



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Wamalwa (Criminal Case E022 of 2021)
[2023] KEHC 21385 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21385 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E022 OF 2021**

DK KEMEL, J

JULY 28, 2023

BETWEEN

REPUBLIC PROSECUTOR

AND

MARTIN SIKUKU WAMALWA ACCUSED

JUDGMENT

1. The accused herein Martin Sikuku Wamalwa was charged with the offence of murder contrary to Section 203 as read with section 204 of the *Penal Code*. It was alleged that on the 20th day of May, 2021 at Sawa Village, Mahanga sub-location, Bokoli location within Webuye Sub-County within Bungoma county he murdered Pascal Nyongesa.
2. The prosecution called five witnesses in support of its case. PW-1 Festus Masinde, the area chief testified that the accused and the deceased came to his home fighting on May 20, 2021 at about 10.00 PM. He chased them away to the roadside. He was joined by members of the public who inquired about the genesis of the fight which was explained by the accused who claimed that the deceased had stolen his clothes. He instructed the two to report to his office the following day but they didn't turn up. Later, he heard from the accused's cousins that the fight had continued and that the deceased sustained serious injuries and was admitted in hospital. He later on learnt the deceased had passed on.
On cross examination, he stated that he had not seen any weapon in the accused's possession.
3. PW-2 Martin Wafula Musekese, the deceased's cousin stated that on May 20, 2021, the deceased knocked at his door around 10 pm and when he stepped outside, he found him bleeding from the side of the head claiming that he had been hit with a metal rod by the accused. He approached the accused demanding to know what had transpired. The accused told him that the deceased had stolen



his trouser. The deceased's condition worsened and he together with Christopher took him to hospital. He later received reports that the deceased had died.

On cross examination, he stated that the deceased had nothing on his hands at the time he came to his house. He stated that he did not witness the incident but that the accused confirmed assaulting the deceased.

4. PW-3 Dr. Brian Ilima Kenyali conducted an autopsy on the deceased on 31/5/2021 and noted three superficial wounds on the right hand, left forearm and right thigh. On dissecting the body, there was a scalp wound on the left frontal aspect, a skull fracture extending from the right frontal bone to the left parietal bone. That there was massive right sided epidermal hematoma. His conclusion was that the deceased died of severe head injury secondary to assault with a heavy object. He produced the post mortem report as an exhibit.
5. PW-4 Christopher Sikuku Manyonge testified that the deceased called him out speaking in a low tone on the night of May 20, 2021. He stepped out and inquired from the deceased what had transpired to which the deceased told him that he had been hit by the accused on the head with a metal rod accusing him of stealing his trouser. That he took the deceased to hospital.

On cross examination, he confirmed that the deceased informed him that the accused had assaulted him. He did not see any injury on the deceased or even blood in the accused's compound. He also stated that the deceased had been a habitual thief in the area.

6. PW-5, IP Patrick Wafula stated that he received a call on May 23, 2021 from one Sgt. Machasyo who informed him of the incident. He rushed to Webuye District Hospital and found the deceased had died. He organized for witnesses to be brought from Sawa and recorded their statements. He later arrested the accused and charged him.
7. The accused was put on his defence and elected to give a sworn statement to the effect that he passed by Bokoli market while from work and met a certain pastor who had part of his money from work he had done. He saw the deceased herein selling clothes and spotted his clothes and that of his family members and suspected the seller must have stolen them from his house. That he went home where his wife informed him that all their clothes had been stolen.
8. When he went back to the deceased to inquire about their clothes, the deceased became hostile threatening to stab him with a knife. They ran to the chief's camp from where the deceased hit him on the mouth and eye. Members of the public responded after the accused raised alarm and escorted him home. Later, the deceased pursued him. That the deceased fell down and became unconscious. After that, his cousin (PW-2) and Chris Manyonge alerted him to assist in taking the deceased to hospital. That he contributed Kshs 4,000/- towards the deceased's medication. He denied murdering the deceased. He stated that it was the members of the public who were responsible for the deceased's death.

