



**Republic v Wekesa (Criminal Case E010 of 2021)
[2024] KEHC 14979 (KLR) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14979 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E010 OF 2021**

DK KEMEL, J

NOVEMBER 29, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

ALEX SIMIYU WEKESA ACCUSED

JUDGMENT

1. The accused herein, Alex Simiyu Wekesa, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the 14th February, 2021 at Kamasielo village in Kimilili Sub- County within Bungoma County, he murdered Belisa Chepkwemoi.
2. The Prosecution called SIX (6) witnesses in support of its case which was as follows: -
3. PW1 was Joseph Wekesa Maosio who testified that the accused herein is a neighbour and that he recalled on 14th February 2021, at around 5.00 p.m. he was urged to go arbitrate over the issues between the accused and the deceased herein. On arrival at the house of the accused, two men emerged from the house claiming that the accused and his wife had killed each other. On entering the house, he found the deceased lying on the floor as the accused faced upwards. He told the Court that he did not see any injuries on them and that the accused appeared to be still breathing. He quickly alerted the accused’s uncle and the assistant chief who brought the police officers to the scene. He told the Court that he was never at the deceased’s house to solve any domestic disputes and that when he got to the accused’s house it was empty as there was no bed, mattress or seats.

On cross-examination, he stated inter alia; that the accused had another wife before marrying the deceased whom he had known for about nine months; that the deceased had no visible injuries and that he could not tell if she had died of natural causes; that he could not where the deceased had spent



the night; that he could not tell if the accused suffered shock upon seeing his dead wife; that he found the accused's house swept of furniture; that he does not know the cause of death.

4. PW2 was Roselyn Wanyonyi who testified that she is an assistant chief of Kamasielo Sub-Location and that she only came to know about the deceased herein after the incident. According to her, on 14th February 2021 while at her home she received a call at 4.00 PM. from PW1 who alerted her that the accused herein and deceased had committed suicide. She rushed to the scene and found the accused lying outside his house with breathing difficulties and on entering the house, she found the deceased herein, who was the accused's wife, lying dead on the ground. She also found a bottle of triatix, used to spray cows, next to her body. She alerted the Police officers from Kimilili who arrived and collected the body of the deceased. She told the Court that she did not see any injuries on the body of the deceased and that she could not tell if the deceased and the accused had any marital disputes. She told the Court that she saw a bed and a mattress in the room and could not tell who had killed the deceased herein.

On cross-examination she stated inter alia; that she saw a mattress and a bed in the room; that she could not tell if the deceased died due to epilepsy or other medical conditions; that she could not tell if accused takes alcohol; that she learnt that the deceased had spent the night at her parents' home the previous night; that she does not know the cause of deceased's death.

5. PW3 was Alice Cherotich Dishon who testified that she is the mother of the deceased herein and that the accused was her son-in-law. According to her, on 13th February 2021, at 9.00 p.m. while at her house preparing dinner for her grandchildren, the deceased herein showed up with her daughter and that she informed her that the deceased herein had threatened to kill her. Later, the accused herein called the deceased requesting her to return back to him although she was against it. That the deceased spent the night at her house and that the following day she left for work. She felt apprehensive and decided to go back to her house only to find the deceased had left her child and went away. She told the Court that it was later in the day that she received the news of the death of the deceased. She rushed to the house of the accused only to find her deceased daughter's body with no visible injuries and that the accused appeared to have taken some poison. She told the Court that she was not aware of any differences between the deceased and the accused herein and that it was the first time for her daughter to come home. She told the Court that the deceased informed her that she had no problem with the accused and that she denied claims that the deceased had epilepsy.

On cross-examination she stated inter alia; that she did not get the conversation between the deceased and accused; that she could not tell if the deceased lied about the identity of the person who called her while she was at home; that the deceased informed her that she had quarreled with the accused but could not tell if she had lied to her about the said quarrel; that the accused married the deceased while she had another child out of wedlock then aged nine months old; that the deceased had lived with the accused for one year; that the deceased informed her that she had had no problems with the accused previously; that she witnessed the autopsy but that the doctor did not tell her the cause of the huge amount of blood in the deceased's stomach; that the deceased had grown up with no medical condition; that she does not agree that her daughter developed some epilepsy; that it is not true that the deceased fell down unconscious due to pangs of hunger; that she does not know the cause of death and that the accused should explain the cause of her daughter's death.

