



REPUBLIC OF KENYA



**Republic v Mwangi (Criminal Case 6 of 2020)  
[2023] KEHC 3205 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3205 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 6 OF 2020**

**TM MATHEKA, J  
MARCH 30, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DUNCAN MWAMBA MWANGI ..... ACCUSED**

**JUDGMENT**

1. The accused Duncan Mwamba Mwangi is charged with murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) Laws of Kenya. It is alleged that on the 12<sup>th</sup> January, 2020 at Muchorwe Trading Centre in Molo Sub- County within Nakuru County jointly with another not before court he murdered Stephen Wandera.
2. He denied the charge and the matter went into trial. The prosecution called ten (10) witnesses.
3. PW1, Susan Wanjiru, testified that on 12<sup>th</sup> January 2020 at 9.00pm she was at Club 7 with her friends. i.e. Margaret Wambui and one Steve taking alcohol. At 10pm she and Steve left the bar to go home. Outside the bar they met two persons whom she named as Dan and Chege. She stated that Steve was caring some alcohol with him and that Dan and Chege wanted this alcohol. She said that Steve refused to hand over the alcohol. As a result Chege went and pulled a piece of timber from a nearby Kibanda and hit Steve twice on the head. That Dan picked the same piece of timber and also hit Steve. That Steve fell down. She screamed loudly for help. Margaret Wambui and Joseph Chege and others came to help. Steve was bleeding profusely. She used her handkerchief to stem the bleeding. They then hired a pro-box m/v and took him to Molo District hospital where he was treated and discharged to return the following day. She testified that she found a place for Steve to stay that night because his home was far but she with him. However his condition got worse by 5:00am and she hired a bodaboda and took him to Molo District Hospital. They were referred to Nakuru but he died before they could leave for Nakuru so they took the body to Molo Hospital Mortuary.



4. She stated that on the 14th January 2020 Steve's father sent for her and they met at Molo Police station where she recorded a statement.
5. She stated that there was a street light outside. That Dan and Chege are persons she used to see at Muchorwe. In her words she said nilimjua Dan kumuona. She said that Dan and Chege came from a corridor and attacked them. She said she was not vey drunk not to recall what happened.
6. On cross examination she said she had lived in Muchorwe for 7 years. That she knew Dan's mother. That she had known Dan 5 months prior to the incident and that her children were not friends of Dan.
7. She stated that she and Steve had been drinking from 9:00 pm and were leaving the club at 10:00pm. That it was while they were outside that the club two men came from across the road from the club came and began what she described as mabishano. They asked for the alcohol, they were denied. they went back, crossed the road, Chege broke a piece of timber from a nearby kiosk, they came back and attacked Steve.
8. Asked whether Steve was a resident of Muchorwe she said no, whether he knew the two men, she said no, whether Dan and Chege were friends, she said she did not know.
9. She said Steve was her friend and a resident of Chandra. That on the material night he could not stay in her house because she had children and he stayed in the house of Margaret where she stayed with him.
10. PW2 Margaret Wambui Nyambura testified that on the 12th January 2020 she was at Muchorwe drinking at Club 7. Susan PW1 joined her at 9:00pm and they continued drinking Tripple Ice. She said Steve joined her and he too ordered Tripple IceShe said Susan and Steve stayed for less than 10 minutes and left. Soon thereafter she heard Susan raising alarm , screaming calling her name. When she went out Steve was on the ground because he was drunk and he also had injuries on the head. Susan told her that he had been hit and she showed her two young men as the ones who had done it.  
  
