



**Republic v Wasike (Criminal Case E005 of 2023)
[2024] KEHC 8123 (KLR) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E005 OF 2023
REA OUGO, J
JUNE 25, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MOSES WANJALA WASIKE ACCUSED

JUDGMENT

1. Moses Wanjala Wasike (the Accused) is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that; on the 26th day of January 2023 at Makhele village, Township Location in Webuye West Sub-County within Bungoma County the accused murdered Sylvia Khayecha Wasike.
2. The accused denied the offence and the prosecution called six (6) to support their case. Pw1 Jentrix Olayo the accused's sister in law. Pw2 Wanjala Wekesa is the accused person's father. Pw3 Benjamin Olayo Wanjala is the accused's brother. Pw4 Boaz Okumu Wanjala is also the accused's brother. Pw5 was Doctor Edward Vilembwa attached to Webuye County Hospital and Pw6 No. 85572 P. C John Marwa the investigating officer. When put on his defence the accused gave a sworn statement.

Prosecution Case

3. Pw1 testified as follows; the accused is his brother-in-law and the deceased was the accused's wife. On 25.1.2023 at 5.20 pm, she took her child to Sylvia (the deceased) to look after her as she went to take a bath. On returning to Sylvia's house she found the deceased with Hellen. The deceased asked her not to leave as she wanted her to witness something, she was going to give Hellen some money. She entered her house and came out with Kshs. 78,000/-. She counted the money in her presence. Hellen left and the deceased remained in her house. At about 7.30 pm the same day she heard her father-in-law call her. Her father-in-law told her that there was a discussion going on in Sylvia's house and that it was being said that she knew to whom the deceased gave the money. She told her father-in-law that Sylvia



had given the money to her sister. Her father-in-law told them that they would discuss the matter the next day. She went back to her place. At about midnight the same night Boaz went to their door and called her husband Benjamin. They both left for Musa's place. Her husband returned and told her to lock the door and that Sylvia was not feeling well. She looked at the door and slept. At 6.00 am, her mother-in-law informed her that Sylvia had died. At the time she left the house of the deceased, they were both okay. Sylvia was not unwell. During cross-examination, she told the court that the accused and the deceased were not quarrelling by the time she left their place and that she did not accompany her husband when he was called out by Boaz.

4. Pw2 testified as follows; the accused is his last born and the deceased was his wife. They had been married for 2 years. On 24.1.2023 the deceased went to their house and asked him if he could sell a portion of the land he had given them. He allowed them to do so. She did not see the accused or deceased on 25.1.2023. At about 6.00 pm the accused and his wife returned home at 6.00 pm and began quarrelling. He woke up and went to the accused's house which is within the same compound about 60 meters away. He asked her son why they were quarrelling and Sylvia told him that the accused had a plan to build a house and that he was asking for money to go and misuse. The deceased further told him that she had given the money to her sister to go and keep it. He told the accused to keep quiet until the next day, as his wife had disclosed where she had kept the money. The deceased told him that Pw1 had witnessed her give out the money. Pw1 confirmed the same. At midnight he heard the sounds of a motorbike. He woke up and saw the motorbike was at the accused's place. The door was open. He realized the Boaz had tried to call him. Musa's children said that the accused's wife had fainted and that she had been taken to Webuye Hospital. He went to Webuye Hospital with his other son and they found Sylvia had died. The hospital officials had detained his two sons. They were released after he identified himself as their father. He asked them where the accused was and they told him that he had gone to look for money and that he was to follow them but that the accused's phone was off. He went and reported the matter to the police with his 3 sons and they were asked to get the accused. Later his brothers found him and took him to the police station. He never heard the accused and his wife before he went to sleep. During cross-examination, he told the court that the disagreement the accused and his wife had was over the money but he sorted it. This was at 6.30 pm. The accused and his wife were both inside their house. By the time he left the house, the deceased was alive. She had a wound in her right leg. There was light in the compound when he heard the motorbike. He could not tell what caused the death of the deceased.
5. Pw3 testified as follows; the accused is his brother and the deceased was his sister-in-law. On the 25.1.2023 he was at home at 9.00 pm. At midnight he heard a knock at his door. It was Boaz knocking on his door. Boaz told him that Musa had called him and told him that his wife had fainted in the house. He went to the accused's house and found the deceased on the floor, she was breathing but was not talking. The accused was in the house too. They decided to take the deceased to the hospital. He did not see any injury on her but her clothes had dust at the back. At the hospital, they were told she had died. The accused was later arrested. On cross-examination, Pw3 told the court that when he entered the accused's house he told that his wife had woken up and just fallen. As they left with the deceased to take her to hospital, the accused told them he was going to look for money. When they went to the accused's house he was the only one in the house with the deceased.
6. Pw4 recalled that on 26.1.2023 at midnight he got a call from the accused who is his brother. The accused requested him to go and assist him take his wife to the hospital, the wife had fainted. He woke up Pw3 and they went to the accused's house. The door was locked the accused opened it for them and they found the deceased lying there. The accused told them she had fallen. She did not talk to them. He called their father but his phone was off. They put her on a motorbike. She had no strength. Her clothes were dusty and she had a scratch on her right arm. The accused told them that he had no



