



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Wanyama (Criminal Case E012 of 2021)  
[2023] KEHC 19377 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19377 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE E012 OF 2021**

**DK KEMEL, J**

**JUNE 30, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**AYUB SIMIYU WANYAMA ..... ACCUSED**

**JUDGMENT**

1. The accused herein Ayub Simiyu Wanyama was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (cap 63 of the Laws of Kenya). The particulars of the charge are that on the 26<sup>th</sup> and March 27, 2021, at Sayoni Village in Misikhu Sub-location of Bungoma East Sub-County within Bungoma County, he murdered Charles Natembea Simiyu (hereinafter referred to as the deceased).
2. The accused pleaded not guilty to the charge. The hearing kicked off in earnest. The prosecution called six (6) witnesses in support of its case. PW1 was Dr. Edward Vilembwa who testified that he worked at Webuye District Hospital and was the one who together with Dr Alex Munyendo, conducted the post-mortem examination on the body of deceased. They noted injuries on the right forearm, deformed skull, cut wound on the frontal head and lacerations on the occipital region of the head. He opined that the cause of death was severe head injury due to comminuted skull fractures with brain laceration inflicted by a blunt object with a sharp edge. He produced the post mortem report dated 30<sup>th</sup> March, 2021 as Pexh 1.  
  
On cross-examination, he told the Court that the deceased only had head injuries and that the suspected weapon of assault was both blunt and sharp.
3. PW2 was Fredrick Lucas Simiyu who testified that the deceased was his step-elder brother. He recalled on March 26, 2021 while preparing to go to bed, the deceased came to his house shouting that one of his brothers was intending to kill him using a crude weapon. The assailant went by the moniker “Ras”



and on heading out to investigate, he met the deceased and suddenly ‘Ras’ joined them. He quickly tried to intervene only for ‘Ras’ to allege that the deceased had hired goons to injure and kill him. The deceased alleged that ‘Ras’ had always wanted to eliminate him and he requested both of them to cease harassing each other. The deceased left his house but kept on taunting ‘Ras’ to accomplish his mission and he was then drunk. The accused herein ‘Ras’ then hit the deceased with a metal bar while the deceased was seated. He hit him on the head and this prompted him to quickly rush to where they were as the accused continued hitting him. The accused herein, ‘Ras’, claimed that the deceased had squandered his Kshs. 30,000/= with prostitutes. He quickly raised an alarm and villagers arrived at the scene. The accused fled from the scene. The police were alerted and that the body was taken to the mortuary while the accused was apprehended the following day. He identified a long metal rod and slasher which were marked as Mfi-2 and 3.

On cross-examination, he told the Court that both the accused and the deceased came to his house that night and were both drunk.

4. PW3 was Natembea Charles Wanyama who testified that the accused is his cousin while the deceased was his cousin and elder brother to the accused. He recalled on 26<sup>th</sup> March 2021, PW2 informed him that the accused had killed the deceased. The accused goes by the moniker ‘Ras’. He rushed to the scene and found the accused viciously hitting the deceased with a metal rod (mfi-2) while claiming that the deceased should refund his money. He raised an alarm and the villagers came to the scene. The accused fled the scene threatening anyone who tried to follow him with injury. The police officers arrived and he led them to the scene where they picked up the body of the deceased. He added that the police apprehended the accused the following day.

On cross-examination, he told the Court that he found the deceased lying on the ground and that the accused was still hitting him even though there were signs that the deceased had already passed on.

5. PW4 was No. 100139 PC Nicholas Kipchumba who testified that on March 27, 2021 at 2.30 am while on his duties, he received a report that an incident had been booked in the OB in relation to the death of the deceased. He proceeded to the scene and found the body of the deceased. Next to the body, he saw a slasher which had blood stains as well as the metal rod. They took photographs of the scene, took the exhibits collected and escorted that body to Webuye Hospital Mortuary. He recorded witness statements and at around 12 noon, they arrested the accused herein. He produced the two recovered items from the scene (slasher and metal rod) as Pexh 2 and 3. He also produced three photographs and a certificate as exhibits 4 A-D respectively.

On cross-examination, he told the Court that the body was found outside the house of PW2. He told the Court that the body of the deceased was recovered five metres from the house of the accused.

On re-examination, he told the Court that on arriving at the scene, the accused had already fled and that when they arrested him, he was drunk but couldn’t tell if that was the case at the time of the incident.

6. PW5 was Peter Wanyonyi Luka who testified that while at home, PW2 alerted him that one Kanja had killed the deceased and he quickly accompanied him to the scene. Kanja was his elder brother and he witnessed the lifeless body of the deceased and he also saw his elder brother Ayub Simiyu alias Kanja holding a slasher, metal rod and hammer. He was shouting and claiming that he also wanted to kill him as well. The villagers arrived at the scene forcing the accused to flee into a maize plantation. The accused was later arrested and that they recorded their statements.

