



**Republic v Wainaina (Criminal Case 16 of 2016)
[2023] KEHC 1186 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 16 OF 2016
TM MATHEKA, J
FEBRUARY 22, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPH MWANGI WAINAINA ACCUSED

RULING

1. The Accused person Joseph Mwangi Wainaina is charged with Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The particulars of the offence are that on the night of March 21 and 22, 2016 at Sunrise Cemetery in Piave Location in Njoro Sub County within Nakuru County jointly with others not before court he murdered Michael Kuria Mwaura.
3. On April 15, 2016 the charge was read to the accused person and he pleaded not guilty. The trial ensued and the prosecution called 6 witnesses in support of its case.
4. PW1 was Peter Mwaura, brother of the deceased. He testified that on the night of March 21 and 22, 2016 at 2 am he received a call from his neighbour that the deceased had been beaten and his clothes burnt at Sunrise. He received another call that the deceased had been taken to the hospital and he prepared and left for Njoro hospital in company of his younger brother where they found the deceased being treated. He said the deceased was bleeding profusely from the back of head, had burns on the hand and his left leg was broken. They got an ambulance and transferred him to Nakuru Hospital where he died at 2p.m while undergoing treatment. He stated that prior to his death the deceased told him that Mwangi wa Nduthi, Chomley and 2 others hit him. He confirmed he had never seen the accused person before.
5. PW2 was Roselyne Njeri, an assistant chief. She knew the deceased by appearance only. She said the accused person was from her location and had known him since the year 2010. It was her testimony



that on the material day at around 1 p.m. she received a call from a Mr. Ngetich, a retired Police Officer that a cattle theft suspect had been beaten and the crowd was about to set him on fire. Thereafter the chief one Mathenge also called and directed her to meet him at the scene. She proceeded to the scene in company of the Village Elder. Upon arrival she saw the deceased lying on the ground, he recognized her and said “mbona wameniumiza sana,afadhali wangueniuu”. Since he was naked he covered him with a blanket then took a motorcycle and rushed him to the hospital. She testified that on the way to the scene they met four people and 20 youths at the scene. She said the 4 men she met were Mwangi & Mkorino whom she said she identified by the lights of the motorbike. She testified that the youths at the scene told her that they had met Mwangi at the scene then he left without bothering to attend he scene. At Njoro Hospital she questioned the deceased about the incident and he informed her that Mwangi wa Nduthi and Chomley beat him as they suspected that he was trying to steal cattle. She said she knew the accused as a repairer of motor/bikes

6. On cross examination she said that her family and that of the accused had a land dispute however she refuted that she had previously threatened the accused. She said she received a call from a retired police officer that a suspected cattle thief was being beaten. She went to the scene. She found a crowd . She questioned the crowd. She also found 7 brothers namely, Nicholas Chelule, Justus chelule, Robert chelulue ,Patrick chelule, Kibugi and Murimi who told her that they heard screams, rushed to the scene where they found Mwangi and others with the deceased. She said they all told her that they saw the accused beat the deceased. She said she recorded in her statement that that she was told there was a mob beating the deceased. She said knew the deceased as a cattle and cereals broker. She confirmed that on her way to the scene she passed Mkorino and Mwangi and 2 others leaving the scene and Chomley and another group also leaving the scene. That while at the hospital she heard the deceased tell his brothers that Mwangi wa Nduthi and Chomley had beaten him.
7. In re-examination she refuted that she had a grudge against the accused. She said she met the accused and Chomley 200m away from the scene
8. PW3, was Gideon Mwaura, a brother of the deceased. He confirmed he attended the deceased’s post mortem examination at Nakuru. He saw the deceased’s body had injuries on the legs and head, and burn wounds on the face and hands.
9. PW4, Joseph Mwatha nephew of the deceased confirmed he did not know the accused. He said that on March 24, 2016 at 10.am he attended the deceased’s post mortem examination and he saw injuries on his face, legs, back and head. He testified that the deceased prior to his death told him that Mwangi and Chomley had beaten him.
10. PW5 was 234280 C i Peter Wanima attached to Nairobi County. He received the information about the incident herein on March 22, 3016. He visited the scene on March 27, 2016 but never conducted any investigation. He charged the accused based solely on the dying declaration of the deceased made to the witnesses herein.
11. PW6 was Dr Joseph Wachira, orthopaedic surgeon attached to Nairobi Hospital. He testified that on March 24,2016 he conducted a post mortem on the body of the deceased. He said externally he noted:The deceased body was very paleDecerebrate posture both hands, legs fully extendedMultiple abrasions on the faceDeep cut on the bridge of the nose measuring 2 x 3 cmMultiple bruises on shoulders bilaterallyDegloving injury on left arm on lateral sideDegloving injury on both fore armsDegloving injury on the left upper part of the abdomen measuring 6 x 7 cmBruises on the right upper part of the abdomenMultiple bruises on both thighs anterior part.

