



REPUBLIC OF KENYA



**Republic v Wambugu (Criminal Case 20 of 2010)
[2023] KEHC 21140 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL CASE 20 OF 2010
FN MUCHEMI, J
JULY 27, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

SAMUEL MWANGI WAMBUGU ACCUSED

JUDGMENT

1. The accused person was jointly charged with Eliud Kinyua Kinyanjui, with the offence charge of murder contrary to Section 203 of the *Penal Code* as read with Section 204. The particulars of the charge are that on the 30th day of June 2010 at Kiambara Village in Mathira East District within Central Province, jointly murdered Samuel Mwangi Gachanja.
2. The 1st accused fell ill while in custody and was admitted in hospital for a long time. His case was separated from the one of the accused. The accused remained the accused person in this case. The said Eliud Kinyua later passed on.
3. The prosecution case was fully heard by Justice Ngaah and the accused was placed on his defence. I took over this case after taking directions under Section 200(3) of the *Criminal Procedure Code* and heard the defence case.
4. Precisely, the evidence of the prosecution was that on June 30, 2010 a commotion ensued between PW2 and one Eliud Kinyua Kinyanjui who was accompanied by the accused. The tussle involved a motorcycle which had been parked around PW2's compound and it was taken away by Eliud Kinyua's brother after PW2 called him. Eliud Kinyua was looking for the said motorcycle and upon learning that PW2 had called his brother, attacked PW2 with a *panga* that he was carrying. The commotion caused neighbours to run the scene and see what was happening. One Isaac Waithaka, a brother to PW2 was among the first people to arrive at the scene carrying a torch and identified the accused person and Eliud Kinyua as PW2's attackers. The accused person and Eliud Kinyua left together and soon thereafter



some noise was heard emanating from around 80-100 metres from PW2's house. The neighbours rushed to the scene and found PW6 who had been stabbed on the left hand and wrist by Eliud Kinyua with a blood stained knife. The two witnesses reported the assaults to the police station then went to hospital for treatment. Upon returning to his home, PW2 learnt that the deceased had been murdered and his body had been discovered by PW3 and one Simon Mwangi, an elder at the village.

5. Eliud Kinyua Kinyanjui was thereafter arrested and he led Police to the accused's home where the accused was arrested. The accused was thereafter taken for mental assessment and Dr Owino declared him fit to plead.
6. Post mortem of the deceased's body was conducted by Dr Kimathi David and he formed the opinion that the deceased died as a result of cardio pulmonary arrest secondary to hypovolemic shock secondary to haemorrhage secondary to a stab wound to the heart.
7. Upon being put in his defence, the accused person elected to give sworn testimony. He stated that on the material day he was at Mukore shopping centre visiting his friend and went home at approximately 7.30pm. On his way home he met Eliud Kinyua, Joseph Wamai Kinyua and Stephen Kinyua who were arguing about a motorcycle. The accused said he told Eliud Kinyua that his motorcycle had been taken by his brother, Joseph Mwangi. He then escorted Eliud Kinyua to his home and thereafter went to his house and slept. At around 11-12pm police officers came to his house and arrested him.
8. The prosecution and the defence filed their submissions in this case which the court has considered in this judgment.
9. In summary, the prosecution submitted that the evidence of PW2 and PW6 placed the accused person at the scene of the crime as they both saw him in the company of Eliud Kinyua when Eliud Kinyua stabbed the two witnesses. PW12 the investigating officer testified that when he arrested Eliud Kinyua, he took them to the accused's house. The prosecution further submits that the accused in his evidence admitted that he was in the company of Eliud Kinyua on that fateful night.
10. The prosecution further submitted that from its evidence, there exists circumstantial evidence which points to the guilt of the accused. The evidence consists of the jacket recovered by police officers from Eliud Kinyua's house which was heavily stained. PW10 concluded that the blood stains on the jacket matched the DNA of Eliud Kinyua who was attacking people at night in the company of the accused person. PW2's evidence was that he was attacked by Eliud Kinyua who was in the company of the accused. The accused did not take any steps to stop the attack on PW2. After the attack, the accused was seen leaving with Eliud Kinyua which strongly infers that he was an accomplice to the attacks that were being carried out by Eliud Kinyua on that fateful night. Further, PW6 who corroborated the narrative of PW2, his brother. PW6 testified that he rushed to the scene when he was informed that the accused person and Eliud Kinyua were beating up PW2. He further testified that he found his brother, PW2 but that the accused person and Eliud Kinyua had fled the scene. As he was going to look for credit to call his cousin to take PW2 to hospital, PW6 testified that he was attacked by Eliud Kinyua, who was armed with a blood stained knife. Eliud Kinyua stabbed him on his left hand and then told the accused to check for PW6's shoe which had fallen down. Additionally, PW12 testified that upon arrest, he booked Eliud Kinyua and the accused in the morning of July 1, 2010 and observed that they both had blood stained clothes. PW12 took the clothes as exhibits which were produced in court as exhibits 7, 10, 11, 12, 13 and 14.
11. The prosecution relied on the cases of *Abama Abolfathi & Another vs Republic* (2018) eKLR; *R v Taylor, Weaver and Donovan* [1928] Cr App R 21 and *Sawe v Republic* [2003] KLR 364 and submits that although no one witnessed the killing of the deceased, from the circumstances of the case, it is only reasonable to say that that the accused and Eliud are the ones who murdered the deceased because they