On cross examination, he stated that he was involved in the fracas at the assistant chief's house. He stated that the deceased attempted to stab him but dodged and that the deceased fell down backwards in his presence. That the deceased had been beaten earlier by members of the public occasioning him injury to the head.

9. The parties filed their written submissions. The state submits that the first condition to be established in a murder charge is that death occurred. That according to PW-3, the deceased died from epidermal hematoma secondary to head injury as a result of assault with a heavy object.



10. On the ingredient that there was intent or malice aforethought, it is submitted that PW-2 and PW-4 testified that the accused hit the deceased with a metal rod which signifies the need to cause grievous harm. That the motive of the killing was clearly because of the stolen clothes. Reliance is placed on the provisions of section 206 of the *penal Code*, the decision in *Rex v Tubere s/o Ochen* (1945) 1Z EACA 63, *Hyam v DPP* (1974) AC and *Ernest Asami Bwire Abanga alias Onyango V R* (CACRA No 32 of 1990).
11. The third ingredient is that the accused person caused death. In this regard, it is submitted that the accused was indeed properly identified as he had been with the deceased until he suffered fatal injuries. That the fight between the deceased and the accused outside his home was witnessed by PW-1, PW-2 and PW-4. Counsel cites *Miller V Minister of Pensions* (1947) 2 ALL ER 372 and *Bakare V State* (1987) 1 NWLR (PT 52), 579.
12. For the accused, it is submitted that based on the evidence on record, the prosecution failed to prove their case beyond reasonable doubt. That there is no material evidence to corroborate the evidence adduced before the trial court since the same was hearsay.
13. In this regard, the authority in *Kipkering Arap Koske and kamure Arap Matata* (1949) 16 EACA 135 gives the standard required to prove a case on circumstantial evidence. That the prosecution has failed to prove the elements of malice aforethought as required by section 203 of the Penal Code.

Analysis and determination.

14. Section 203 of the *Penal code* creates the offence of murder and for the prosecution to secure a conviction, it must establish the following ingredients; proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought. The proof must be beyond reasonable doubt.
15. On the ingredient of proof of death, it was the prosecution's case that the deceased died. PW-3 Dr. Brian Kenyali was categorical that he performed an autopsy on the deceased's body on May 31, 2021. This was indeed confirmed by other witnesses who testified to the deceased's death. He formed the opinion that the cause of death was epidermal hematoma secondary to head injury as a result of assault with a heavy object. I find this limb was proved.
16. On the cause of death, PW-2 testified that the deceased came to his house bleeding from the side of the head. He informed him that the accused had hit him with a metal rod. PW-4 testified that the deceased knocked at his house and informed him that he had been hit with a metal rod by the accused.
17. Similarly, PW-3 who performed the post mortem on the deceased's body found the following injuries on the deceased; three superficial injuries on the right arm, left forearm and right thigh. On dissecting, the found a scalp wound on the left frontal aspect, skull fracture extending from the right frontal bone and to the left parietal bone, that there was massive right-sided epidermal hematoma and formed the opinion that the death was caused by severe head injury secondary to a massive epidermal hematoma secondary to the head as a result of assault with a heavy object.
18. From the evidence on record, it is clear and I thus find that the cause of death was caused by severe injury to the head.
19. On the issue that the death was due to an unlawful act or omission, it was stated by PW-1, PW-2 and Pw-4 that the deceased complained to them that he had been hit by the accused due to an altercation over the theft of the accused's trouser by the deceased. Article 26 (1) of *the Constitution*



guarantees every person the right to life and none should take away that right except by what is permitted in law. The accused on his part attributed the deceased's death to an earlier injury sustained after the deceased was attacked by a mob over theft. He also alleged that the deceased fell down while trying to stab him using a knife and became unconscious. That efforts to resuscitate the deceased proved futile.