Internally he noted;



wet gangrene Distal ileum intestine dying off ascending colon, proximal part of the transverse colon large blood collection in just behind the abdomen on the right side Internal bleedings caused by torn big artery

12. He established the cause of death as hypovolemic shock caused by blunt abdominal trauma to the abdomen in keeping with the assault with a blunt object.
13. On cross examination he stated that degloving injuries are mostly caused by sharp objects e.g machete, piece of wood with a sharp edge. He said there was a possibility that the injuries were as a result of a Road Traffic Accident.
14. The Prosecution closed its case after PW6 had testified.
15. The accused person filed his submissions on January 20, 2023 while the prosecution opted to rely on evidence on record.

The Accused Person Submissions.

16. Counsel for the Accused person submitted that the police did not conduct investigations into the death of the deceased. She submitted that there was no evidence that the accused was known as Mwangi wa Nduthi. She placed reliance on *Republic v David Ngugi Wanyoike* [2021] eKLR Nakuru High Court Criminal Case No 54 of 2018 where the court acquitted the accused because of insufficient circumstantial evidence. The Court stated as follows

She argued that circumstantial evidence on record did not exclusively point to the accused as the perpetrator of the offence. Counsel cited the Court of Appeal decision of *Ibrahim Ali v Republic* [2017] eKLR where the court stated that for circumstantial evidence to succeed it must be incompatible with the innocence of the accused person, incapable of explanation upon any other hypothesis than that of guilt of the accused person and there must be no other existing circumstances which could weaken or destroy the inference of guilt.
17. She submitted that the prosecution material witness was PW2 yet she failed to lay basis for relying on secondary evidence and to explain why any of the named witnesses did not come forth as a witness to implicate the accused person. She contended that her evidence was hearsay.
18. Counsel submitted that going by the pathologist's evidence it could not be ruled out that the deceased was involved in a Road Traffic Accident. She also faulted PW2 for failing to arrest, question or bring forth Mukorino as a witness whom she said she had met on his way out from the scene in company of the accused.
19. Counsel submitted that it was utterly unsafe to rely on the evidence of identification as the accused person's name is different from the one allegedly uttered by the deceased. No witness testified that the accused went by the moniker Mwangi wa Nduthi. That charge sheet speaks of Joseph Mwangi Wanaina and not Joseph Mwangi Wanaina alias Mwangi wa Nduthi. She submitted that the name "Mwangi wa Nduthi" cannot and should not lead to the conclusion that it referred to the accused person.
20. She submitted that evidence of PW2 cannot be relied on as she had a personal vendetta against the accused person. That PW2 admitted there being a land dispute between her family and that of the accused and that she is the only person who links the accused person with the death of the deceased.
21. She submitted that there are grave inconsistencies in the nature of injuries suffered and cause of death. That the pathologist's findings were materially incompatible with the witnesses' account on the deceased's injuries. She submitted that the doctor would have noted if the deceased suffered any burns



on the face and hands as was stated by PW1, PW3 & PW4 and that it was highly improbable that the witnesses also did not note degloving injury that was noted by the doctor.

22. Counsel submitted that failure to produce treatment notes to confirm the nature of injuries suffered by the deceased was fatal to the prosecution case. She argued that the variance of injuries between the pathologist and the witnesses failed to identify the cause of the deceased's death. She relied on *Republic V Naphtaly Kaunjura Arayason* [2006] eKLR where the court faulted the prosecution for failing to adduce previous medical reports of the deceased to support the pathologist opinion on the cause of death. The court stated "... PW6 DR Muriuki while giving evidence on the post mortem report prepared by Dr Njue also agreed that the injuries seen on the body could result from a fall on blunt object and further agreed that it was necessary to see the previous medical reports on the deceased which was not done in the present case especially when the deceased is said to have been suffering from the mental illness..."
23. Counsel argued that the same issue came up in *Ibrahim Ali v Republic (supra)* where the court stated as follows "of course there are cases, for example where the deceased was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the cause of death in the circumstances relied on by the prosecution"
24. Counsel argued that the prosecution's failure to call crucial witnesses precisely those who allegedly witnessed the incident weakened their case. She submitted that prosecution had not established a *prima facie* case against the accused person to warrant him to be placed on his defence.