Margaret said she knew them as Dan and Chege. She stated that when she went out Dan and Chege were just there. She did not see them armed with anything. She said the two young men just stood there without assisting them. She stated that they used Susan's handkerchief to stop the bleeding then took Steve to hospital. From the hospital they came to her house where she let him sleep in her son's house. He got worse and by 6:00am Susan took him back to hospital. She did not see anyone hit Steve.
11. PW3, George Ngugi Kabugi, testified that he received a phone call from Susan that she needed a m/v to take a patient to hospital. It was towards 1:00am. He went and found them at Muchorwe Centre i.e Susan, Margaret, Abdi and Maina. He said They were all drunk. He told them to board the m/v with the patient whom he did not know. He said he could not tell where the patient was sick but he had blood stains on his clothes. When they went in for treatment he slept in the car. He took them back from where he had found them.
12. PW4, Ibrahim Kahore Kamau, testified that he was at this home on the material night sleeping when he was rang by his brother John Chege Kamau who told him that that they (sic) had hit someone and they wanted him to assist them to take him to hospital. He went there and found them outside a chemist which was closed. He found Paul Wainaina, John Chege, Duncan Mwamba , Margaret , Susan and husband to Margaret one Chege. They took Steve who had injury on the head to hospital. He said they paid for the taxi, and the hospital. He learnt later that the said Steve had died. He said his brother was not in court but he could see Duncan. He said that he did not know who had killed Steve.
13. On cross examination he told the court that his brother told him that he and the other person walichapana - that is they fought. He said that Dan and that his brother were friends. On reexamination he said Dan and Chege beat someone.



14. PW5, Charles Maina, on his part testified that on the material day he was walking about between 8 and 9:00pm when he found a lady raising alarm and a young man seated bleeding from the head. He stated that he went there and assisted to look for the owner of the nearby private clinic they did not have the number of the owner so he was taken to Molo hospital. He said the injured person spoke to his mother on phone. He accompanied them to Molo hospital and came back with them after the patient was stitched. He later learnt that the young man had died. He did not know who had injured him.
15. PW7 Caroline Atemo Andayi the sister to the mother of the deceased received information deceased on 13th January 2020 at 6:00am that Steve had been attacked by wakora i.e thugs. She left for Molo but while on the way she was rang that he had passed on. She had relatives in Njoro and she went there and together with her cousins went to the Mortuary and saw the body of Steve, He had injuries on the head.
16. PW8 Fredrick Otuoma Ojasi the father to the deceased testified on 12th January 2020 his son Stephen rang him and told him he had been attacked by people at Muchorwe who knew him and they were taking him to hospital. He rang Steve's mother and she told him that she had heard about it and had sent money to hire the m/v to take him to hospital. The next morning, he received a call that Steve was in a bad state and needed to be taken back to hospital. He got someone on the ground with whom he stayed in touch until the Steve passed on while in an ambulance to take him to Nakuru.  
  
He was told that Susan is the one who knew the persons who had attacked Steve and she is the one who gave out their names for arrest.
17. PW7 and PW8 also identified the body for postmortem.
18. PW9, Dr. Rodgers Namusi Wangalya was a doctor who produced a post mortem report (P.Exhibit 1) that was prepared by his colleague Dr. Deborah Wang'alya. He stated that his said colleague conducted a post mortem examination on the body of the deceased on 14<sup>th</sup> January, 2020. The body was extensively pale. Fracture of the head, bleeding under the skull and inside the brain. The cause of death was severe head injury due to blunt force trauma to the head.
19. PW9, No. 79684 Cpl Edwin Koech, was the Investigating Officer. He testified that on 14th January 2020 about 2:00pm he was directed by the DCIO to accompany other officers to Muchorwe Police Patrol Base 'where a killing had been reported'. They went there with the reportee Susan Wanjiru and found an entry in the OB of a fight in a bar. The entry was about an assault. That two known youths by the reporter as Duncan and Chege showed up at the club to share the alcohol that the deceased was carrying when the deceased, refused an exchange of abuses resulted between Chege and the deceased That Chege went into a kibanda and picked a piece of timber with which he hit the deceased twice on the head . That Dancun also took the piece of timber and hit him. He fell down bleeding and the reportee screamed and that is when help came from the people who took him to hospital. He testified that the deceased slept in Susan's house, not the house of the son of Margaret as testified by both Susan and Margaret.
20. He said they interrogated Susan and she told them she knew the two youths who had attacked the deceased. She named them as Duncan and Chege. She accompanied them to the home of Chege. He was not found. At Duncan's home he had gone back to school and the police went there and picked him up. Later that he charged the accused person based on the evidence of PW1. That Chege the other suspect disappeared. He said he was told that that Chege hit the deceased twice and Dancun hit him once.
21. On cross examination he told the court that he visited the scene but the kibanda had been repaired so he did not take any photos. He testified that he could not take photos because the owner of the kibanada had repaired it. He said eye witnesses had seen 'the first accused' pull out the timber. He confirmed



