



**Republic v Waweru (Criminal Case 3 of 2020)  
[2024] KEHC 16445 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16445 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL CASE 3 OF 2020  
F GIKONYO, J  
DECEMBER 19, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**BENSON WAWERU ..... ACCUSED**

**JUDGMENT**

**Circumstantial Evidence**

1. The accused person herein, Benson Waweru Alias Mwangi was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars were that on 14/04/2020 at Kajongaa village in Narok East sub-county within Narok, murdered Patrick Leshan (deceased).
3. Briefly, the facts of the case were that on 13/04/2020, the deceased was sent by his grandmother to collect the battery to a phone at his aunt's place (Josephine Seii). He arrived at his aunt's home but his aunt told him to go back home and tell them that the battery was in the cupboard. The child never came back home to pass on the information. When the child failed to show up, they made a thorough search in all neighbouring homes and calls to homes they suspected he might have gone to. The efforts yielded no results.
4. John Ndungu called Sina stating that he met the boy coming from his aunt's place. He told him to go home and wear shoes and follow him to the grazing area. The body of the boy was found in the maize plantation belonging to one Ronang'a. The deceased had been beheaded.
5. The accused had been separated from the mother of the deceased for about two weeks prior to the incident. Some items were recovered knife, gumboots, and a long trouser. The items had blood on them.



6. A message written by Mwangi to one Naipano Kasaini to the effect that, ‘ngoojeni nikiuliwa ukweli, hataamini but nitasema venye niliana wa onyo nimepewa asubuhi’ niko safe. Nitakwambia mwenye walikuwa na mto’ was also part of the evidence.
7. Mwangi surrendered himself to the police station stating that he feared the public may attack him on suspicion of killing the boy as he was cohabiting with his mother. Police officers searched the accused’s house and found black gumboots under his bed. The gumboots had blood stains on them. They searched the toilet and recovered blue jeans trousers. They went to the hotel where the accused worked and retrieved a Maasai simi. The body was taken to Narok mortuary.
8. To prove the case the state called seven (7) witnesses.
9. PW1 PURITY NASERIAN, she is a former wife of the accused. The deceased was her child. She recalled that on 13/04/2020, she was at her mum’s home. Her mother sent her son to her sister to collect the battery of a phone. Her sister stated that her son arrived at her home. But he told him to go back home and tell us that the battery was in the cupboard. The child never came back home to pass the information to us.
10. She thought her boy stayed at her sister’s home or he had left with their mother. Their mother came home and she inquired about the child. Her mother told her the child had not returned from her sister’s home. She went to her sister and her sister stated that she had sent him back in the morning with the instructions of whereabouts of the battery. They slept that night without knowing the whereabouts of the child. They searched the whole neighbourhood to no avail.
11. The following day they embarked on a further search. Sina received a phone call from John Ndungu. John stated that he had asked the boy to go home wear his shoes and follow him to the grazing area.
12. Later the body of the deceased was found on Ronang’a shamba.
13. She stated that they had separated from the accused for like two weeks and there was a tussle when they separated.
14. The police called her to identify the items recovered from the house they were living in with the accused. She identified a knife, gumboots, and long trousers. The items were in a sack. The gumboots, knife, and long trousers had blood on them. Some items were recovered from the toilet.
15. On cross-examination, she stated that the long trouser was recovered from the toilet. The others were recovered from the house.
16. PW2- ELIUD KASERO. the deceased is his grandson. He recalled on 15/04/2020 he witnessed a postmortem examination of the body of the deceased. He was with his brother Henry Kasero. He identified the body as he knew the boy well. He stated that the body had injuries. He was completely beheaded. The hand and back had cuts.
17. On cross-examination he stated that there were injuries to the neck right hand and back
18. PW3-JOSHUA LETEIPA TUUKUO. He testified that on 13/04/2020 his cousin John Ndungu went home and informed him that a child had disappeared. They searched for the child the following morning in the maize plantation. He saw a blue top. He went closer and confirmed it was the boy. He had been beheaded. He ran away and called for help. The police then visited the scene.
19. PW4-JANE NAIPANO KASAINI. She testified that her mother informed her that the deceased had gone missing. She called the boy’s father, Mwangi but the father stated not being aware and that the boy was not at their plot. They started the search the following day. He found people



screaming. He was told the boy had been found. Immediately Mwangi wrote her a message(sms). ‘NGOOJEENI NIKIULIWA UKWELI’ ‘HATAAMINI BUT NITASEMA VENYE NILIONA NA ONYO NIMEPEWA ASUBUHI’ ‘NIKO SAFE NITAKWAMBIA MWENYE WALIKUWA NA MTOTO’

