her evidence points a finger to the 1st or 2nd Accused.
58. PW-3 John Kago Gichobi, the Assistant Chief Mahiga-ini Sub-Location Mwea East, recalled having been called on 29th August 2019 at about 2:30 by Ngeka Munyara. He was told that there was a female body of a minor found floating at a canal within his area. He visited the area and confirmed a minor girl had been found.
- He took initiative to inform the OCS Wang'uru Police Station who took the body to Kerugoya Mortuary. Nothing in his evidence pointed to either accused person.
59. PW4 merely recounted that members of the public had brought both accused persons to the police station where he booked them. Both accused said they knew nothing about the deceased's death. The core of PW5's evidence was that he used to see the accused persons at Kimbimbi market. These witnesses did not advance the prosecution's case.
60. PW-6, the Investigating Officer, testified that she had not visited the scene where the deceased was found. There were no eye-witnesses to the death. The accused persons witness statements were recorded by the inspector. In her testimony she blamed the 1st accused for the death of the child as she had her full custody. However, she did not visit the accused's home. She stated that the deceased was killed before being thrown in the canal. She did not have a witness to prove the same. Her testimony was no more than a theory of casting liability on the 1st Accused.
61. The Pathologist's evidence merely disclosed the cause of death as asphyxia due to drowning. The doctor confirmed that the deceased's lungs were soaked with fluid inhaled by the child. There was nothing to show that the deceased was killed before being thrown into the canal.
62. Ultimately, there is no evidence availed that the 1st accused and the 2nd accused caused the death of the minor.
63. In their submissions the prosecution admits that none of the witnesses testified that they saw the accused persons inflict any injuries on the deceased. The prosecution's case, therefore, seeks to prove identification of the accused by circumstantial evidence and the doctrine of last seen alive.
64. In the case of *Mohamed & 3 Others v Republic* (2005 eKLR), Osiemo J as he then was explained what constitutes circumstantial evidence as follows:
- “Circumstantial evidence means evidence that leads to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and the tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.”
65. In the present case the Investigating Officer seeking to string together the facts available to her, testified that she placed the 1st accused at the scene because the 1st accused had been given full custody of the deceased. No evidence was laid out to connect any of the accused with the child's death at the canal.



66. Similarly, no evidence was led to the effect that the 2nd Accused had ever been seen with the child. There was also no evidence that he was the last person seen with the child before she went missing and before being discovered dead. Thus, no inference can be drawn as to his guilt

That the accused persons had Malice aforethought

67. Section 206 of the Penal Code, requires proof as to whether or not the murder was committed with malice aforethought. The pointers in the evidence should reflect any of the circumstances in the section.

Section 206 of the Penal Code requires proof of intention. It provides:

- “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.”

68. The prosecution submitted that malice aforethought was apparent in the conduct of the accused persons after the incident. The prosecution relies on the fact that the minor was under their custody as parents. Further, the accused persons swiftly left the home of 2nd accused where the minor was left and were unbothered with the child’s wellbeing.

69. The prosecution relies on the evidence of PW6 to the effect that the 1st accused had a history of abandoning the minor, and that several reports had been made at the children’s department with two cases having been registered at the Wang’uru Law Courts. However, none of these cases were produced as exhibits.

70. I think it is a long stretch to impute malice aforethought for the death of the deceased on a person because they had responsibility for her. Malice aforethought is proved by evidence showing the intention of the accused and what was in their mind. This has not been shown of the 1st and 2nd accused.

71. Section 107 (1) of the *Evidence Act* Cap 80 of the Laws of Kenya provides that:

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists.”

Disposition

72. The prosecution admits that the accused persons were charged by large for being in the custodians of the deceased.

73. From all the above evidence and the testimony of the witnesses, the accused persons have not been shown to have had a common intention to harm the deceased minor. The claim as to negligence has not been proved, and there is no evidence of prior or present mistreatment of the child.



74. Ultimately, there is no evidence of malice aforethought on the part of the accused persons. Hence, the prosecution did not prove the charge of murder beyond reasonable doubt as against the two accused persons.
75. Accordingly, the accused persons are hereby acquitted and shall be set at liberty forthwith, unless otherwise lawfully held.
76. Orders accordingly.

DATED AT KERUGOYA THIS 28TH DAY OF MAY, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Present in person - Accused 1

Present in person - Accused 2

State Counsel - Maari

Makworo Advocate for Accused 1

Wambui Advocate for Accused 2

Murage, Court Assistant