that he was told that he deceased had slept in the house of Susan yet her the testimony in court was that that was not the case? He simply stated that he was not aware of Susan's testimony. Asked whether Dancun had any grudge with the deceased, he testified that he was not aware of any grudge between Dancun and the deceased but was aware that the said Chege was Susan's previous lover. Asked about the deceased and Susan's relationship he said that she had left Chege and was now the deceased's new lover. He said he was not aware of any relationship between the accused and Susan or the accused and the deceased person

### **Defence Case.**

22. The accused gave a sworn statement of defence and called two witnesses. He told the court that at the material time he was in Form Four at Keringet Boys. On the material night he decided to go and collect school shoes from his friend Stephen Mwaura who had just completed form four and had promised to lend him the shoes to use for school. This is because he was returning to school on the 13th the following day. Stephen's house was about 30 minutes from his home and he left his home after supper with his mother about 8:00pm. On reaching Stephen's he got the shoes stayed a while and then left for home.
23. While going home is when he came across the commotion regarding this case at Muchorwe Shopping Centre where he had to pass on his way home. He told the court that there was one lady whom he knew as Susan or Mama Shiku and two men outside Club 7. He did not know the two men. He entered the hotel nearby to take tea. He was with one Buda Samwel Kariuki who actually asked him whether he was not going to school the following day. He said he was. He finished his tea then left. Behind him was Chege. When they reached where Susan and the two men were he heard Chege ask: hii kesi ya watu wawili wanaopendana haijakwisha? This case about two lovers is not over yet? It is then he looked back and saw that Chege and the said man were fighting. The other man overpowered Chege and pushed him. It is then that Chege went back and took a piece of timber while asking What is wrong with you? I find you with my wife then you want to hit me as well? The man on seeing Chege armed told Chege he did not want anything and told him to go fight his wife. Chege instead hit the man with the timber the man fought back with the bottle of alcohol he had, Chege ducked and hit the man with the piece of timber. He fell down on the verandah. The accused told the court that he went and held Chege and pushed him aside the telling him to leave the man as he was drunk. He took the man to where Buda was as Susan began to scream wezi! wezi! thief! thief!. He told Chege to call his brother to take the person to hospital. Chege's brother was called. Chege left with the piece of timber. Susan was rolling on the ground talking about Chege, Maggie the bar tender came out. Accused told her what happened. she referred them to the nearby chemist. The person did not want Susan to take him to hospital and said he was calling his mother. Chege's brother Abdi came. Chege came back and wanted to fight Susan. Abdi called a taxi which came after 30 minutes. The accused was asked to accompany them but he told them he was going to school the next day. They left and he went home. On 13th he was taken to school by his mother. On the 14th CID officers came to school. He explained to them what had happened but one of the officers began to slap him telling him that he had killed a person. He said he felt bad for being slapped and accused of the offence he had not committed and responded rudely to the Afande who had slapped him. The Afande decided to charge him. He testified that the other Afande told him that Susan had reported that he had hit the deceased and that he was also being held because it was said he knew the whereabouts of Chege.
24. He said he did not know Stephen, that Chege and Stephen were not fighting over alcohol but over Susan because Chege was accusing Stephen of taking his wife.



