



**Republic v Wanyonyi (Criminal Case 37 of 2020)  
[2023] KEHC 19387 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19387 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE 37 OF 2020**

**DK KEMEL, J**

**JUNE 30, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**BILL BRIGHT WANYONYI ..... ACCUSED**

**JUDGMENT**

1. The accused herein Bill Bright Wanyonyi was charged with the offence of murder contrary to sections 203 as read with section 204 of the Penal Code. It is alleged that on 9<sup>th</sup> August, 2020 at Sikulu Village, Mukhe Sub-location, Sirende Location in Webuye Sub-County within Bungoma County he murdered Alex Wanjala Simiyu
2. The accused denied the charge. The hearing kicked off in earnest. The prosecution called a total of eight (8) witnesses in support of its case. PW1 was Dr. Edward Vilembwa who testified that he conducted a post mortem on the body of the deceased at Webuye Hospital on 12<sup>th</sup> August, 2020 at 11.00 A.M. He established that the body was in fair nutritional status. Externally, he noted that there was presence of a cut on the contents of the stomach with rough edges measuring 4cm by 2cm. On dissecting the body, he found the central brain (cavernous system) had been disrupted as there was a split frontal parietal skull bone and that brain tissue had been disrupted as there was cerebral hemorrhage. He formed the opinion that the cause of death was cardiopulmonary arrest due to brain injury due to assault. He produced the post mortem report dated 12/8/2020 as exhibit No.1.  
  
On cross-examination, he confirmed that there was an external wound on the stomach and that he did not see any weapon. He also stated that he collected some nail samples for purposes of DNA analysis but did not have such findings.
3. PW2 was Miriam Namaemba Khaemba, who testified that she had known the accused as her classmate by the name Bill Bright Wanyonyi with whom they did class eight at Sirende primary school in 2019.



She also stated that she had known the deceased as he had been her boyfriend and who was a student in form three at Sirende Secondary school. She recalled that on 9<sup>th</sup> August, 2020 at around 10.00 PM, the deceased visited her home after calling her on her phone which he had purchased for her. She stated that she sneaked out and met with the deceased at the roadside and that the accused followed them from behind as they reached a certain forested area and that the accused lunged at the deceased and cut him with a small axe. She stated that the deceased fell on the ground. She thought that the deceased had ducked but to the contrary the axe had stuck on his head. She testified that she had no love affair with the accused as she had refused his advances previously and had informed him that she was already hitched with the deceased. She further testified that the deceased had confided in her that the accused had hinted to him that he would kill him.

On cross-examination, she confirmed that the accused had tried to seduce her sometimes in 2019 but had rebuffed his advances. She also confirmed that the deceased had been her lover with whom she had engaged in sexual intercourse before. She stated that the accused kept on following them from behind them for about one hour which made her a bit uncomfortable. She denied that they had been making love before the incident took place. She maintained that the accused had followed them with the sole aim of killing the deceased. She also stated that she did not scream for help on witnessing the incident.

On re-examination, she maintained that the accused was the assailant.

4. PW3 was Wycliff Simiyu Wangwe, who testified that the deceased had been his son and that he recalled on 9<sup>th</sup> August, 2020 he was with the deceased and later around 11.30pm he heard his father calling him to come outside only to inform him that the deceased who was his son had been killed and that his body was at a certain bush. He went there and found the body of the deceased with an axe embedded on his head.

On cross-examination, he denied witnessing the incident.

5. PW4 was Walter Wafula Wangwe, who testified that he knew the accused herein as they were classmates and that the deceased had been his elder brother. He recalled that on 9<sup>th</sup> August, 2020 while at home with the deceased they took their supper and that the deceased later requested him to accompany him to a nearby home where there was a ceremony and later, he informed him that he needed to rush somewhere. He later heard people talking about somebody who had been killed only to find out that it was his brother.

On cross-examination, he stated that the accused had been a boyfriend to Miriam Namaemba Khaemba (Pw1) before she switched her love to the deceased.

6. PW5 was Noah Wanjala Mwangala, who testified that he is the assistant chief of Mukhe sub location and that the accused is one of the residents. He testified that the deceased hailed from the neighboring sub location and that on 9<sup>th</sup> August, 2020 at around 11.00 PM, he received a call informing him that the deceased had been killed and his body lay along the road. He stated that he rushed to the scene and found the body of the deceased lying on the ground with a small axe embedded in his head. He alerted the police who collected the body. He stated that he interrogated the deceased's girlfriend who implicated the accused herein.