On cross-examination, he told the court that the accused is his brother and that he found the deceased already dead when he arrived at the scene. He added that he found the accused near the body of the deceased and that he held a metal rod, a slasher and a hammer. He finally stated that the accused had been demanding for proceeds of sale of land from the deceased.



On re-examination he told the Court that he saw the accused near the body of the deceased and that there was moonlight at that time and that he was able to recognize his voice as he spoke with him.

7. PW6 was Polycarp Luta Kweyu who testified that he worked at Kisumu Government Chemist as a principal chemist. He recalled on 13<sup>th</sup> April, 2021 he received five items namely:

- i. A metal rod marked “A”
- ii. Hair sample of Charles Natembea Simiyu (deceased) marked “B”
- iii. Blood sample of Charles Natembea Simiyu (deceased) marked “C”
- iv. Fingernail of Charles Natembea Simiyu (deceased) marked “D”
- v. Buccal swab of Ayub Simiyu Wanyama (accused) marked “E”

He stated that it had been requested that they carry out DNA profiling and establish any genetic relationship between the items. After thorough analysis, the following was his conclusion:

- i. The metal rod “A” had stains that tested positive for blood of a human being
- ii. The DNA found on the metal rod did match that of Charles Natembea Simiyu (deceased)

He produced the analysis report dated 16<sup>th</sup> March, 2022 as Pexh 5 and the exhibit memo dated 13<sup>th</sup> April, 2021 as Pexh 6.

On cross-examination, he told the Court that a mouth swab was collected from the accused and that the DNA profile of the accused did not match that of the deceased. He also stated that he did not conduct fingerprint analysis on the exhibits as that was the duty of the investigators.

8. The prosecution then closed its case. A prima facie case was later established to have been made by the prosecution and that the accused was placed on his offence. He opted to tender a sworn testimony.

9. Ayub Simiyu Wanyama (DW1) is the accused herein and who testified that the deceased was his step-brother. His case is that on the material date, he was at the police station where he had rushed for protection as he feared for his life after unknown persons descended on his home. He refuted claims of him disagreeing with the deceased and the allegations on debts. He claimed the testimony as rendered by PW2 was false and that he did not know PW3. He claimed that he was at the police station from March 17, 2021 to March 27, 2021 and that he did not know the cause of the deceased’s death.

10. On cross-examination, he stated that he did not know PW3 and that there was no discord between him and the deceased and that he was not aware of when exactly it is the deceased died. He stated that he was arrested on 17<sup>th</sup> March 2021 after strangers stormed his house and he remained in custody for a period of one month. He stated that he went to the police station to lodge a report on March 17, 2021 and not on the date of the incident.

11. At the close of the defence hearing, the court directed that submissions be filed and exchanged by the parties.

12. Vide submissions filed on April 6, 2023, the prosecution’s counsel Miss Mukangu submitted that to establish the offence of murder, the prosecution needed to prove the following ingredients: that there was an unlawful act or omission; that there was malice aforethought; and that the accused caused the death of the deceased.



13. Ms. Mukangu submitted that there was malice aforethought as the evidence of PW1 who testified on the injuries inflicted on the deceased proved the same. PW2 on the other hand testified that the accused hit the deceased with a metal bar while he was seated and that the reason for his actions were that the deceased had hired someone to kill him and he blamed the deceased for squandering his Kshs. 30,000/= on prostitutes. Counsel relied on section 206 of the Penal Code and the case of *Rex vs Tubere s/o Ochen* (1945) 1Z EACA 63 Eastern African Court of Appeal.
14. It was submitted that the accused was known to all the eye witnesses as they were all related and that the same occurred with a lot of interactions between the witnesses and the accused. It was submitted that the prosecution was required to prove its case beyond reasonable doubt and relied on the cases of *Miller vs Ministry of Pensions* (1947) 2 All E R. 372 and *Bakare vs State* (1987) 1 NWLR (PT 52) 579. Counsel argued that the eye witnesses were clear and concise on their recollection of what happened that evening and that the description of the assault was concurrent with the observations by the pathologist. Counsel argued that the ingredients of the offence were proved beyond reasonable doubt and asked this court to convict the accused.
15. Vide submissions filed on May 2, 2023, Miss Natwati, counsel for the accused submitted that a defence of alibi stating that the accused was at the police station at the time of the alleged offence was raised and which was not disproved by the prosecution. She relied on the case of *Republic vs Omar Ali Chidagaya*.
16. It was submitted that there is no direct evidence against the accused and that the prosecution entirely relied on circumstantial and hearsay evidence. Counsel relied on the case of *Musili Tulo vs Republic* (2014) eKLR. She urged the court to acquit the accused under section 215 of the Criminal Procedure Code.
17. Having considered the evidence on record and the submissions of the parties, the issue for determination is whether the prosecution proved its case to the required standard. The burden to prove all ingredients of the offence of murder beyond reasonable doubt falls on the prosecution in all save for a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. *Miller v Minister of Pensions* [1947] All. E.R 372. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused.
18. The four ingredients that the prosecution is required to prove in a charge of murder are that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused.
19. The post-mortem examination on the body of deceased indicated that there were injuries on the right forearm, deformed skull, cut wound on the frontal head and lacerations on the occipital region of the head. PW1 opined that the cause of death was severe head injury due to comminuted skull fractures with brain laceration inflicted by a blunt object with a sharp edge. He produced the post mortem report dated March 30, 2021 as Pexh 1. This ingredient of the offence was duly proved by the prosecution.
20. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic v Boniface Isawa Makodi* [2016]



eKLR that referred to the case of *Gusambizi Wesonga v Republic* [1948] 15 EACA 65 where it was 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.”

