



**Republic v Wekesa (Criminal Case E023 of 2021)  
[2023] KEHC 19367 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19367 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE E023 OF 2021**

**DK KEMEL, J**

**JUNE 30, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ESAU MASINDE WEKESA ..... ACCUSED**

**JUDGMENT**

1. The accused herein Esau Masinde Wekesa 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 the 12th Day of June, 2021 at Biliso A village in Bumula Sub County within Bungoma County, he murdered Chrispinus Wanjala Masinde.
2. The accused denied the charge. The hearing kicked off in earnest. The Prosecution called a total of thirteen (13) witnesses in an attempt to prove its case. PW1 was Scholastica Nafula Rang'a who testified that she is the assistant chief of Muanda sub location Bumula Division in Bumula Sub County. She told the Court that the accused herein killed his father. She recalled on June 12, 2021 while in her homestead, a village elder came to inform her that the accused had killed his father. She quickly alerted the police officers. She stated that as she tried to leave the compound, the accused herein turned up while armed with a panga. She pleaded with him to calm down and that he handed over the weapon which had bloodstains to her. She added that the police arrived and picked him up and that they went to the scene where they found the body of the deceased lying down outside his house with several cuts and that the body had been covered with avocado leaves and branches.  
  
On cross-examination, she told the Court that she surrendered the murder weapon to the police but that the same was not before the Court.  
  
On re-examination she stated that the name Boaz is one of the accused's names.
3. PW2 was Chrispinus Wangila Khaemba who testified that on June 12, 2021 at around 10.00 am he received a report that there was a problem at the home of the deceased and on rushing there he found



a large crowd that was claiming that the accused had killed his own father. He quickly rushed to the home of PW1 and on the way he met with the accused who was armed with a panga. He reached the home of PW1 who later alerted the police of the incident.

On cross examination, he stated that he found the accused at the home of PW1 and that he did not know the genesis of the incident leading to the death of the deceased.

On re-examination, he stated that he is the one who alerted PW1 on the incident.

4. PW3 was Judith Wanjala who testified that June 12, 2021 while in her compound she heard someone screaming and that there were noises suggesting someone was cutting trees. She tried to peep through a maize plantation and saw the accused crying while cutting trees. She did not approach the accused but she later established that the accused had cut his father and then covered his body with some tree branches. She quickly alerted PW2. The accused later on tried to burn the deceased's body by heaping some tree branches all over the body. She added that she alerted the village elder and that villagers helped to put out the fire and removed the trees that had covered the deceased.

On cross-examination, he told the Court that she did not witness the accused cutting his father with a panga and that she had not been shown the panga in Court.

5. PW4 was Anthony Nyongesa who testified that the accused herein is his younger brother. He recalled on June 12, 2021 he suddenly heard screams from the deceased's house and on rushing there he found the accused armed with a panga while the deceased was on the ground. He quickly raised an alarm and rushed to PW1's house. The deceased and the accused were alone at the scene and he did not speak to any of them. On his way back home, he met with PW2 with whom he accompanied back to the scene where they found the accused had place tree branches on the body of the deceased. The deceased had been cut on the back of the head and that he felt that the accused might have inquired from the deceased about the proceeds from some land sale.

On cross-examination, he told the Court that they referred to the accused as "Boss" and not "Boaz" and that the accused was in possession of a panga but which had not been shown to him in Court.

6. PW5 was Wycliff Wanyonyi who testified that the accused is his nephew. He recalled on June 12, 2021 while away from his home he learnt that the accused had killed the deceased and that saw him armed with a panga and people who were gathered in the deceased's compound were afraid of him. The deceased's body had panga cuts on the back of the head. He added that he did not know the reasons behind the accused's actions.

On cross-examination, he testified that the deceased had sold a portion of his land and that the accused wanted a portion of the proceeds with which to purchase a motor bike.

