



**Republic v Wesonga (Criminal Case 30 of 2018)
[2023] KEHC 23294 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23294 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 30 OF 2018
A. ONG'INJO, J
SEPTEMBER 28, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

MELTON MARTIN WESONGA ACCUSED

JUDGMENT

1. The accused Melton Martin Wesonga is charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code.
2. Particulars are that Melton Martin Wesonga on the night of 17th May 2018 at Runyu village, Mikindani area in Changamwe Sub-County within Mombasa County jointly with others not before the court murdered Samuel Ochieng Oguk.

Prosecution's Case

3. PW1 Charles Owino Radido testified that he was a village elder in Runyu Mikindani and that on 13/05/2018 at 1.00am he received a call from Catherine the wife of the accused herein who told him that they had been instructed by the Administration Police to tell him to take Samuel Ochieng Oguk to the camp.
4. That Catherine told him that her brother Obama, her husband the accused and 2 other children went and reported that the deceased was disturbing and abusing them due to drunkardness. PW1 said the deceased stayed 3 houses away from Catherine's house. That as PW1 was going to the scene, he met Catherine with her brother, her husband and her 2 children. That when he went to Catherine's house and asked where Samuel was he was told he had been sent to Mkupe by young men. PW1 proceeded to Samuel's house but didn't find him. He said the door was wide open and Samuel's clothes were at the doorway.



5. He said that the house was disturbed and household items were scattered and mattress was in disarray. That when Catherine called Victor to find out where Samuel was, Victor responded that he was in Mkupe near the Baobab tree. PW1 said Victor was Catherine's son and he identified his voice as Catherine's phone was on loudspeaker. PW1 woke up Kevin who was Samuel's neighbour and they proceeded to Mkupe where he called out on Samuel and he answered from darkness in the bush. He said he found Samuel in sewage and he was wearing only an inner wear and was bleeding from the head and legs.
6. That the deceased told PW1 that he was beaten by accused person's children including Victor while the accused held the torch shone towards him. PW1 sent Kevin to call Samuel's brother known as Joshua Oduor to come and assist pull him from the sewage. That when it started raining they carried him to a church nearby for shelter. That the accused person's family joined them at the church and when the accused suggested that the deceased should be taken to hospital the deceased said he would rather die than be taken to hospital by the accused who had done his work.
7. PW1 told the accused and his family to leave the scene so that Samuel could be taken to hospital. That he was taken to Mikindani Medical where the cut on the head and legs were bandaged and they were referred to Coast General Hospital and his brother Joshua accompanied him on a bodaboda. The following day when he went to check on Samuel, he said he had a lot of pain on the legs.
8. At 11.00am, he learnt that Samuel's condition was getting worse and he was taken to Port Reitz Hospital but he was referred to Coast General Hospital. He was however returned to his house and when PW1 saw him in the evening he was crying in pain. Joseph Kazungu later called PW1 at night and told him Samuel had died. PW1 reported at Changamwe Police Station and police moved the body to Coast General Hospital mortuary.
9. PW1 said he had not received any complaint against the deceased from the accused. He said he didn't establish the cause of the disagreement between the deceased and the accused as he was more concerned with his treatment. PW1 said on the night that Samuel died, the accused person's family members shifted and had not returned to live in their house in Runyu. He said Alex told him trouble started when the deceased went to buy food from Catherine as Samuel was drunk.
10. In cross examination, PW1 said that the incident that led to Samuels death started at Catherine's house between 8.00pm to 9.00pm. He confirmed the accused had 2 wives who live in Runyu and Bangladesh respectively and sometimes he lived in Runyu and sometimes he was in Bangladesh. He said he found the accused at the scene and he didn't know if it is Catherine who called him to report there was a problem at home.
11. He said that the accused showed him OB No. that they had made at Mikindani AP Camp. He said he was not aware the deceased had threatened to rape Catherine. PW1 said he left his house to go and arrest the deceased as per instructions of AP given to Catherine but he did not find him at his house. He said he didn't hear of a panga that was taken to the AP Camp by Catherine.
12. PW1 said the deceased recorded a statement at Changamwe Police Station after he had been pulled out of the sewage. He said he saw an open bleeding wound on the deceased's head and holes on his knees from where blood was coming. PW1 confirmed to court that the deceased said that accused held & shone a torch at him as his children beat him up.
13. PW2 Joshua Odour Ochieng testified that the deceased was his brother. PW2 said Alex told him he saw the accused, Catherine Obama and Victor beat the deceased. He was called at 1.00am to go & help pull the deceased from the sewage in Mkupe. He said he found PW1 at the scene together with the accused, Catherine Obama and Victor. That the deceased told him he wanted nothing to do with Wesonga the