21. The deceased in this case was found to have died of severe head injury due to comminuted skull fractures with brain laceration inflicted by a blunt object with a sharp edge. There was a suggestion by Counsel for the accused that there was no evidence adduced to show that the accused committed the offence. It was upon the prosecution to ensure that the allegation that the accused stabbed the deceased was backed by supporting evidence. At this stage, I find it safe to presume that the death was unlawful.
22. Malice aforethought is the intention to cause death. It is an element of the mind which can only be inferred from the circumstances in which the death occurred. Courts consider the nature of the weapon used, the parts of the body attacked, the number of times the weapon is used on the victim and the conduct of the assailant before, during and after the attack.
23. PW2 gave direct evidence as to witnessing the attack on the deceased. There is certainty as to what was used as the murder weapons. PW4 availed the same in court as PExh.2 and 3 and that the DNA analysis done on the samples collected from the deceased and the weapon of assault did match. In this case, the post mortem report presented evidence to the effect that there was a blunt object that caused injury to the deceased and resulted in intensive bleeding. I am satisfied with what was tendered in court as Ex 2 and 3, the weapons recovered at the scene of crime were the weapons of assault. Given the presumed force used on the deceased that resulted in comminuted skull fractures with brain laceration as indicated in the post mortem report, it can safely be inferred that death was the desired outcome of whoever the assailant was.
24. There was direct evidence in form of eye witness accounts, PW2, linking the accused to the crime and there was available evidence that the accused had an opportunity to harm the deceased. I am satisfied that the evidence of the prosecution identified the actions of the accused. According to PW2, the deceased came to his house shouting that one of his brothers was intending to kill him using a crude weapon. The assailant went by the moniker “Ras” and on heading out to investigate, he met the deceased and suddenly ‘Ras’ joined them. He quickly tried to intervene only for “Ras” to allege that the deceased had hired goons to injure and kill him. The deceased alleged that “Ras” had always wanted to eliminate him and he requested both of them to cease harassing each other. The deceased left his house but kept on taunting “Ras” to accomplish his mission and he was then drunk. The accused herein “Ras” then hit the deceased with a metal bar while the deceased was seated. He hit him on the head and this prompted him to quickly rush to where they were as the accused continued hitting him. The accused herein, “Ras”, claimed that the deceased had squandered his Kshs. 30,000/= on prostitutes; a fact that the accused vehemently denied.
25. In the case of *Republic v Kipkering Arap Koske and Another* (1949)16 EACA 135, regarding circumstantial evidence the court held that: -

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt.”



26. Again, in the case of *Nzibo v R* (2005) 1KLR 699 the Court of Appeal held as follows:

“In a case depending entirely on circumstantial evidence in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.”

27. The prosecution case proved beyond reasonable doubt that the accused was the one who killed the deceased because it was witnessed by PW2. From the above authorities, the evidence of the key prosecution witnesses leaves no doubt that there are no co-existing circumstances which could weaken or destroy the inference of guilt of the accused since he was placed at the scene of crime and I find that the accused had the requisite malice aforethought since from the injuries inflicted, it can be discerned that the assailant intended to achieve desired result namely death of the deceased. It transpired from the evidence that the accused had made his intentions known that he wanted to eliminate the deceased for having squandered the sum of Kshs 30,000/ which were proceeds from sale of land on prostitutes. It is clear that the accused felt angry at having been left out and not been given part of the proceeds. Further, the accused had earlier made threats to the deceased that he would kill him and that he actually fulfilled his threats on the date in question. The force used on the deceased was huge as he died on the spot thereby leaving no doubt that the accused intended to kill the deceased. The defence of alibi was properly disproved by the evidence of the eyewitnesses whose evidence clearly placed the accused at the scene of crime. Hence, I reject the said alibi since the same was only to do with the accused reporting to the police that his life was in danger after the villagers vowed to deal with him over the killing of the deceased herein. The alibi raised by the accused related to circumstances after the incident and did not absolve him from being placed at the scene of crime.
28. In view of the foregoing observations, it is my finding that the prosecution has proved the charge of murder against the accused herein Ayub Simiyu Wanyama beyond reasonable doubt. I find him guilty of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* and he is accordingly convicted therefor.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JUNE 2023.**

**D. KEMEI**

**JUDGE**

**In the presence of:**

**Ayub S Wanyama Accused**

**Wekesa for Miss Natwati for the Accused**

**Ayekha for Prosecution**

**Kizito Court Assistant**