7. PW6 was Jackline Wanyonyi who testified that on June 12, 2021 while on a search for sisal ropes, she heard screams from her compound. She quickly stopped what she was doing and rushed there to find her daughter-in-law who informed her that the accused had killed his father, the deceased herein. She found the deceased already dead and that the accused had heaped logs and branches on his body and set it on fire. She saw the deceased's neck and back had been cut and that the accused had also placed plastic containers on top of his body to hasten the burning. She called for help from the villagers.

On cross-examination, she told the Court that she did not see the accused herein at the scene of crime and that she heard the villagers mentioning the name "Boss" as she approached the scene. She finally stated that she did not see the assault weapon at the police station and that none has been shown to her in Court.



On re-examination, she stated that “Boss” refers to Esau and that anyone mentioning the name “Boss” will be referring to Esau.

8. PW7 was Fridah Nekesa Shikuku who testified that on June 12, 2021 while in her compound, her sister-in-law, Colleta, alerted her that the accused had killed his father. She quickly rushed to the deceased’s house where she found the deceased lying on the ground. She retreated back to her home terrified and informed PW6 to rush to the scene. She told the Court that she saw that accused cutting an avocado tree and did not see any other person there. She told the Court that the deceased had sold a piece of land and it seems there was a dispute over money which led to the death of the deceased.

On cross-examination, she told the Court that the accused is her brother-in-law and that she did not find any other villager at the scene. She also told the Court that she has not seen any panga at the police station or in Court.

9. PW8 was Cosmas Opuri Nyongesa who testified that on June 16, 2021 he witnessed the post mortem examination on the body of the deceased at Bungoma Hospital mortuary. He observed several cut wounds on the head, neck and right hand. The cuts were deep and that he learnt the cause of death was severe bleeding. He stated that the accused is his last-born brother who lived within the compound of their parents and that he had been in good terms with the deceased and was surprised as to what had transpired between the accused and their father.

On cross-examination, he told the Court that he did not witness the incident and that the assault weapon had not been shown to him in Court.

10. PW9 was Colletta Naliaka Wanyonyi who testified that on June 12, 2021 while weeding her farm, the accused and two others passed by heading towards the accused’s home. She saw the accused separately head into his home and that her home was 100 metres from that of the accused. She stated that the accused was then carrying a panga and she witnessed him cutting the deceased on the head. She quickly rushed to inform PW7. On the way back, she saw accused cutting a tree in their compound which fell on the deceased’s body. The villagers and the police later arrived at the scene.

On cross-examination, she told the Court that she saw the accused cutting the deceased and that she was the first person to arrive at the scene. She also stated that she did not see the weapon at the police station and that the same had not been shown to her in Court.

On re-examination, she stated that a fire was lit on the legs of the deceased and that she was not there when the same was lit.

11. PW10 was Dr Kosgei Eric who testified that he is based at Bungoma County Referral Hospital as a senior medical officer. He performed a post mortem on the body of the deceased herein on June 16, 2021. On the examination of the external appearance he observed a deep cut wound on the right hand and the right forearm. There was a fracture of the right ulna and radius proximal bones. There was a deep cut on the right temporal region with a fracture of temporal bone. There was a deep cut wound on the scalp (parietal region). He opined that the cause of death was haemorrhagic shock due to deep cut wounds. He produced the post mortem report dated June 6, 2021 as Pexh 1.

On cross-examination, he told the Court that the injuries were due to a sharp object.

12. PW11 was No 42672 SGT. Harrison Mugumo who testified that he is based at Bumula DCI as an investigating officer. He recalled on June 12, 2021 while in the office, he received a report of murder that took place in Biliso Village. In the company of his DCIO and OCS Bumula, they rushed to the scene of crime where they found the deceased under avocado branches which were placed on the body. He also noted that there were plastic containers heaped on the body of the deceased. He noticed the



body had deep cut wounds on the head and hand and that the suspect was not at the scene as it was reported that he had surrendered himself and the weapon to PW1. They proceeded to PW1's home and who handed over the accused and the weapon. He observed the weapon had fresh blood on it and took the body to the mortuary. They received the statements of various witnesses and also interrogated the accused person who made a confession. He told the Court that they proceeded to charge him with the offence of murder. He produced the assault weapon as Pexh 2.