On cross-examination, he stated that chances are that the death is linked to the friendship of Miriam Namaemba Khaemba to both accused and deceased.

7. PW6 was Emanuel Juma Simiyu, who testified that he knew the accused as an old school mate and that the deceased herein was his friend. He recalled that on 9<sup>th</sup> August, 2020 at around 9.00 PM, he left for a nearby home and while on the way he found a young lady and a man both of whom he knew. He



proceeded on his way only to hear screams and on moving towards the noise, he saw the body of the deceased with an axe embedded on his head.

On cross-examination, he denied witnessing the incident save only that he had spotted the deceased and Miriam Namaemba Khaemba walking together at night prior to the incident.

8. PW7 was Peter Bukhuni Wangwe, who testified that on 9<sup>th</sup> August, 2020 at 11.30 PM, someone knocked on his door and informed him that Alex Wanjala had been killed. He proceeded to the scene where he saw a small axe stuck on the head of the deceased as brain matter oozed out of his mouth. He stated that he did not know the person who had killed the deceased.
9. PW8 was No. 231207 PC Edwin Onyango, who testified that on 10<sup>th</sup> August, 2020 at 1.23 AM, he received a call informing him of a murder within Mukhe area. He rushed there and found the body of the deceased with a small axe stuck on his head. He took photographs and managed to interrogate the lady (PW2) who was in the company of the deceased and was able to establish that the assailant was one Bill Bright Wanyonyi. The assailant had already been apprehended by the assistant chief and he took the statements of other witnesses. He produced the recovered weapon namely a small metal axe maroon in colour as well as photographs and a certificate as exhibits.

On cross-examination, he stated that he did not recover anything from the house of the accused. He also confirmed that he did not forward the recovered weapon to the Government analyst or even dust the weapon. He stated that he was certain that the accused committed the offence herein.

10. The prosecution then closed its case. A prima facie case was later established to have been made out by the prosecution and that the accused was placed on his offence. He opted to tender a sworn testimony and called one witness in support of his defence.
11. Bill Bright Wanyonyi (DW1) is the accused herein. His case is that the allegation herein is false as he recalled between 7.00 p.m. and 10.00 p.m. he was at home taking dinner in the company of his late parents and siblings. At 10.30 p.m. they finished taking their dinner and he proceeded to his sleeping quarters. He was with his brother Paul Baron Wanyonyi and that they did some reading up to midnight before retiring to bed. He told the Court that he was classmates with PW2 at Sirende Primary School and he knew her from early 2019. He stated that he was not the one who stabbed the deceased with a small axe on the head as alleged as he did not venture out in the night to attend the circumcision ceremony within the village. He stated that the following day a village elder, Patrick Masinde, visited his parents and requested that he accompanies him to the assistant's chief's office for purposes of bursary. On arrival, he found a huge crowd and was surprised by the turn of events. He later learnt that a certain young man who had attended the circumcision ceremony had been killed and the assistant chief requested he assists with the investigations.

On cross-examination, he stated that on the material day he was with his parents and that it was not true that PW2 could implicate him yet they did not disagree before. He stated that he had a lot of assignments and he could not attend the ceremonies and that it was not true that he eliminated the deceased who was a rival in the love triangle.

On re-examination, he stated that it is not true that he had a love affair with PW2 and that it was not true that all the young men in the village must attend the circumcision ceremonies.

12. PW2 was Paul Baron Wanyonyi who testified that he on August 9, 2020 between 7.00 p.m. and 10.00 p.m., he was at his parent's house and that he left for his sleeping quarters at around 10.00 p.m. He testified that the hut was erected by his late mother for her elder brother who is the accused herein. They had one bed and two blankets, and they covered themselves with one blanket while the other one covered the mattress. The bed was near the wall. According to him, they studied up to midnight



before retiring to bed. They did not venture into the night to attend the circumcision ceremony. He stated that the next morning the clan elder arrived and informed them that the accused was required by the area chief. The accused accompanied him and he later learnt that the accused was arrested on allegations of having murdered somebody. He stated that he could have known if the accused left the house at night as he is one who does not oversleep.