20. PW5- SAMWEL KIPAKI a police officer at Ntulele at the time formerly at Kojonga police patrol base. He recalled that on 14/04/2020 He received a call informing him that a body had been found in a maize plantation. He left for the scene with Cpl Mwadoe and PC Peter Muchai. Upon arrival, they saw the body of a boy aged 8 years. The body showed injuries on the right side of the head, left arm, and on the back near the waist. There were cut injuries. They went back to the camp and found Mwangi had surrendered himself to the police station. Mwangi stated he feared the public may attack him on suspicion of killing the boy as he was cohabiting with the mother.
21. They searched the home of the accused and found black gumboots in his house under the bed. The gumboots had blood stains on them. They found a pair of blue jeans trousers in the toilet. They recovered a Maasai simi at the hotel where the accused worked.
22. On cross-examination he stated that the accused was not at home when they searched. They did not break in as the house was not locked. They also did not book where they were going to the scene. There were no photos of the recovery process.
23. PW6- CPL JOSPHAT MWADOE. He stated that on 14/04/2020 he was at the Kajonga patrol base when PW5 received a call. he accompanied PW5 to the scene. He reiterated the testimony of PW5.
24. PW7- CPL KENNEDY KOECH KETER attached to the DCI, NAROK EAST. He was the investigating officer in this matter. He testified that on 14/04/2020 he was at work when he was informed that a person had been killed at kojonga. He visited the scene. He found the public already annoyed and wanted to burn down the police post where the accused was being held. He took photos using his phone but his phone got lost at the scene. He stated that the body was in the maize plantation. He tried to turn the body but the head had been severed. It fell apart. The crowd became even more angry on seeing this. The maize plantation belonged to the neighbor to the grandfather of the deceased. They took away the body.
25. He received a phone call from CPL Mwadoe that they have recovered maasai sword in the hotel belonging to the accused. He produced it as P Exh 4(A). This is the sheath (P Exh 4(B). Gumboots were recovered from the toilet belonging to the accused (P Exh6). A pair of trouser was also retrieved from the toilet belonging to this accused (P Exh5) and white sack holding these items (P Exh 3) the wife of the accused identified the gumboots and long trousers as belonging to the accused-his husband. She knew them as she used to wash them.
26. He submitted all exhibits to the government chemist Nairobi. They prepared a report (PEXh 7(B) and exhibit memo (P Xh 7(A) are hereby produced. The report showed blood was for a male but unknown.
27. On cross examination, he stated that the report show that the sword was not stained with human blood.

#### **Defense case.**

28. The accused person gave unsworn evidence and did not call any other witnesses.
29. DW1 – BENSON WAWERU MWAURA. He testified that on 13/04/2020 he woke up at 3 a.m. and went to the hotel. at 8 p.m. he received a message from an anonymous source. He was a threat to him and his wife that that they should go to Ntulele at Cheges Timberyard before 7:30 p.m. If we wanted to see our boy alive.



30. After reading the message he went to kajonga patrol base where he found three police officers who were drunk, PW5 and PW6 and another. he showed them the message. Mr. Kibaki told him the message bears no threat. He requested them to track the number in vain. They did not record it in OB. They told him to report at DCI.
31. He then called PW3 but her phone was off. He forwarded the message to her. The next day he went to the hotel. Later at 7 am he went back to the patrol base. He was informed the body of the boy had been recovered. He was informed that people were looking for him because he had not participated in the search for the boy. After about 10 minutes a crowd went to the police station. He asked the police to save him. The DCI later picked him up and took him to Ntulele. On 15/04/2020, his clothes were brought that they were blood stained. He told them he was wearing the clothes to the slaughter house which explains how the blood came on the clothes. He stated that he had no grudge with PW1. He stated that PW5 and PW6 lied that the clothes were recovered from the toilet, yet, al the items were in his hotel.
32. He also accused PW7 of lying about the messages.
33. He denied murdering the deceased.
34. He pleaded with the court to release him so that he could go home and see his ailing mother.