money and that he would look for money and follow them. They took Sylvia to the hospital. After 20 minutes the doctor on duty told them that she had died. The doctor interrogated him and they later went to Matulo police station to report. The accused was later arrested. On 25.1.2023 he had seen the deceased at 4.00 p.m. and she had no issue. The accused and his wife were the only ones staying in their house. During cross-examination Pw4 told the court that he found the accused and the deceased inside the house, she had no injuries and she was seated with dusty clothes. He knew that the deceased had pressure issues.

7. Pw5 Doctor Edward Vilembwa testified that on 7.2.2023 Doctor Simiyu who is his colleague whom he has worked with and is familiar with his handwriting, performed the deceased Sylvia Wasike at 11.00 am. The body had been preserved about 24 hours after her death. Externally and internally the body had multiple bruises of various shapes on the hand and lower limbs. There were blunt wounds on her buttocks and multiple bruises and swelling on the skull, swelling on both sides of the brain tissues. The spinal column and cord were intact. He formed the opinion that the cause of death was a brain injury due to blunt trauma. No specimen was sent to the government analyst as the cause of death had been determined. He filled, signed and dated the post-mortem and produced it as Pext. No. 1. During cross examination he indicated that the body was examined on 7.2.2023 but the report indicated that the time of death was 26.1.2023 at 0200 hours. That the body was said to have been seen after 24 hours but it was after a week.
8. Pw6 testified that on 26.1.23 his boss gave him an assignment to investigate a murder case which had happened on 25.1.23. he learnt that the deceased was at the mortuary at Bungoma Hospital and the accused had been arrested. He did his investigations and went to the scene. He found it had been disturbed. The body was at the mortuary. He interrogated the witnesses who were immediate family members. He was told that the accused had sold a part of his shamba (a piece of land) and kept the money in the house. On returning home after work he found the money missing and on asking his wife she did not give a proper response and a fight started. His father intervened and in the middle, the accused woke up the brothers, who on going to the accused's house found the wife was not feeling well. She died on arrival at the hospital. The post-mortem was done and the cause of death was head injuries caused by a blunt object. He concluded that the accused must have called the brothers after the deceased sustained the injuries. The accused was thereafter charged with murder. During cross-examination, Pw6 testified that he did not find any weapon but the deceased's body had bruises on the head, legs and hands. Some parts of her body were swollen. He established that the money the accused wanted was with the deceased's sister. From the statements he took he concluded that the accused killed his wife as they were both in the house.

Defence Case

9. The accused when put on his defence elected to give a sworn statement. He did not call any witnesses.
10. This is the accused's defence. He is 30 years old and he used to be a motorbike rider. The deceased was his wife. They got married in 2017. He does not know why he is in court. He recalls 26.1.23 he was the deceased in the morning and he left for work. He was not with her the whole day. He returned home at about 2.00 pm to 3.00 pm. He called his wife and she informed him that she was at her sister's place. He loved his wife. On 26.1.23 he had given her Kshs. 80,000/- in front of their child. He had sold a shamba. He went to drink busaa for 20/-. On returning he found his wife annoyed. He asked her what was wrong and she told him that she had given the 80,000/- to his sister to keep and that on going back to get 5000/-s from the sister, her sister said that she had lost the money. She had asked her to get 5000/- to pay the fundi who had come to help build their house. He had given her the money on Monday and it got lost on Wednesday. The deceased had a condition of feeling cold. Her nose would



get blocked when it was cold. He did not quarrel with his wife on the material day. When his father was informed about the money he told them to wait for Mukasa the next day. This was about 6.00 pm. he left with Kshs.50/-. He went to buy a drink. He was not injured anywhere when he was his wife. He was not drunk. On returning home he found his wife seated on the chair. She informed him that she had a headache and that she would go and boil some lemon and take it. He told her to take Panadol. Whilst in the bedroom he heard utensils fall. On 27.1.24 he ran to his father's place and told him that his wife had fallen. She was not talking. He tried to pull her from where she had fallen. She had blood on her forehead. He went to get help as he had no motorbike. Boaz took her to the hospital. He was asked to get 200/-. He did not know that she had died. He went to the hospital. He did not receive back his Kshs.80000/-. He does not know who killed his wife to date. Sylvia and Hellen had disputes. His wife had even advised that they move away. Money caused her death and he does not know who did it. Hellen had even asked Sylvia for Kshs. 40,000/-. During cross-examination, he said that he left the deceased seated on a chair and that the deceased was taken to the hospital because of the condition she had of feeling cold and her nose getting blocked. He had taken her to hospital before because of the said illness but he did not have medical documents. The sister she gave the money is called Emily. Her sister was at her place when she fell. This was about 10.00 pm to 10.30 pm. There is a time she fell and got burnt on her leg, her forehead and her finger. The post-mortem was done when he was at the police station and he still does not know why he is in court. The deceased's sister knows about her death. He was not responsible for her death. When she left their home, she had not died. He has not lied to the court.