On cross-examination, he told the Court that the accused is his older brother and that they are in good terms. He stated that he is not lying to the Court and that he would exchange with the accused on who gets to sleep on the side of the wall. He confirmed that the accused did not go out at night. He stated that he knew PW2 and at no time did she visit his brother and could not tell if the accused denied having engaged with PW2. He stated that he had nothing to say about the love triangle involving the deceased, PW2 and accused. He added that he knew the deceased as they used to attend church together and he would be surprised to learn that the accused did not know the deceased.

On re-examination, he stated that it is not the accused who killed the deceased and that the accused did not attend the circumcision ceremony.

13. At the close of the defence hearing, the court directed that submissions be filed and exchanged by the parties.
14. Vide submissions filed April 26, 2023, Ms. Mukangu, counsel for the prosecution submitted that there was malice aforethought as the evidence as availed by all the eye witness suggested that accused was following PW2 and the deceased for about an hour before he attacked the deceased. It was submitted that PW2 had stated that the deceased was her boyfriend and that there was no love affair between her and the accused as she had refused his advances previously and had informed him that she was hitched to the deceased and further testified that the deceased had confided in her that the accused had hinted to him that he would kill him. It was thus submitted that the accused had the motive and reason to harm the deceased. Counsel relied on section 206 of the Penal Code and the case of *Rex vs Tubere s/ o Ochen* (1945) 1Z EACA 63 Eastern Court of Appeal.
15. It was submitted that the prosecution was under obligation 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 urged this court to convict the accused.
16. Vide submissions filed on 12<sup>th</sup> April 2023, Mr. Wamalwa submitted that the prosecution did not prove its case beyond reasonable doubt as the prosecution's evidence is full of contradictions and that the witnesses are incredible. Counsel relied on the case of *John Mutua Munyoki vs Republic* (2017) eKLR and *Kimani Ndungu vs Republic* (1979) eKLR.
17. It was submitted that the incident took place at night thus PW2 could not have possibly been able to identify the assailant. According to Counsel, PW2 could not know the colour of the shoes on the assailant because it was dark and she could not even recall what the accused was wearing. He relied on the cases of *Abel Maina Mburu vs Republic* (2012) eKLR and *Roria vs Republic* (1967) EA 583.
18. It was submitted that the accused raised an alibi defence that was cogent, watertight and unshakable and that the same was not challenged in any way. He relied on the case of *Elias Kiamati Njeru vs Director of Public Prosecution* (2015) eKLR. Counsel urged this Court to acquit the accused under section 215 of the Criminal Procedure Code.



19. For prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. In *Anthony Ndegwa Ngari vs Republic* [2014] eKLR, the elements of the offence of murder were listed as follows: -
  - a. the death of the deceased occurred;
  - b. that the accused committed the unlawful act which caused the death of the deceased; and
  - c. that the accused had malice aforethought.
20. On whether there was death of the deceased, the death of the deceased has been proved by PW1, PW2, PW3, PW5, PW6, PW7 and PW8 who saw deceased's body with an axe embedded on his head and by the post mortem report, Pexh.1, produced by PW1 that confirms that deceased died of cardiopulmonary arrest due to brain injury due to assault.
21. On whether the accused caused the unlawful act which caused the death of the deceased, the actus reus for the offence of murder are such unlawful acts carried over directly or indirectly that cause or hastens the death of the deceased. Section 213 of the Penal Code defines causing death to include acts which are not the immediate or sole cause of death in which the accused may be held responsible for the death of another person. [See also text on Criminal Law by William Musyoka 2nd Edition Law Africa 2016 at (page 304)]. For a case founded on this, criminal evidence by the prosecution must show that the accused person executed an unlawful act intended to cause death or grievous harm. It does not matter whether assault was a single act or multiple infliction of bodily harm so long as the death is traceable to the act carried out by the accused. Section 213 of the Penal Code will apply to the facts of the case depending on the circumstances as manifested by the evidence for the prosecution.
22. In the present case, there is evidence of PW2 who was at the scene of the crime with the deceased when he was assaulted by the accused person. On the fateful night, she described the chronology of events on how the deceased met a homicidal death. Suffice to say that according to PW2 on the night of 9<sup>th</sup> August 2020, the deceased visited her home after calling her on her phone which he had purchased for her. She stated that she sneaked out and met with the deceased at the roadside and that the accused followed them from behind as they reached a certain forested area and that the accused lunged at the deceased and cut him with a small axe. She stated that the deceased fell on the ground. She thought that the deceased had ducked but to the contrary the axe stuck on his head. She testified that she had no love affair with the accused as she had refused his advances previously and had informed him that she was already hitched with the deceased. She further testified that the deceased had confided in her that the accused had hinted to him that he would kill him. PW1 Dr. Vilembwa who carried out the postmortem (exhibit 1) confirmed that the deceased's cause of death was cardiopulmonary arrest due to brain injury due to assault. This evidence goes to demonstrate that the deceased did not die as a result of natural causes or accident. The right to life under Article 26 of *the Constitution* is jealously protected and can only be excused as authorized by the same Constitution or any other written law.
23. In absence of cogent evidence that an attack will take place and the precise nature of its gravity, there was no reasonable cause for the accused to use lethal force to cause the death of the deceased. That alone satisfies the criteria that the death of the deceased was unlawful.
24. It is manifest therefore that the incident in question occurred at night while it was dark. Accordingly, the Court must remind itself, as I hereby do, of the need to test such evidence with greatest care to avoid the possibility of mistaken identification in cases on an only one eye witness.