#### **Directions of the court.**

35. At the close of the hearing, both the prosecution and the defense opted not to file written submissions

#### **ANALYSIS AND DETERMINATION**

36. The central issue for my determination in this trial is whether the accused person murdered the deceased.

#### **Elements Of Murder**

37. According to section 203 of the Penal Code:

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

38. Therefore, the prosecution must prove beyond reasonable doubt:
  - a. The fact of death;
  - b. The cause of death;
  - c. That the death was caused by the unlawful act or omission of the accused; and
  - d. That there was malice aforethought. (also see the case of Anthony Ndegwa Ngari V Republic (2024) eKLR).

#### **The Fact and Cause of Death**

39. The fact and cause of death could be handled together for their inextricable connection.
40. The body of the deceased was identified by Eliud Kasero (PW2) and Henry kasero on 15/04/2020 for purposes of a postmortem examination.
41. According to PW2 the body had injuries. He was completely beheaded. The hand and back had cuts.



42. The evidence of those who identified the body of the deceased proves the death of the deceased beyond reasonable doubt.

### **Was death due to unlawful act or omission by the Accused?**

43. PW1 PURITY NASERIAN, she is a former wife of the accused. The deceased was her child. She recalled that on 13/04/2020, she was at her mum's home. Her mother sent her son to her sister to collect the battery to a phone. Her sister stated that her son arrived to her home. But he told him to go back home and tell us that the battery was in the cupboard. The child never came back home to pass the information to us.
44. She thought her boy stayed at her sister's home or he had left with their mother. Their mother came home and she inquired about the child. Her mother told her the child had not returned from her sister's home. She went to her sister and her sister stated that she had sent him back in the morning with the instructions of whereabouts of the battery. They slept that night without knowing the whereabouts of the child. They searched the whole neighbourhood with no avail.
45. The following day they embarked on a further search. Sina received a phone call from John Ndungu. John stated that he had asked the boy to go home and where his shoes and follow him to the grazing area.
46. Later the body of the deceased was found on Ronang's shamba.
47. She stated that they had separated with the accused for like two weeks and there was a tussle when they separated.
48. She was called by the police to identify the items recovered from the house they were living in with the accused. She identified a knife, gumboots, and long trousers. The items were in a sack. The gumboots, knife and long trousers had blood on them. Some items were recovered from the toilet.
49. On cross examination, she stated that the long trousers were recovered from the toilet. The others were recovered from the house.
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- maize plantation. He left for the scene with CPL Mwadoe and PC Peter Muchai. Upon arrival they saw a body of a boy aged 8 years. The body showed injuries on the right side of the head, left arm and on the back near the waist. There were cut injuries. They went back to the camp and found Mwangi had surrendered himself to the police station. Mwangi stated he feared the public may attack him on suspicion of killing the boy as he was cohabiting with the mother.
55. They searched the home of the accused and found black gumboots in his house under the bed. The gumboots had blood stains on them. They found a blue jeans trouser on the toilet. They recovered a maasai simi at the hotel where the accused worked.
  56. On cross examination he stated that the accused was not at home when they conducted the search. They did not break in as the house was not locked. They also did not book where they were going to scene. There were no photos of the recovery process.
  57. PW6- CPL JOSPHAT MWADOE, he stated that on 14/04/2020 he was at kajonga patrol base when PW5 received a call. He accompanied PW5 to the scene. He reiterated the testimony of PW5.
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  59. He received a phone call from CPL Mwadoe that they have recovered maasai sword in the hotel belonging to the accused. He produced it as P exh 4(a). This is the sheath (P exh 4(b)). Gumboots were recovered from the toilet belonging to the accused (p exh6). A pair of trouser was also retrieved from the toilet of belonging to this accused (p exh5) and white sack holding these items (P exh 3) the wife of the accused identified the gumboots and long trousers as belonging to the accused-his husband. She knew them as she used to wash them.
  60. He submitted all exhibits to the government chemist Nairobi. They prepared a report (P exh 7(b) and exhibit memo (P exh 7(a) are hereby produced. The report showed blood was for a male but unknown.
  61. On cross examination, he stated that the report show that the sword was not stained with human blood.
  62. In his defense DW1 – BENSON WAWERU MWAURA. He testified that on 13/04/2020 he woke up at 3 a.m. And went to the hotel. At 8 p.m. He received a message from an anonymous source. He was a threat to him and his wife that that they should go to Ntulele at Chege's Timber yard before 7:30 p.m. If we wanted to see our boy alive.
  63. After reading the message he went to kajonga patrol base where he found three police officers who were drunk, PW5 and PW6 and another. He showed them the message. Mr. Kibaki told him the message bears no threat. He requested them to track the number in vain. They did not record it in OB. They told him to report at DCI.
  64. He then called PW3 but her phone was off. He forwarded the message to her. The next day he went to the hotel. Later at 7 am he went back to the patrol base. He was informed the body of the boy had been recovered. He was informed that people were looking for him because he had not participated in the search for the boy. After about 10 minutes a crowd went to the police station. He asked the police to save him. The DCI later picked him up and took him to Ntulele. On 15/04/2020, his clothes were