- were attacking people using a knife the same night the deceased was stabbed to death. PW5 testified that the cause of death was cardio pulmonary arrest secondary to shock secondary to haemorrhage secondary to stab wound to the heart.
12. The prosecution submitted that the deceased suffered stab wounds which were consistent to stab wounds from the weapon recovered. The stab wounds caused the deceased to bleed profusely and yet the accused persons were found with blood stained clothes. The prosecution further submits that the deceased suffered cardio pulmonary arrest secondary to stab wounds to the heart which indicates that the accused person and Eliud Kinyua intended to kill the deceased which is an express malice aforethought under Section 206 (a) of the *Penal Code*. Alternatively, if the accused person never intended to kill him, he intended to cause him grievous harm that ended up with death which is an implied malice aforethought under Section 206 (a) of the *Penal Code* or he knew that his actions would possibly cause the deceased grievous harm which is also an implied malice aforethought under Section 206 (b) of the *Penal Code*.
 13. The defence submitted that the prosecution had failed to prove its case beyond a reasonable doubt. The circumstances as brought out by the prosecution witnesses are such that nobody witnessed the deceased being murdered. The defence submits that the closest thing the prosecution have to pointing a finger to the accused person is that he was seen in the company of Eliud Kinyua Kinyanjui who was initially the first accused in this case. The case was withdrawn against Eliud Kinyua after he passed on. It is speculated that a notebook belonging to Eliud Kinyua, a mobile phone with one sim card and a stained knife were found near Eliud Kinyua's house making him the key suspect of the murder of the deceased.
 14. The defence relied on the cases of *R vs Ahmad Mohammed* (no citation given) and *R vs Chirangu & Another* (no citation given) and submitted that the prosecution evidence does not meet the test for admissibility for circumstantial evidence. PW10, the government analyst did not find any link between the accused person and the items that were recovered and linked to the murder of the deceased. The defence further submitted that the DNA that was lifted from the deceased's clothes and the items linked to the murder does not in any case relate to the accused but instead relates to two other males. Furthermore, the clothes picked from the accused's home bore the DNA of the accused alone but not to the deceased.
 15. The defence further submitted that there exists contradictory statements amongst the other witnesses creating missing links in the narrative advanced by the prosecution. The chief prosecution witness stated in his testimony that they did not recover any item from the accused's home that could link him to the scene of the crime. Furthermore, the purported murder weapon and all the blood stained items found bore the deceased's DNA and a third unknown person. The defence thus submits that the accused was not present at the scene of the crime and the alibi provided for is actually true and reliable. As such, the prosecution failed to prove beyond reasonable doubt that the accused killed the deceased.
 16. The defence relied on the case of *R vs Michael Mucheru* (no citation given) and submits that an accused person's defence is considered on a balance of probabilities. According to the defence, the accused person articulately and elaborately, to the extent of using a diagram demonstrated the sequence of events of the fateful evening. It was argued that the prosecution has been unable to rebut or cast aspersions on the cogent and flowing testimony presented by the accused person.
 17. The defence further said that the area chief and the arresting officers confirmed that they found the accused asleep in his house with his wife who was serving him dinner. According to the defence, the accused did not need an express alibi to corroborate what the prosecution witnesses told the court.



The Law and Analysis

18. The burden of proof in criminal cases lies on the prosecution to establish that the deceased's death was a result of the unlawful act of the accused person. The prosecution must prove the primary ingredients of the offence of murder namely:-
- a. That the deceased died as a result of the unlawful act of the accused;
 - b. That the accused person has been positively identified and placed at the scene of the crime;
 - c. That the unlawful act was actuated by malice, rather than malice aforethought existed on part of the accused person.
19. Upon the death of the deceased, PW5 Dr David Kimathi conducted an autopsy on the deceased. The post mortem report shows that the cause of death was cardio pulmonary arrest secondary to hypovolemic shock secondary to hemorrhage secondary to a stab wound to the heart. The death and cause of death have been established by the prosecution herein.