25. Indeed, in *Paul Etole & Another vs. Republic* [2001] eKLR, the Court of Appeal sounded the caution that:

“...Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger...”

26. In this instance, the accused was well-known to PW2; a fact conceded to by the accused in his defence. Hence, this was a case of recognition; in respect of which the Court of Appeal held thus in *Anjononi & 2 Others vs. Republic* [1980] eKLR held: -

“...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other...”

27. Thus, I am convinced that, in the circumstances set out by PW2, she was in a position to see and recognize the accused. It is noteworthy too that PW2 spotted the accused following them for about an hour prior to the assault of the deceased. It came out clearly that PW2 had been classmates with the accused in 2019. Pw2 denied having had a love affair with the accused save only that she had rebuffed his advances and made it clear that she had switched her love to the deceased. The brother to the accused (DW2) stated that PW2 had been a lover to the accused previously. That being the position, PW2 was well known by the accused and vice versa and hence the said witness did not mistake the identity of the accused at the time of the incident. The identification of the accused was that of recognition of a person well known to the witness.

28. It is manifest therefore that the accused was unhappy with the current state of affairs. He wanted PW2 to be his woman but PW2 was already hitched to the deceased and had prior brushed off his advances. The accused thus was not happy about being booted by PW2 for the deceased and thus his plan to eliminate the deceased who was his rival. Pw2 stated that the deceased had intimated to her that the accused had threatened to kill him. Hence, I find that the accused had the requisite malice aforethought. He had stalked the deceased and PW2 for about an hour before he finally struck and killed the deceased.

29. The foregoing being my finding, the question to pose is whether the accused’s alibi defence is tenable. To counter the evidence of PW2, the accused stated that, at the material time, he was at home with his family and further claimed that he slept in the same quarters and bed with his younger brother (DW2). It was thus the duty of the prosecution to disprove the said alibi.



30. It is trite law that the burden to prove the authenticity of the accused's alibi rested with the prosecution. Thus, in *Kiarie v Republic* [1984] eKLR, the Court of Appeal held thus:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the court a doubt that is not unreasonable...”

31. Similarly, in *Athuman Salim Athuman v Republic* [2016] eKLR, the Court of Appeal held that:

“It is trite that by setting up an alibi defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case...The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution...the purpose of the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act...”

32. It is also trite that the defence of alibi ought to be raised at the earliest opportune time to enable the prosecution investigate the legitimacy of the alibi. The Court of Appeal for Eastern Africa in the case of *R. v Sukha Singh s/o Wazir Singh & Others* [1939] 6 EACA 145 held: -

“...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 it 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...”

33. The accused claimed that the day after the incident a village elder called Paul Masinde visited him requesting that he accompanies him to the office of the area assistant chief as it was with regard to bursary. PW5 the area assistant chief testified that he visited the house of the accused where his parents informed him that they had been exasperated by his deviant behavior. He never brought up the alibi defence in both instances when he had the audiences of community leaders. I hereby do find, that the alibi is an afterthought and is for rejection. In any case, having found that the evidence of PW2 is credible, I am convinced beyond reasonable doubt that the accused's alibi was disproved by the prosecution. Credible evidence was adduced to prove beyond reasonable doubt that he was at the scene of crime when the act of murder took place; and was sufficiently and squarely placed at the scene of crime and culpable for the crime.