On cross-examination, he told the Court that the avocado leaves on top of the deceased's body were fresh and not burnt and that the accused surrendered himself to PW1. He also stated that one of the companions of the accused namely, Kevin had not been traced despite him being a vital witness.

13. PW12 was No 232704 CIP Evans Mwangi who testified that he is the current DCIO Bumula sub County and that on June 13, 2021 while in his office, PW11 informed him that the accused in this case had confessed to the crime. He immediately ordered the accused to be brought to his office and on interrogating him, the accused confessed to injuring and killing the deceased. He informed the accused that he needed to prepare a proper confession and he proceeded to read to him his rights and informed him that he was at liberty to have his advocate present. During the recording to the confession, he enquired whether the accused was coerced to confess and that the accused maintained that he was doing it out of his own volition. He established from the accused that he needed his brother one Cosmas Opuri, to be present during the recording of the statement. He stated that he managed to contact the said Cosmas Opuri. After caution, he proceeded to record his statement on June 13, 2021. He stated that the accused stated that there was a disagreement between him and the deceased over Kshs 50,000/= which were the proceeds from the sale of land and which he needed to pay as deposit for a motorcycle. He stated that an argument arose in the course of the discussion and that the deceased almost hit him with a club but he managed to ward it off and snatched it from him. He further stated that the deceased attempted to cut him with a panga but he managed to wrench it from him and used it to cut him until he died. He later handed himself to the assistant chief who escorted him to the police. After that, he proceeded to prepare a certificate confirming that the confession had been made freely and that the accused signed the same.
14. Counsel for the accused objected to the production of the confession as the same had been obtained under duress as his client was harassed and compelled by the police to confess. The same was made contrary to the accused's constitutional rights and section 26 of the *Evidence Act*.
15. Counsel for the State submitted that the assertions by the defence on duress are unsubstantiated and mere allegations. It was further submitted that the *Confession Rules (out of Court) 2019* were complied with by the respective officer and it is clear the accused voluntarily and willingly in the presence of his brother made a confession and that the same ought to be accepted. It was finally submitted that no evidence was availed to prove the accused's rights were violated and that the confession be admitted in evidence.
16. This Court carefully reviewed the sentiments of both counsels and it was satisfied that the accused's confession was taken in accordance with the *Evidence (Out of Court Confession) Rules* and was admissible under section 26 of the *Evidence Act*. The Court allowed PW12 to proceed and produce the confession document in Court as evidence.
17. PW12 produced the statement of the accused and the certificate of confession dated June 13, 2021 as Pexh 4 (a) and (b) respectively.
18. PW13 was Polycarp Luta Kweyu who testified that he works at the Kisumu Government Chemist. He recalled on June 18, 2021 PW11 submitted a panga with black rubber handle marked as "A" and Blood sample of Chrispinus Wanjala Masinde (deceased) marked "B" for analysis. It was required that



they determine the genetic relationship between the two items. It was his finding that the stains on the panga tested positive for blood of a human being. The DNA comparison profiles led him to the conclusion that the DNA profile from the panga were similar to that of the deceased. He produced a report dated November 24, 2021 as Pexh 5 and the exhibit memo dated June 17, 2021 as Pexh 3.

On cross examination he told the Court that he did not know the person who used or handled the panga.

19. 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 defence. He opted to tender a sworn testimony.
20. Esau Masinde Wekesa (DW1), is the accused herein. His case is that on that material date he was in the company of the deceased, his father, who had earlier requested to see him that morning. The deceased wished to purchase two oxen for ploughing purposes. According to him, the deceased sent him to the place where he could purchase the same and on getting back he found him lying on the ground. He told the Court that he was shocked and raised an alarm as he rushed to the assistant chief to make a report on the same. He told the Court that the assistant chief did not listen to him but she locked him in her house and called the police who came and arrested him for investigations. He told the Court that he did not know the man responsible for the death of the deceased and that the allegations against him are false.