Analysis & Determination

20. The prosecution's case was based on circumstantial evidence as to what actually transpired on the material night. Circumstantial evidence must be examined in light of the principles set out by the Court of Appeal in *Sawe vs Republic* [2003] KLR 364 where the court held:-

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. There must be other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

21. Similarly in the case of *Sylvester Mwacharo Mwakeduo & Another vs Republic* [2019] eKLR:-

“Over the years, courts have set the threshold which has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. For circumstantial evidence to form the basis of a conviction several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of others. This test has previously been applied by this Court in a myriad of cases for instance in the case of *Judith Achieng' Ochieng' vs Republic*, Criminal Appeal 128 of 2006, this Court stated the law as follows:-

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-

- a. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established;
- b. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;



- c. 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;
 - d. In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any reasonable hypothesis other than that of the accused's guilt."
22. From the evidence of PW2 and the defence, it is evident that on the fateful night, there was some disagreement about a motorcycle at PW2's compound, which placed both the late Eliud Kinyua and the accused at the scene of the crime. PW2 testified that commotion broke out when he informed Eliud Kinyua that his brother had taken the motorcycle in question and the said Eliud Kinyua stabbed him using a panga that he was carrying. On hearing the commotion people arrived at the scene including a brother of PW2, one Isaac Waithaka. The witness testified that he saw Eliud Kinyua leaving with the accused person. PW2 further testified that they heard some noise approximately 80-100 metres away and when they arrived where the noise was coming from, they found PW6 had been stabbed on his left hand. PW6 testified that on the fateful night, he was informed by his brother's wife that Eliud Kinyua and the accused person were beating up his brother, PW2. He stated that he went to PW2's place and saw Eliud Kinyua and the accused person beating PW2. He further stated that there was electricity light emanating from PW2's neighbours compounds which was about 4 to 5 metres from where PW2 was being beaten. He stated that he saw that his brother had been cut on the head and he went in search of credit to call his cousin to take PW2 to hospital. As he was on his way to look for credit, PW6 stated that Eliud Kinyua approached him and grabbed him whilst he was armed with a blood stained knife. PW6 testified that Eliud Kinyua stabbed him on his left hand and when the accused person arrived, Eliud Kinyua told the accused to look for his shoe as it had fallen down. PW3 testified that on the fateful night he heard noises on two occasions and when he went to find out what was happening at the second instance he was informed that PW2 and PW6 were stabbed. He testified that he looked for the village elder Simon Mwangi Kinyua to enquire about the noises and they discovered the body of the deceased on the road.
23. I have perused the evidence of PW2, PW3 and PW6 who are the key witnesses herein. It is evident that none of them witnessed the assault on the deceased that inflicted the injury that caused his death. What the witnesses witnessed was one Eliud Kinyua who was in the company of the accused assaulting PW2. Eliud Kinyua was the 1st accused in this case but he passed on in the course of the trial.
24. The evidence of PW2, PW3 and PW6 is that the accused was in the company of Eliud Kinyua as Kinyua unleashed violence and injured PW2 and others on the material night. The evidence on record does not support the act of common intention on part of Eliud Kinyua and the accused. The Government Analyst report implicated the said Eliud Kinyua but not the accused in respect to the blood stained clothes and knife recovered. The body of the deceased was recovered about 80-100 metres from where PW2 and PW3 were assaulted by Kinyua. Although the witnesses and other people went to the place where the body was found, none of them gave evidence to the effect that the accused was spotted assaulting the deceased. The prosecution in their submissions agree that none of the witnesses witnessed the murder of the deceased.
25. The issue that arises is whether the circumstantial evidence on record is sufficient to prove this case against the accused person. In the case of *Sewe Vs Republic* (2003)eKLR 364 the test applied as cited earlier in this judgement is that "the inculpatory facts must be incompatible with the innocence of the



accused and incapable of explanation upon any other reasonable hypothesis that of guilt,” that is if such evidence is to be relied on in convicting the accused.

26. The evidence on record does not place the accused at the scene which was 80-100 metres from where PW2 and PW3 were assaulted. Furthermore, apart from placing an accused person at the scene, the prosecution must adduce other co-existing circumstances implicating the accused in the act of inflicting the fatal injury on the deceased by the accused. I have carefully analysed the evidence on record and I am of the considered view that it does not pass the test of circumstantial evidence set by superior courts as set in the decisions cited herein.
27. I come to the conclusion that the prosecution have failed to discharge the burden of proof in this case against the accused. Consequently, I find him not guilty of the offence of murder and I acquit him accordingly under Section 306 of the *Criminal Procedure Code*.
28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 27TH DAY OF JULY, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 27th day of July 2023