Analysis & Determination

25. The only issue for determination is whether the prosecution has established a *prima facie* case to warrant the accused being placed on his defence.
26. Under section 306(1) of the *Criminal Procedure Code* Cap 75 Laws of Kenya, when the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is no evidence that the accused person committed the offence the court should, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.
27. Under section 306(2) on the other hand, when the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is evidence that the accused person committed the offence, the court should proceed to put the accused to his defence and inform him of his right to call evidence in support of his case
28. What then is a *prima facie* case? The test of this was settled in the case of *Bhatt vs Republic* (1957) E A 332 where the Court of Appeal expressed itself as follows:

"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a *prima facie* case is made out if at the close of the prosecution case it is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to suggesting that the court would not be prepared to convict if no defence is made but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never



be enough; nor can any amount of worthless discredited evidence. It is true as Wilson J said that the court is not required at that stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively”

29. The offence of Murder is defined by Section 203 of the Penal Code as follows;
- “ Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.
30. To obtain a conviction the prosecution must prove that there is death of a person, caused by an unlawful act or omission of the accused person and the unlawful act or omission was actuated by malice aforethought. Malice aforethought is defined at Section 206 of the Penal Code thus:
- “ Malice aforethought shall be deemed to be established by evidence proving 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.”
31. The prosecution called six (6) witnesses none of whom witnessed the killing of the deceased. According to PW5 no investigations were conducted in this matter and the accused person was charged with the instant offence based solely on the alleged dying declaration of the deceased made to PW1.
32. According to the prosecution to PW1, the deceased said he was beaten by Mwangi wa Nduthi, to PW2 testified that the it was Mwangi Wa Nduthi & Chomley that beat him and to PW4 it was Mwangi . PW1 & PW4 confirmed they did not know the accused person while PW2 knew the accused however she did not testify that his nickname was Mwangi wa Nduthi. Clearly there is no evidence on record to prove that the accused’s went by the name “Mwangi wa Nduthi”.
33. PW2 testified that when she visited the scene she met 7 brothers namely, Nicholas Chelule, Justus Chelule, Robert Chelule ,Patrick Chelule ,Kibugi and Murimi who told her that they saw the accused beat the deceased. By then she had allegedly met the alleged attackers 200m away from the scene whom she identified by the light of the m/bike.
34. These persons she met at the scene crucial witnesses and the actual eye witnesses to the crime and should have been called to testify. The prosecution did not disclose whether there was any challenge in procuring their attendance before court. Failure to call them can only be construed to mean that their testimony would not have supported the evidence of the PW2 or even the totality of the case for the prosecution.
35. Secondly these persons who were treated with such casualness by the persons in authority could have been the key suspects considering that this witness testified that she met them coming from the scene



- while she was headed there. Her evidence with respect to what the group told her is hearsay and unreliable.
36. Further there were critical inconsistencies regarding the injuries suffered by the deceased. PW1 & PW4 testified that the deceased had suffered burns on the face and hands. These injuries were not noted by PW6 who conducted a post mortem examination on the deceased's body. These contradictions were not explained by the prosecution. The pathologist was of the view that they could have been out of an RTA.
 37. It is noteworthy that the prosecution did not have any other evidence to counter this theory other than that PW2 was told by a group of people that they had seen Mwangi beating the deceased. There is no description of any weapon, or how the beating took place or if he was with others how they actually beat him.
 38. For the Investigating Officer to testify on oath that he charged the accused solely on the basis of the alleged dying declaration is to place the case for the prosecution on shaky ground. This is because there was other evidence on oath that some other people were involved and the alleged dying declaration would require corroboration by this other evidence of the alleged eye witnesses. The I O chose not to investigate the veracity of the alleged eye witness evidence. This is the evidence that would have placed the accused at the scene of crime. As it is the prosecution witness placed the accused 200m away from the scene yet those who would have placed him at the scene did not testify.
 39. There was no evidence to connect the accused with the name Mwangi wa Nduthi. The allegation that he was a motor bike repairer was not established by any evidence.
 40. Hence other than establishing that the deceased met a painful death, the prosecution has not placed the accused person in the place expected by the law to warrant his being put on his defence. This is that case where a reasonable tribunal taking into mind the evidence and the law would find that the same falling short of a case to answer.
 41. In the circumstances I so find, and going by section 306 (1) Criminal Procedure Code make a finding of not guilty and acquit the accused person accordingly.
 42. He is to be set at liberty unless otherwise legally held

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND FEBRUARY DAY 2023.

MUMBUA T MATHEKA

JUDGE

CA Yego

Accused Present

M/S MURUNGA FOR THE STATE

M/S SABAYA FOR THE ACCUSED PERSON.