25. On cross examination he told the court that he was not in Club 7, he knew Susan, there was some light outside the Club, enough for him to see Susan and the persons she was with, that it was closing up time at the Centre and there were many people. He said he was aware of what Susan said that the accused hit the deceased on the head which he denied insisting that it was Chege and what he did was to separate the fight. He said he rang Abdi after borrowing a phone but it is Chege who spoke to his brother.
26. DW2 was Jonah Wanjohi Wanjiku. It was his testimony that on 12<sup>th</sup> January, 2020 he went to Muchorwe center to buy medicine. When he arrived there he found two people fighting on the road. He stopped and saw them. That one was Chege while the other one was unknown to him. He said from the words they were exchanging he could tell they were fighting over a woman. He stated that Chege jumped onto the other side of the road and took a piece of timber which he used to hit the deceased on the head and the deceased fell down. He said the woman who was also there screamed and people came to the scene. He testified that the accused person who was standing at the shop's corridor run to where Chege was and got hold of him and pushed him away. It was also his further testimony that while the deceased and the accused were fighting Buda was there speaking. He thereafter bought his medicine and left.
27. In cross examination, he said he found the fight ongoing and confirmed that at that time also the accused person and one woman were present at the scene.
28. In reexamination, he stated that one Buda was also there but in a shop near the scene.
29. DW3 was Herman Ogada Lugalua, a friend to the Accused. It was his testimony that on the fateful day at around 9.30 p.m he had gone to buy supper at Muchorwe Centre near Club 7. While there he heard Chege and another person whom he did not know quarreling outside the said Club. He then witnessed them fighting. He stated that at that time Jonah, Buda and the accused were also there. That the accused was standing beside the kiosk (kibanda). He did not know what he was doing there. He witnessed Chege hitting the deceased twice on his head with a piece of timber. He said the accused took away the timber from Chege and pulled him to where Buda was while PW1 raised an alarm and he left them there.
30. In cross examination he said he saw PW1, Chege and the deceased come out of the bar and as the deceased and Chege began fighting he was there. He reiterated that the accused was besides the "kibanda" where he was and that he learnt after the fight that DW2 had come to buy medicine at the centre.

### **Analysis & Determination.**

31. The only issue for determination is whether the prosecution has proved beyond a reasonable doubt that the accused person murdered Stephen Wandera to warrant a conviction against him. The offence of murder is defined at Section 203 of the [Penal Code](#) as follows:-
 

“ Any person who of malice afore thought causes the death of another person by unlawful act/or omission is guilty of murder.”
32. The prosecution must establish the ingredients of the offence *vide*;
  - a. Proof of the fact and the cause of death of the deceased.
  - b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission.



- c. Proof that the unlawful act or omission was committed with malice aforethought as defined by section 206 of the [Penal Code](#).
33. Section 206 of the [Penal Code](#) defines malice aforethought as follows:
- “(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.”

#### **Proof of death**

34. The fact and cause of death is not in dispute. The post mortem report produced in evidence shows that the deceased died as a result of severe head injury due to blunt force trauma to the head.

#### **Proof that the death was caused by the unlawful act of the accused with malice aforethought**

35. There is no doubt that Stephen Wandera did not die a natural death. Both the defence and the prosecution gave evidence that he sustained injury following an attack with a piece of timber on his head. Evidence was that he succumbed to the injuries while undergoing treatment. The Pathologist’s report (post mortem report) indeed confirmed that death resulted from injuries consistent with those described in the evidence on record.
36. From its description that attack on the deceased was not a lawful act. In any event the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. In [Republic vs Boniface Isawa Makodi](#) [2016] eKLR the court observed held:
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”
37. The big question is who caused the injuries on the deceased, was it the accused?
38. The only witness to the alleged assault to the deceased is PW1 Susan. Hers is the evidence of a sole witness. The question is whether her evidence as the sole witness to the alleged attack by the accused is credible and reliable when held up against the defence of the accused person.
39. It was held in [Ndungu Kamanyi vs Republic](#) [1976-80] 1 KLR:-
- “The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straight forward person, or raise a suspicion about his trust worthiness or do something which indicates that he is a person



of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.”

40. In *Republic v Jeremiah Juma Wekesa & another* [2020] eKLR the learned Judge stated;

A witness in any proceedings before court should not give an impression that he is not telling the truth. This severely erodes the credibility of the witness before court and materially affects the reliability of his evidence. In this case, the only identifying witness has not from his testimony and previous statement not earned the confidence at this court that he is saying the truth.