On cross-examination, he told the Court that some neighbours were against him such as PW3 and PW9 as they had in the past disagreed over his younger sister being taken to “*disco matanga*”. He told the Court that he never invited his older brother to witness his confession statement. He also admitted that he had no grudge with his elder brother (PW8).

On re-examination, he told the Court that PW8 was brought by the police officers during his confession and that he had an issue with PW8 and had differences with PW9.

21. At the close of the defence hearing, the Court directed that submissions be filed and exchanged by the parties. It is only counsel for the State who filed submissions.
22. Vide submissions filed on March 27, 2023, the Counsel for the prosecution submitted that all the requisite elements to establish a murder conviction were proved beyond reasonable doubt. Counsel relied on the cases of *Rex v Tubere s/o Ochen* [1945] 1Z EACA 63 Eastern Court of Appeal; *Hyam v DPP* [1974] A.C.; *Ernest Asami Bwire Abanga alias Onyango vs R* (CACRA No 32 of 1990); *Miller v Ministry of Pensions* [1947] 2 All E R 372 and *Bakare vs State* [1987] 1 NWLR (PT52) 579.
23. Counsel submitted 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 and that the accused wrote down a confession even though he was not forced to admit it..
24. This Court must now analyze the evidence on record to determine whether this charge of murder has been proved beyond reasonable doubt.
25. The offence of murder is defined as follows by section 203 of the *Penal Code* Cap 63 Laws of Kenya  

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”
26. In order therefore to prove the charge of murder, the prosecution must tender evidence to prove the following crucial ingredients of the offence beyond reasonable doubt.
  - i. Proof of the fact as well as the cause of death of the deceased



- ii. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused.
  - iii. Proof that the said unlawful act or omission was committed with malice aforethought.
27. The first ingredient was readily proved. PW1 to PW9 all confirm that they saw the body of the deceased lying dead with heaps of logs and avocado leaves as well as plastic containers.
28. Evidence regarding the cause of death was tendered by PW10, Dr Kosgei Eric, who testified that he is based at Bungoma County Referral Hospital as a senior medical officer. He performed a post mortem on the body of the deceased herein on June 16, 2021. On the examination of the external appearance, he observed a deep cut wound on the right hand and the right forearm. There was a fracture of the right ulna and radius proximal bones. There was a deep cut on the right temporal region with a fracture of temporal bone. There was a deep cut wound on the scalp (parietal region). He opined that the cause of death was haemorrhagic shock due to deep cut wounds. He produced the post mortem report dated June 6, 2021 as Pexh 1. This was expert medical evidence – it was neither challenged nor controverted. I find that the deceased met his death due to haemorrhagic shock due to deep cut wounds.
29. Having proved the fact and cause of death, the prosecution must go further and avail evidence to prove that it was the accused who inflicted the deep cut wounds resulting to the death of the deceased. As stated earlier, the accused and deceased were known to each other as they shared a father and son relationship. It was the evidence of PW9 Colletta Naliaka Wanyonyi, that while weeding her farm, the accused and two others passed by heading towards the accused’s home. She saw the accused separately head into his home and that her home was 100 metres from that of the accused. She stated that the accused was then carrying a panga and she witnessed him cutting the deceased on the head. In his defence the accused stated that he had differences with PW9 and alluded to him being framed.
30. PW13 testified that that the accused confessed to him that he had killed the deceased. The law regarding the admissibility of confessions is very clear and is to be found in section 25A (1) of the *Evidence Act* Cap 80 Laws of Kenya. This Section provides that
- “25A(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate, or before a police officer (other than the Investigating Officer), being an officer not below the rank of Chief Inspector of Police and a third party of the person’s choice.”
31. This Court was satisfied that the accused’s confession was taken in accordance with the Evidence (Out of Court Confessions) Rules and deemed the same admissible under section 26 of the *Evidence Act*. PW12 proceeded to produce the confession document as evidence together with the certificate of confession dated June 13, 2021 as Pexh.4 (a) and (b). This Court has perused a copy of the said confession and finds that it is in essence setting out the accused’s defence. It does equivocally confirm that the accused is aware of having killed the deceased and it does confirm that the accused admits that the act done was unlawful. This Court reproduces the relevant part of the statements as follows: -
- “..... At about 10.00 a.m. I decided to go to my father’s homestead which is about 60 metres away. The purpose of my going there was that I wanted to know the progress of Kshs 50,000/= which my father had promised me as part of the proceeds of the sale of our ancestral land. I intended to use the Kshs 50,000/= for partial payment of a motor bike. On arrival, I asked my father where the Kshs 50,000/= we had agreed upon was and he became annoyed of this. He retreated to his bedroom and picked a rungu and advanced towards