11. No submissions were tendered at the close of the defence case. I will therefore rely on the evidence adduced by the prosecution and the defence.

Analysis and Determination

12. It is trite law that the standard of proof in criminal cases is beyond reasonable doubt. In a murder case, the prosecution has to prove all three ingredients of murder to secure a conviction. They are; the death of the deceased and the cause of death, proof that the accused committed the unlawful act which caused the death of the deceased and lastly proof that the accused had malice aforethought.
13. On the first ingredient, there is evidence that the deceased died as a result of brain injury due to blunt trauma, doctor Edward Vilembwa testified the body had multiple bruises of various shapes on the hand and lower limbs, and she also had blunt wounds on her buttocks and multiple bruises and swelling on the skull, swelling on both sides of the brain tissue. This evidence leaves no doubt in my mind that whoever assaulted the deceased had the intention of causing grievous harm to her body.
14. On the 2nd ingredient no one saw the accused beat the deceased. The evidence adduced is purely circumstantial. The Court of Appeal in Criminal Appeal No. 135 of 2016 eKLR 2018 stated as following on circumstantial evidence;

“Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990 this Court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;



- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

(See also *Sawe v. Republic* (supra) and [*GMI v. Republic, Cr. Ap. No. 308 of 2011*](#).)

In addition, the prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt.

(See *Teper v. R.* [1952] All ER 480 and *Musoke v. R.* [1958] EA 715). In *Dhalay Singh v Republic*, Cr App. No. 10 of 1997, this Court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”

15. The evidence led by the prosecution is that the accused and his wife had sold land. The money was given to the deceased to keep. She kept it but later called her sister who collected the money. Pw1 witnessed this. Later his father Pw2 was called when a dispute arose between the accused and his wife. Pw2 called the sister-in-law who confirmed that she had the money. They parted with the understanding that the matter would be discussed the next day. Pw2 left the deceased in the accused’s house. She was well no injuries. The same night Pw3 and Pw4 were called by the accused that the wife had fainted. They both went to his house and found the deceased lying in the house, she was not talking but was breathing, she had no strength. Her clothes were dusty and she had a scratch on her right arm They took the deceased to the hospital and she died on arrival. This was the same night Pw2 had left the accused and the deceased in their house. The accused was the last person seen with the deceased in their house. When his brothers went to his house the same night after their quarrel, the accused opened the door for them. His defence that his sister-in-law could have beaten the sister in my view is an afterthought. His father told the court that he had just handled a dispute between the accused and his wife over money. The accused defence that the injuries on his wife were caused by someone else is an afterthought. He was the only one in the house with the deceased and she was found unconscious as a result of the beating. This evidence points to the accused person as the only person who was with the deceased on the material night. If indeed the sister-in-law had been to their house he could have mentioned this to his brothers or even the police. In my view, there are no other co-existing circumstances capable of destroying the inference of guilt on the accused’s part.
16. I am persuaded that it is the accused who caused all the injuries the deceased sustained on the material night and that there was no 3rd party involved. The evidence on what happened on the material night irresistibly points to the accused as the one who assaulted the deceased. He had the opportunity to do so and he did assault the deceased causing grievous bodily harm. The injuries on her hands show that she was defending herself whilst being assaulted. The accused caused the injuries the deceased sustained and she died as a result of the said injuries. The prosecution has proved that the accused committed the unlawful act which caused the death of the deceased.
17. On proof of malice afterthought. Pw2 testified that he had just settled a dispute between the accused and the wife. Pw1 saw the deceased give her sister the money. Pw1 did inform Pw2 about this when Pw1 called her to confirm what the deceased told him about the money. The accused was not happy with the deceased hence the quarrel the same night the deceased got a thorough beating. Under section 206 (a) of the Penal Code, an intention to cause grievous harm amounts to malice afterthought for purposes of a murder conviction. The accused inflicted grievous harm on the deceased. It is not someone else as he states in his defence which I reject as aforethought. The prosecution has proved malice aforethought.



18. In conclusion, I find that the prosecution has proved their case beyond reasonable doubt. I find the accused person guilty of the murder of Sylvia Khayecha Wasike and he is convicted as charged accordingly.

DATED SIGNED AND DELIVERED AT BUNGOMA THIS 25TH DAY OF JUNE 2024.

R. E.OUGO

JUDGE

In the presence of;

Moses Wanjala Wasike/Accused -present in person

Miss Matere - State Counsel ODDP

Wilkister/ Diana - C/As

