



**Republic v Wanja alias Boom (Criminal Case E013 of 2022)
[2023] KEHC 21795 (KLR) (9 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E013 OF 2022
LM NJUGUNA, J
AUGUST 9, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

PETERSON MUGENDI WANJA ALIAS BOOM ACCUSED

JUDGMENT

1. The accused person herein was charged with the offence of murder contrary to Section 203 as read with section 204 of the *Penal Code*. The particulars of the charge being that, on the November 28, 2021 at Shauri area in Embu West Sub-county within Embu County jointly with others not before the court murdered Alex Mutwiri. Upon arraignment in court, he pleaded not guilty and a plea of not guilty was entered for him.
2. The case proceeded for trial and wherein the prosecution called five (5) witnesses in support of its case after which the prosecution closed its case. The ruling herein is pursuant to Section 306 (1) of the *Criminal Procedure Code*.
3. Rosemary Wangari Kamau testified as PW1. She is a pathologist working at Embu Level (5) hospital. It was her evidence that, on the December 7, 2021. She conducted post mortem on the body of the deceased Alex Mutwiri at Embu Level (5) Hospital mortuary. On external appearance the body had signs of recent injuries which included multiple superficial lacerations. On the anterior chest wall, there was non-penetrating chest wound measuring 3 x 4 cm. On the left chest region around the 4th and 5th ribs, on the left side, there were missing dentures and a loosely hanging sisal rope around the neck and ligature work. There was also another loosely hanging rope on the left lower limb and a bruising with accompanying laceration on the occipital region. On the head there was difused sub-galeal haematoma and a linear fracture of the occipital region. On the nervous system, there was extra-dural haematoma on the left occipital region among other injuries. She formed the opinion that the cause of death was severe head injury; secondary to blunt force trauma.



4. Purity Mukami PW2 testified that on the December 7, 2021 she was at home when she was called and was informed that her son, the deceased herein had been found dead. This information was given to her by the principal of Bridge Academy who further informed her that the body was at Embu Level (5) Hospital mortuary. She went to the said mortuary and identified the body of her son. She stated that she did not know the cause of death of the deceased.
5. Joseph Njiru, (PW3) the grandfather to the deceased testified that on the December 7, 2021 he was called by PW3 who told him that she was at Embu Level (5) Hospital Mortuary and that her PW2's son had been murdered. He proceeded to Embu Level (5) Hospital mortuary and on seeing the body, it had injuries on the face and the head but he could not tell how the deceased met his death.
6. Dr. Sheila Shavulimo testified as PW4. It was her evidence that, on the August 25, 2022 she examined the accused person herein and found him fit to plead and undergo the trial.
7. PC Simon Kirubi, (PW5) was the investigating officer in the case having been instructed to do so, on the November 29, 2021 by the DCIO. In the company of Corporal Opiyo and the OCS, they proceeded to a scene within Shauri area, where on arrival, they found a crowd of people gathering around a certain kiosk. That on getting near they found a lifeless body of a young man which was tied with a rope. They called the scenes of crimes officers and they processed the scene and the body was taken to Embu Level (5) mortuary. That the body had bruises on the hands and it had a wound on the head. They commenced investigations and recorded statements of witnesses who stated that on the November 28, 2021, the deceased was subjected to beating by some people who had alleged that the deceased had stolen their bhang and that he occasionally used to steal their products. That the witnesses identified five (5) people who tortured the deceased and among them was the accused person herein whom they charged with the offence of murder.
8. The prosecution closed its case opted not to make any submissions at this stage and so was the counsel for the accused.
9. The court has considered the evidence on record. The accused has been charged with the offence of murder contrary to Section 203 as read with 204 of the [Penal Code](#). The offence of murder is defined in Section 203 as follows:

“ Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”
10. From this definition, the prosecution is expected to prove beyond reasonable doubt the following elements:
 - a. The death of the deceased and the cause of the death.
 - b. That the accused person committed an unlawful act or omission that led to the death.
 - c. That the accused person committed the unlawful act with malice aforethought.
11. Under Section 109 of the [Evidence Act](#), the prosecution bears the burden of proving the above element beyond any reasonable doubt, a standard that was set in the case of [Woolmington Vs DPP](#) (1935) AC 462 and that of [Miller vs Minister of Pensions](#) (1947/A11 ER 373).
12. On the first element, PW1 conducted the post mortem on the body of the deceased, on the December 7, 2021 at Embu Level (5) Hospital mortuary. The body has various injuries and in her opinion, the cause of death was severe head injury secondary to blunt force trauma. The first element was therefore proven beyond any reasonable doubt.



13. On the 2nd element as to whether the accused herein committed an unlawful act or omission that led to the death of the deceased, on record is the evidence of five (5) prosecution witnesses which evidence the court has summarized hereinabove. It is clear that none of the witnesses witnessed the accused committing the offence. There is also no circumstantial evidence to connect him with the commission of the offence, not even an iota of evidence save that of the investigating officer who testified as PW5. However, a critical analysis of his evidence reveals that what he gave was hearsay evidence which is not admissible and cannot form the basis of a conviction. He stated that he recorded statements of witnesses who stated that on the November 28, 2021, the deceased was subjected to beating by some people who had alleged that he had stolen bhang and that he occasionally used to steal their products. He further stated that the witnesses identified five (5) people who tortured the deceased and among them was the accused person herein. That the other suspect was one Morris who was using a piece of wood to beat the deceased. There was also Ngweru Umudwe and Gachire who was using a piece of timber while another suspect namely Bimbare held a knife.
14. In his further evidence, PW5 named another witness, one Peter Njeru who allegedly witnessed when the deceased was being beaten by one Ogweno with a piece of wood while one Gachuri was tying his legs with a rope. This witness was not called to testify, yet, his evidence could have been very useful to the prosecution's case. The prosecution closed its case without the benefit of their evidence after the court was told that the police could not procure their attendance.
15. With the evidence on record though the prosecution was able to prove the first element as to the cause of death and the fact that the same was caused by an unlawful act, there is no evidence that was adduced to connect the accused person with the offence at all. What PW5 told the court was just hearsay and worthless evidence to the prosecution's case.
16. In view of the foregoing, I find and hold that the prosecution has failed to establish a prima facie case against the accused person on the basis of which he could have been called upon to defend himself.
17. In the end, I acquit him under Section 306 (1) of the [Criminal Procedure Code](#).
18. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF AUGUST, 2023.

L. NJUGUNA
JUDGE