6. PW4 was Dr. Wanambisi Caleb Wata testified that he was before the Court to produce a post mortem report conducted by his colleague Dr. Graham Masika dated 19th February 2021, who was currently admitted at the hospital thus could not appear before this Court to produce the same. He confirmed that he had worked with the said doctor in Kimilili hospital and was quite familiar with his handwriting and signatures. According to him, on the post mortem examination of the deceased herein there was no visible injuries on the digestive system but that there was blood in her stomach. He told the Court



that he noted that the deceased person's liver was severed and that he formed the opinion that the cause of death was hemorrhagic shock due to blunt trauma. He produced the post mortem report dated 19th February 2021 as PEXH.1. He told the Court that the deceased's person's liver had ruptured and that the weapon that caused the injury was either a flat surface or blunt object. He also alluded to the fact that any person suffering from epilepsy could fall and sustain such injuries but force was to be extreme for a person to sustain such injuries as a mere fall cannot cause such injuries.

7. PW5 was Ben Kipsang Cheses who testified that the deceased herein was her sister and that he did not know the accused herein but that he lived with the deceased. According to him, on 14th February 2021 while at home he received a call from his mother (PW3) demanding that he visits home urgently over an issue involving the deceased herein. He rushed her home and that PW3 informed him that the deceased herein had confided in her that she was experiencing marital issues with the accused and that the deceased had spent the night at her house. He told the Court that PW3 had informed him that the deceased had informed that that she would go to fetch her clothes from the house of the accused but that the deceased had delayed coming back home. PW3 instructed him to go in search of the deceased and in the company of his younger brother they proceeded to the house of the accused herein where they found nobody at the compound. They called out but there were no responses. As he enquired of the whereabouts of the deceased and accused from a neighbor weeding his crops, his young brother alerted him that he had managed to open the door of the house. They gained access to the house and found the deceased lying on the floor facing upwards while the accused lay facing downwards in a curved position close by the wall. They alerted the clan elder who alerted the area assistant chief. The deceased was confirmed dead and that the accused was rushed to hospital for medical attention. He told the Court that he was not aware that the deceased had been married to the accused herein and that they had any squabbles. He refuted the allegations that the deceased suffered from epilepsy and that when they found the deceased the accused was not at his place of work. He further testified that they found a small bottle of a pesticide placed on top of the door and that he learnt that the accused had consumed the said pesticide. That he could not tell the cause of death of the deceased.
8. PW6 was No. 77903 Pc Leserwa Patrick Kisoso who testified that he is currently attached at Musikoma Police Station but that at the time of the incident he was based at DCI Kimilili. According to him, on the instructions of his DCIO he was directed to investigate an incident wherein it was alleged that the accused herein had killed his wife. He visited the scene where he found the body of the deceased lying on the floor and later learnt that the accused had been rushed to the hospital as he had swallowed some pesticide (triatix). He told the Court that they found a small bottle of the triatix next to the body of the deceased and which was empty. He produced the small bottle of triatix stock spray in Court as PEXH.2. He proceeded to process the scene and had the deceased's body taken to Dreamland Hospital Mortuary. He visited the accused herein at Kimilili Hospital where he established that he was being treated for swallowing poison. He told the Court that the bottle of triatix was not taken for analysis. He told the Court that he recorded the witness statements of the witnesses and that none of them confirmed seeing the accused assaulting the deceased and that it was PW1 who heard screams from the accused's house and that the injuries sustained by the deceased were as a result of blunt objects.

On cross-examination, he stated inter alia; that he did not take the bottle of triatix for analysis; that none of the witnesses witnessed accused assaulting the deceased; that it was Joseph Wekesa who had heard screams from accused's house; that the deceased had spent the night at her parents' home; that he could not tell if the deceased got injured elsewhere before coming to her husband's house; that he established that the accused is behind the murder; that the deceased died in the presence of the accused and that it was the accused who used his hands and legs to injure the deceased.



9. After close of the Prosecution's case, the Court found that the prosecution had established a prima facie case against the accused and subsequently found that he had a case to answer. He was placed on his defense. He tendered a sworn testimony and called one witness.

10. DW1 was Alex Simiyu Wekesa testified that he is the accused herein and that the deceased was his wife. He denied all the charges leveled against him. According to him, On 14th February 2021 he was working at the quarry, his usual place of work, with his colleague one Protus Wafula. He told the Court that the deceased was not at home as he had visited her parents. He told the Court that after work they proceeded with Protus to his house as he needed some drinking water and it was only when he entered the house that he saw the body of the deceased lying on the floor. He called out to Protus to come and see what was happening. He insisted that it was the events that he met at his house that caused him to fall unconscious and that he did not kill the deceased herein. He told the Court that he had another wife in addition to the deceased but that he had separated from his first wife. He insisted that he never differed with the deceased herein and did not know what happened as he was away at the time of the incident. He denied killing the deceased.