me. He attempted hitting me with the rungu and I blocked it using my hands. I managed to disarm him of the rungu and threw it to the nearby maize plantation. My father then retreated back to his bedroom and emerged with a panga. I forcibly took the panga from and in anger started assaulting him using the panga. I cut him on the head, neck and hands and he fell on the ground. I proceeded to a nearby avocado tree and started cutting it with trunk and branches falling on my father who was now lying down bleeding. I entered his house removed a cupboard, utensils and other items and threw them on his now dead body. From there, armed with the panga I used to kill my father I walked to the home of the area assistant chief namely Scholastica and found her present. I presented the panga I had used to kill my father to her in the presence of some fundis who were working in her compound. After a short while, a crowd gathered in the home of the assistant chief and she locked me in her house....”

32. Having found that the confession was valid, and that there was an eye witness, this Court finds that the prosecutions’ evidence was not shaken by the defence. The prosecution was under duty to ensure that the allegation that the accused assaulted the deceased was with malice aforethought and not excusable. From the evidence of PW9, the same proved that the accused assaulted the deceased. The next issue for determination is whether the said assault was with malice aforethought. According to the accused’s confession, it is clear that there ensued a disagreement with regard to the promised Kshs 50,000/= and the moment the deceased did not grant him the response he expected when he walked into his abode but was arming himself to attack the accused, the accused managed to disarm the deceased and proceeded to assault him with the same panga. He did not end his assault there but rather, he proceeded to a nearby avocado tree and started cutting its trunk and branches falling on the deceased who was now lying down bleeding. He entered his house removed a cupboard, utensils and other items and threw them on deceased’s dead body. I find this was the factor giving rise to the malice aforethought. All these provided the requisite malice aforethought in this offence. Hence, the accused’s attempted claim that the deceased sent him to purchase two oxen and on getting back he found him lying dead on the ground is not convincing. I find that the accused had the requisite malice aforethought to eliminate his father in the event that he would not give him the sum of Kshs 50, 000/ with which to pay as deposit for purchase of a motor cycle. The act of the accused continuing to inflict further injuries and heaping tree trunks and leaves as well as kitchen items and setting fire on the deceased was clear evidence of malice aforethought.
33. From the evidence of the prosecution witnesses, it is clear that the same placed the accused at the scene of crime. The said evidence was corroborated by the confession of the accused herein. This leaves no doubt about the accused being the person responsible for the death of the deceased herein. His defence evidence did not shake that of the prosecution in any way and was further weakened by his own confession. The accused’s grievance against his father for not giving him some agreed money could as well have been raised with the authorities or the civil courts for redress. The accused did not have to resort to killing his own father.
34. In the result, it is my finding that the prosecution has proved the charge of murder against the accused herein Esau Masinde Wekesa 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 30<sup>TH</sup> DAY OF JUNE, 2023.**

**D. KEMEI**



**JUDGE**