20. Going by the evidence, this assertion is unsupported by evidence and I hereby proceed to reject it.
21. On whether the unlawful act or omission was on the part of the suspect, it is evident that none of the witnesses saw the accused strike the fatal blow to the deceased's head. However, from the evidence on record, PW-1 witnessed the fight in his compound before ejecting them from his house. PW-2 and PW-4 on their part received information from the deceased that the accused had struck him with a metal rod.
22. It is further evident that the accused told PW-2 and PW-4 that the accused had struck him with a metal rod because the accused suspected him of stealing his trouser. PW-4 confirmed that the deceased was a habitual thief and was well known in the area for that behaviour.
23. PW-2 also confirmed on cross-examination that upon asking the accused why he had assaulted the deceased, the accused confirmed that he had indeed assaulted the deceased.
24. From the above piece of evidence, I am satisfied that the accused caused the deceased's death.
25. On the question of whether it was the accused who caused the deceased's death, it is not in contest that none of the witnesses saw the accused strike the deceased with the metal rod as alleged by the deceased.
26. According to *Abamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

27. The Court of Appeal in the same case gave the test to be applied in considering whether circumstantial evidence adduced can support a conviction when it stated: -

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those



circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

28. In this case, PW-1 narrated of a fight involving the deceased and the accused at his home over an alleged theft of the accused's trouser by the deceased. The same narrative was given by PW-2 and PW-4 as reported to them by the deceased shortly before being taken to hospital.
29. In his defence, the accused also mentioned that he had suspected the deceased of stealing his trouser as he saw the deceased allegedly selling clothes belonging to his family members.
30. All these taken into account leads to the conclusion that the accused caused the deceased's death due to suspicion that the deceased had stolen his trouser. Coupled with the fight at the assistant chief's home, there cannot be any doubt that the accused killed the deceased over the alleged theft and that he was placed at the scene of crime.
31. From the evidence tendered herein, the accused in this case was required to offer an explanation on how the deceased met his death. Sections 111(1) and 119 of the Evidence Act provides as follows:

“111. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

32. In the circumstances herein, I am of the view that the accused failed to offer any explanation as to how the deceased might have met his death. The evidence of Pw1 is that the accused and deceased went to his house while fighting and that he advised them to come the following day when he would handle the dispute. The accused was thus the last person in company of the deceased before he ended up at the house of PW2 and PW4 whom he briefed them about the attack by the accused herein. His defense therefore amounted to a mere denial as he was squarely placed at the scene of the crime. The accused thus ought to explain how the deceased ended up dead. The accused was enraged by the conduct of the deceased in stealing his trouser and thus assaulted him leading to the death of the deceased. He admitted in his defence evidence that he spotted the deceased at the market selling clothes he suspected to have been stolen from his house and that he went straight home where his wife confirmed the theft. He thus went and confronted the deceased over the same. He also admitted on cross-examination that he was involved in the fracas with the deceased at the home of the assistant chief. Had the accused restrained himself and reported the theft to the authorities, the deceased could be alive today.



33. On the issue of malice aforethought, section 206 of the [Penal Code](#) defines the same as;
- “206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - (c) an intent to commit a felony;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”
34. These provisions were interpreted in [Joseph Kimani Njau v R](#) (2014) eKLR, where it was held as follows:
- “Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;
- i) The intention to cause death;
 - ii) The intention to cause grievous bodily harm;
 - iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.
35. From the injuries noted by PW-3, the force applied and the nature of the weapon used demonstrates that the accused must have intended to cause death of the deceased. The injuries sustained are commensurate with the intention to either cause death or grievous harm. In my view the accused’s intention can be inferred from the weapon used and the injuries sustained and further by the fact that the accused had earlier confronted the deceased for stealing his trouser. The accused’s claim that the deceased had been attacked by villagers due to his thieving ways is not convincing as no evidence of a mob being involved arose in the entire proceedings.
36. In the result, it is my finding that the prosecution established the all the ingredients of the offence to support a conviction against the accused for the offence of murder contrary to section 203 as read with Section 204 of the [penal Code](#). I accordingly I find the accused herein Mark Sikuku Wamalwa guilty as charged and is convicted accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY 2023.

D.KEMEI

JUDGE

In the presence of :

Mark Sikuku Wamalwa Accused



Makokha for Wanjala for Accused

Ayekha for Prosecution

Kizito Court Assistant