Consequently, I do not accept his evidence that he saw accused attack the deceased as truthful.

41. Susan told the court that the deceased was her friend and they were drinking at club 7. When they left the bar for no reason at all, accused and one Chege attacked Stephen – why – because they wanted to forcefully share the bottle of alcohol Stephen was holding. Asked to describe to the court how it went down now that she was the sole witness to the whole incident; Susan’s response was one word – mabishano. That there was mabishano. She did not give the court details, only that there was mabishano before Chege took a piece of timber and hit Stephen.

42. It is noteworthy that the Investigation Officer told the court that Chege was Susan’s previous lover and she had just left him for Stephen. Susan deliberately hid this fact from the court. She simply shared that there was mabishano among Chege, accused and Stephen before the attack. Why did Susan not mention this fact to the court if she was not hiding anything? It came out clearly from the defence that the argument was between Chege and the deceased over his relationship with Susan. The I,O did indeed form the opinion that there was a grudge between Chege and the deceased because of the relationship between Chege and Susan.

43. Is Susan a credible witness? She told the court that Stephen was her friend but he could not sleep in her house because she had children. Yet she told the Investigation Officer that Stephen slept in her house – Margaret on the other hand told the court that the deceased slept in her house in her son’s room. Who between these two ladies is telling the truth, and what happened on the night of the incident after Stephen came back from hospital?

44. From the evidence on record the report made to the police was about a bar fight and assault. Susan told members of Stephen’s family that Stephen had been attacked by wakora. Was it a fight in a bar, an assault or was the deceased attacked by thugs? The father to the deceased testified that Stephen called him and told him that he had been assaulted by people who knew him and they were taking him to hospital.

45. Again the scenarios set out by the prosecution as to what exactly happened on the material night and who did what begin to crack the credibility and reliability of the evidence given by Susan. This is because she was clearly not forth right about a very key fact in this case. Her relationship with Chege who was the only person who could have been provoked by the circumstances he found her in and to cause a fracas and which explain his disappearance following the attack.

46. This because the question of the motive for the attack comes into sharp focus. What motive would the accused have to attack the deceased? None was established. This is because Susan’s testimony about the accused and Chege attacking the deceased over a bottle of alcohol easily crumbles in light of the defence – Chege her previous lover had every reason to attack the deceased. The Investigation Officer



was of the view that there could have been a grudge on the part of Chege because of his love relationship with the said Susan.

47. The accused person testified on each that Chege made it clear that his quarrel with Stephen was over Susan – the words he uttered were heard by DW2 and DW3. This evidence by the defence is supported by the Investigation Officer’s testimony with respect to his finding about the relationship between Susan and Chege.
48. When Chege called his brother – the brother said that Chege told him that they had beaten a person. He drew his own conclusion that Chege meant and Duncan. There is no evidence that there was any basis for him to draw this conclusion. Chege disappeared after the incident, why? The action of a man – innocent person. He knew what he had done – and he took off-
49. The police did not investigate the case- they simply went and arrested the accused and proceeded to charge him – on the basis of what turns out to be the discredited evidence of the only witness for the prosecution.
50. A life was lost in circumstances only Susan knows. The testimony by the accused person and his witnesses together with the conclusions drawn by the investigation officer about Chege clearly draw a doubt into the case for the prosecution with regard to the accused person.
51. This doubt can only be resolved in favour of the accused person.
52. In the circumstances charge is dismissed and the accused person is accordingly acquitted. He is to be set at liberty forthwith unless otherwise legally held.
53. Lastly let me point out that the delay of the judgment in this matter was as a result of defence counsel seeking time to file her submissions on behalf of the accused person. She informed the court that the same were at the registry. So as not to prejudice the accused seeing that I had left the station I adjourned the matter so as to obtain the same. They have not been traced in the registry and no copy was forwarded to the court email for onward transmission to me.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> MARCH 2023**

.....  
**MUMBUA T MATHEKA**

**JUDGE**

CA Yego

Accused Present

Counsel for Accused: Ms. Kiama Not Present

Counsel for state: M/s. Murunga Present

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