brought that they were blood stained. He told them he was wearing the clothes to the slaughter house which explains how the blood came on the clothes. He stated that he had no grudge with PW1. He stated that PW5 and PW6 lied that the clothes were recovered from the toilet, yet, all the items were in his hotel.

65. He also stated that PW7 lied about the message.
66. He denied murdering the deceased. he said that, they suspected him only because he did not help in the search for the deceased.
67. He pleaded with the court; to release him so that he could go home and see his mother who was ill.

### **Circumstantial evidence**

68. Distinct pieces of evidence which depict a specific cast emerge from the evidence.
69. First, the accused surrendered himself to the police after sensing danger from the members of the public who were accusing him of killing the deceased, and were baying for his blood for not taking part in the search for the deceased.
70. Second, the accused claims to have received messages threatening him with the death of the deceased. The message was not produced or reported to DCI as advised at Kojong'a police post.
71. Third, the accused sent messages in connection with the death of the deceased after the deceased disappeared.
72. Fourth, the accused and the mother of the deceased had a bitter separation not long before the beheading of the deceased.
73. Fifth, the police conducted a search and recovered some items which were blood stained from the house of the accused person and a toilet where he resided and a maasai sword from his work place. The government chemist confirmed the blood on the gumboots and clothes which belonged to the accused, was of a human male person although not identified. The accused claimed the blood was animal blood which he came into contact with at the slaughter house.
74. The chain of events, the subtleties of evidence and the circumstances of the case, paint a picturesque that is incapable of any other hypothesis other than that the accused murdered the deceased. The evidence is largely circumstantial but meets the threshold of the law. This court finds on the basis of circumstantial evidence an inescapable inference arising therefrom points to the guilt of the accused.
75. Thus, the death was caused by the unlawful act or omission of the accused.

### **Of Malice Aforethought**

76. Section 206 of the Penal Code, provides circumstances in which malice aforethought is established when there is evidence of;
  - i. Intention to cause death of or grievous harm to any person whether that person is the one who actually died on not;
  - ii. 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;
  - iii. Intent to commit a felony; or



- iv. 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.
77. The evidence is succinct. The deceased was beheaded. The act of beheading a person is intended to produce death. The evidence adduced establishes the intention to murder. It bears repeating that, the manner the injury was inflicted shows that the accused did not intend to leave the deceased alive or with remotest chance of survival. Accordingly, this court finds that there was malice aforethought in the killing of the deceased by the accused.
78. In the upshot, the accused is convicted for the murder of Patrick Leshan on 14/04/2020 at Kajongaa village in Narok East sub-county within Narok county, contrary to section 203 as read with section 204 of the Penal Code.
79. Right of appeal explained-14 days.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 19<sup>TH</sup> DAY OF DECEMBER, 2024.**

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**HON. F. GIKONYO M**

**JUDGE**

In the presence of: -

D. Langat for the accused

Accused person

Ms. Rakama for DPP

Otolo C/A