On cross-examination, he stated inter alia; that he and deceased had not yet been blessed with child but that the deceased had a child out of wedlock; that he did not assault the deceased and neither did they have a dispute prior to the incident; that he lost consciousness due to the death of the deceased; that he did not take poison to cover the alleged crime.

11. DW2 was Protus Wafula Wanyonyi who testified that the accused herein was a workmate at the quarry and that on the date of the incident they were at work and later he decided to pass by the accused's house to take some water and while at the sitting area he entered the bedroom to fetch water for him and that he suddenly heard the accused say "my lover what has happened yet i had left you in good health". He entered the bedroom and found the accused holding the deceased and then he fell down and started forming in the mouth. He told the Court that he raised alarm and villagers arrived at the scene. He told the Court that he did not see the accused ingest any pesticide as he saw no such pesticide bottle. He told the Court that that morning he passed by the house of the accused but that the deceased was not at home and that the charges against the accused are simply false.

On cross-examination, he stated inter alia; that he knows the accused very well and that he has never disagreed with him as they are friends and that he would feel bad if the accused went to jail; that he knows Kevin Kirui Kipyegon as he is the brother-in-law of the accused and that while at the scene he did not see any of the Prosecution witnesses; that he left the scene after the accused was taken to hospital.

12. After close of the defence case, it is only the defence who opted to file submissions as the prosecution opted to rely on the evidence adduced.

13. I have considered all the evidence availed in this case as set out above as well as the submissions filed. I find the issue for determination is whether the prosecution has proved its case beyond reasonable doubt.

14. Section 203 and 204 of the Penal Code under which the accused has been charged provide for the offence of murder and the punishment therefor. They require that the Prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought.

15. The sections read as follows:

“ 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.



204. Any person who is convicted of murder shall be sentenced to death.”

The death of the deceased

16. The postmortem form dated 19/2/2021 (PEXH.1) produced by PW4 (Dr. Wambisi Caleb Wata) on 28th March 2022, reveals that the deceased died of hemorrhagic shock as a result of secondary trauma caused by a blunt object. He further observed that the stomach of the deceased herein had blood and that her liver was severed. I therefore find that the prosecution proved the element and or fact of death beyond reasonable doubt.

Proof that the accused committed the unlawful act which caused the death of the deceased

17. From these testimonies, there is no direct evidence linking the accused to the murder. However, there is plenty of circumstantial evidence available that can be examined by the Court. In considering circumstantial evidence, the Court warns itself of the factors to take into account and to proceed cautiously in that direction. The Court has pronounced itself on this in the case of *Chiragu & Another v Republic* (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR) where it stated:

“Thus, there was no direct evidence linking the appellants to the death of the deceased. The prosecution case on this aspect therefore hinged on circumstantial evidence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, this Court had this to say on circumstantial evidence: “However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”

Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Suffice to mention *Abanga alias Onyango v. Republic* CR. App NO. 32 of 1990(UR) in which this court held 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.””

18. In the case of *Sawe v. Republic* (2003) KLR 364, the Court of Appeal amplified on the above thus:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving



facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

19. PW3 testified that the deceased herein was married to the accused for a period of one year and that prior the incident, the deceased came to complain to her, for the first time, that the accused herein had threatened to kill her. Later, the deceased received a called from the accused requesting her to come back to their home, but she was against that suggestion. The deceased spent the night at her house and later on 14th February 2021 she left. Later, PW3 felt an uneasy feeling and apprehension she rushed back home only to find the deceased had left her child and went away. She reached out to PW5 and briefed him on the ongoing situation and requested him to proceed to the house of the accused to enquire about the deceased. PW5 in the company of his younger brother were able to locate the house of the accused where they found the deceased lying dead while the accused lay curved in a fetal position by the wall. PW1 testified that when PW5 and another young man were able to access the house of the accused, they found both the accused while the deceased lay on the ground. PW2 also told the Court that after being summoned to the scene she found the accused lying outside with breathing difficulties and that the body of the deceased was lying dead in the house.
20. The accused raised an alibi that he was not at the scene of the crime. The alibi was supported by DW2 who told the Court that on the morning of the incident he passed by the house of the accused and that the deceased was not there and later on after work he passed by the accused’s house to ease his thirst and that was when they discovered the body and that he also noticed the accused foaming in the mouth and eventually falling unconscious.
21. Alibi is defined in the Black’s Law Dictionary, 10th Edition as:

“ A defence based on the physical impossibility of a defendant’s guilt by placing the defendant in a location other than the scene of the crime at the relevant time” .
22. The principle has long been accepted that an accused who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. In Republic v Sukha Singh S/O Wazir Singh & Others [1939] 6 EACA 145, the former Court of Appeal for Eastern Africa held that:

“ If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped” .
23. It is trite that once an accused raises an alibi defence, the onus is on the Prosecution to displace the defence of alibi. It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution. This is based on the sound legal principle that an accused is presumed innocent until proved guilty. That burden of proof does not shift at all to the defence and must remain upon the prosecution throughout a trial.
24. In this case, it is noted that this defence of alibi was raised at the defence hearing and not at the beginning of the trial. Accused was not only placed at the scene of crime by PW1 and PW5 but was also noted to have been found lying next to the deceased with PW5 noting that he also noticed a small bottle



of pesticide on top of the door. Consequently, it is my finding that the defence of alibi raised by the accused and his attempt to shift the cause of the injuries to a fall are an afterthought and must fail.

25. Coming back to the evidence tendered before this Court, it is the testimonies of PW1 and PW5 that tended to place the accused at the scene of crime. This court has no reason to doubt PW3's evidence that the accused had threatened to kill the deceased herein and that on that day of the incident he was found by PW1 and PW5 lying next to the body of the deceased while he was hyperventilating. PW2 testified that he was alerted by PW1 of the situation on ground and not DW2. The defence evidence was a made up story and which did not shake or cast doubt upon that of the prosecution which is overwhelming against the accused. It transpired that the deceased did not have any medical illnesses prior to her demise and hence the death was unlawful in all respects.

Malice aforethought

26. Having found that the Prosecution has proved actus reus, the issue for determination is whether malice aforethought can be inferred now that a single blow to deceased's stomach and liver caused her death.
27. The offence of murder is complete when, "malice aforethought" is established if, pursuant to Section 206 of the Penal Code evidence proves any one or more of the following circumstances:
- "(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."
28. Further, the Court in Republic v Njeru & 3 others (Criminal Case 2 of 2019) [2023] KEHC 19141 (KLR) stated as follows:

"The Court of Appeal in Bonaya Tutu Ipu & Another Vs Republic [2015] eKLR stated as follows on the prove of malice aforethought; -"It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of Chesakit Vs Uganda, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in Rex v Tubere s/o Ochen [1945] 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue: It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick....."



29. In this case, the cause of death was ascertained as hemorrhagic shock secondary to trauma caused by a blunt object. PW4 further testified that they noted blood in the stomach of the deceased herein and that her liver was severed. While it may remain unknown how the accused caused the death of the deceased, a lot can be deduced from the manner in which PW1 and PW5 found him at his house, given the circumstantial evidence available. In my view, the evidence as tendered by PW3 and the manner in which the body of the deceased and the accused were found speaks to the intention by the accused to kill the deceased. I find that the murder was well calculated and executed willingly by the accused and that the moment the deceased went back to his house to collect her clothes as PW3 had alluded, he took advantage of that opportunity to execute his threat. It is obvious that he must have hit the deceased either with his hands and legs to injure the deceased's stomach going by the fact that the liver was severed. The blunt force trauma must have been so severe to cause such injuries. It is only after the deceased had died that the accused realized the enormity of what he had done and thus his feeble attempt to pretend to have become unconscious upon learning of the death. The accused was placed at the scene of crime and that he had the requisite malice aforethought. It is noted that the accused and deceased had lived for one year without a child of their own and that the deceased had come along with a nine month old child born out of wedlock and that they had serious marital issues prior to the death and hence the resolve by the deceased to quit the marriage and which must have angered the accused and who plotted to eliminate her.
30. In the end, having carefully considered the evidence before the Court and the relevant laws, it is my finding that the Prosecution has proved the offence of murder against the accused herein Alex Simiyu Wekesa beyond reasonable doubt. Consequently, I find him guilty of the offence of murder as charged and hereby convict him accordingly.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 29TH DAY OF NOVEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Alex Simiyu Wekesa.....Accused

Wamalwa R.....for Accused

Minishi.....for Prosecution

Kizito/Ogendo.....Court Assistant