34. And in *Victor Mwendwa Mulinge v Republic* [2014] eKLR, on alibi, the Court of Appeal rendered itself on the defence of alibi as follows: -

“...It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja vs Republic*, this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought...”

35. On whether there was malice aforethought, in this case the accused is alleged to have committed murder with malice aforethought. The mens rea for the offence of murder as deduced from the definition



on malice aforethought under section 206 of the Penal Code is an intention to cause death or an intention to cause grievous bodily harm. Further, malice aforethought is proved not only when the accused's purpose is to cause death or grievous bodily harm but when he carries out the killing with the knowledge that his acts or commission will cause death.

36. The formulation of malice aforethought as set forth in section 206 of the Penal Code imports the element of recklessness, design and premeditation. This is where the accused foresees that a particular result would flow from his unlawful acts but proceeds to execute his intention. In *Ogeto v R* 2004 2KLR 14 the Court of Appeal held inter alia that:

“malice aforethought in murder is proved where the accused chases the deceased and when he catches up with him stabs him with a knife on the chest from which wound he fatally dies. Section 206(a) of the penal Code on the intention to cause death or grievous harm is effectively proved.”

37. There are other numerous cases herein which demonstrate the elements of malice aforethought in the trial of an accused person. Among the relevant authorities applicable to the circumstances of this case are *R v Tubere s/o Ochen* 1945 12 EACA 63. The grounding elements being the nature of the weapons, the manner in which it was used, the relevant parts of the body targeted, the nature and gravity of the injuries inflicted and the conduct of the accused person concerning the manner of killing.
38. The prosecution therefore has a duty to prove that the accused with malice aforethought caused the death of the deceased.
39. Reverting to the case before me, the prosecution relied on the testimony of PW2 and the post mortem report to establish that the accused had malice aforethought. PW2 stated that as she sneaked out to meet up with the deceased by the roadside and as they were walking to the place where the circumcision ceremonies were taking place, she noticed the accused following them from behind and as they arrived at a certain forested area the accused lunged at the deceased and cut him with an axe. She thought he was hit by a stick only to realise that it was an axe. She testified that she had brushed off the accused's advances and informed him that she was already hitched to the deceased and that the deceased had confided in her that the accused had hinted to him that he would kill him. When PW8 visited the scene, he observed that the body of the deceased was lying on the ground with a small axe embedded on his head. Pw2 had known the accused before as they had been classmates and that the accused had earlier tried to befriend her. Further, DW2 confirmed that Pw2 had been a lover to the accused before she switched to the deceased. Hence, there was no mistaken identity about the accused by PW2 who placed him at the scene of crime. The alibi evidence by the accused was disproved by the prosecution's evidence which was overwhelming against him. The defence evidence did not shake the prosecution's evidence in any way. As noted from the evidence, the prosecution has discharged the burden of proof of the offence as defined in section 203 of the Penal Code. In attacking the deceased, the accused formed the necessary malice intended to cause death or grievous harm to the deceased. It transpired that the deceased was then unarmed as he was walking in company of his girlfriend (PW2) before the accused, who had been silently following them from behind for about an hour, attacked him. It is clear that the accused intended to eliminate the deceased no wonder the deceased fell down upon being hit on the head with an axe and died suddenly. The act of the accused in hitting the deceased on the head with an axe which actually got embedded on the head was a clear intention to eliminate the deceased and to get rid of him completely as he had posed a threat to his love for Pw2. The gravity of the injuries suffered by the deceased and the unreasonable force used by the accused, the part of the body targeted, and nature of the weapon used connotes malice aforethought as per section 206 of the [Penal Code](#).



40. The accused's defence was not cogent enough to cast doubt on the evidence availed by the prosecution to prove its case beyond reasonable doubt against him. The evidence of Pw2 placed him at the scene of crime as the assailant. Pw2 came off as a truthful witness and who was unshaken even on cross-examination. Nothing came out that PW2 was settling scores against him over their alleged love affair before Pw2 switched her love to the deceased. She had no reason to do so.
41. In the result, it is my finding that the prosecution has proved the charge of murder against the accused herein Bill Bright Wanyonyi 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**