- accused. PW2 said Samuel had a cut on his head and the other wound on the knee looked like a nail had been driven into the knee.
14. That he also had an injury on his shin. That Samuel said all his body was painful on touch. They took the deceased to Mikindani Medical from where they were referred to Port Reitz Hospital. He said the deceased's leg was broken and they were referred to Coast General Hospital. They took him to Changamwe Police Station where his statement was recorded after which the family hired a matatu to take him to Coast General Hospital, where he was treated and discharged and he was taken back to his home. He said that the pain killer given were not effective as the deceased was crying out in pain and also vomited when given porridge.
 15. That they went back to Coast General Hospital where X-ray of the leg was done and it was found to have been fractured and it was established a nail was hammered into his knee. That the leg was plastered afresh. They were discharged back home but at 11.00 pm the deceased's condition worsened and when PW2 rushed to his house he found he had difficulties breathing and he died. That PW2 and his brother Eli went and took Catherine to Changamwe Police Station but they did not get the accused & Victor in the house. The body of Samuel was removed to Coast General Hospital where post mortem was conducted on 4/6/2018 after which body was released & transported for burial in Ugenya.
 16. PW2 said that Catherine's house was burnt by rowdy youths. PW2 said he didn't hear & was not aware the deceased attacked Catherine. He said he was not aware the deceased went to Catherine's house while wearing underwear only. He said the deceased was not killed by a mob.
 17. PW3 Jacob Kibusi Owino testified that the deceased was his nephew, a son to his sister, and that they were residing in the same neighbourhood together with the deceased and the accused. PW3 said he had been neighbours with the accused for 14 years. He testified that on 13th June 2018 he was at his shop at 8.00pm when Samuel passed by and he joked with him telling him to buy him a drink. The deceased said he was going to Odera's place to buy for his uncle a drink. That after a short while he heard the deceased and the accused wife Catherine exchanging words as if they were quarreling. That he wanted to go to where the 2 were quarreling but he heard Catherine remark that she knew it was PW3 who had sent the deceased. His wife also restrained him from going to where the 2 were quarreling. At 9.30pm, he closed his shop and went to sleep. At 10.00pm he heard Samuel talking at the veranda with some neighbours. PW3 said he knew the quarrel between Catherine & the deceased had ended.
 18. That at 2.30a.m. Joshua Oduor the brother of the deceased called him and told him Samuel had been beaten and injured by the family of the accused and that Joshua had taken him to Mikindani Medical. That when he went to Mikindani Medical he found the village elder with other neighbours as well as Joshua. He said they took Samuel to Port Reitz as they didn't have money. He said the deceased had a cut on the head, wounds on the ribs/chest. That he also had pain on the legs. That they went back to the house at 10.00am on 14th May 2018 but Samuel's condition worsened and they took him to Coast General Hospital and they were advised to report the matter at Changamwe Police Station.
 19. That they took Samuel to Changamwe Police Station and he explained and recorded his statement. That Samuel was treated at Coast General Hospital & discharged. On 17/5/2018, the deceased's condition worsened & he was taken back to Coast General Hospital and the plaster was removed and afresh one placed. That when they returned home at 8.00pm, the deceased slept and died in his sleep at 3.00am. He said he was woken up by screams from the deceased's house. When he found Samuel had died, they reported to the village elder who reported to Changamwe Police Station and the body was removed to Coast General Hospital Mortuary for post-mortem.
 20. PW3 said the accused is an influential politician and he relocated to Busia because of threats to his life. He said he took long to come and testify because of threats to his life. PW3 said that the accused



Obama, Victor Wesonga & Catherine were the main suspects and yet it is only Melton who had been arrested. PW3 said he was not aware that the deceased wanted to rape the accused person's wife. He said he was not aware the deceased had stripped naked.

21. PW4 Dr. Nuzla Ali from Coast General Hospital testified on behalf of Dr. Mururi who conducted postmortem on the body of the deceased. She produced post mortem report in which it was indicated the 27 years old deceased body had multiple bruises on anterior chest, anterior right and left chest wall & anterior abdominal wall, a sharp incision mark was also observed on the left upper quadrant of the deceased's abdomen. The deceased also had a stitched incision wound measuring 6.5cm on the left frontal bone. The left lower lip also had a cut and multiple bruises on the left lower limb.
22. There was an open fracture of left tibia fibula with 2 stitched wounds above the left knee above the left tibia/fibula. The doctor formed the opinion that the cause of death was hemorrhagic shock secondary to massive epidural hematoma, open-left tibial and fibula fracture. Dr. Muzla produced the postmortem report as Exp1.
23. PW5 CPL. Thomas Minayi of Changamwe DCI was instructed by Chief Inspector Stephen Mworega to investigate the murder case that resulted from an assault committed on 13/05/2018 at Runyu Village in Mikindani. PW5 recorded statements of witnesses and established that the accused was involved in the assault of the deceased.
24. PW5 testified that the accused was arrested by members of the public and taken to the police station where he was placed in the cells. PW5 established that the wife of the accused reported that the deceased had created disturbance and that led to accused who was armed with a panga and 7 other people to attack the deceased and inflicted injuries on him. PW5 said the weapon used to attack the deceased was not recovered as the accused was arrested almost 2 weeks after the incident. PW 5 said that other suspects were still at large.
25. In cross examination PW5 said that the accused person's wife made a report about threatening life at Mikindani AP Camp to APC Fred Onyango at 21.00hrs. It is indicated in the OB that the deceased was armed with a knife when he wanted to strangle the accused person's wife and that he was disarmed and disciplined by the kids who had gathered at the scene.
26. PW5 said he established the accused was armed with a panga from statements of witnesses. It was however confirmed that PW1 didn't indicate if he saw the accused armed with a panga. PW5 said the deceased reported assault but did not record a statement as he was still undergoing treatment. PW5 also confirm that treatment notes indicated that the deceased was assaulted by a mob. He said the treatment notes were not prepared by him.

Defence Case

27. When placed on defence the accused gave sworn statement and denied killing the deceased. He said that on 13/05/2018 he received a call from his 2nd wife Catherine Atieno who told him someone was disturbing her and knocking at her door. He advised her to report to the village elder. He said Catherine was staying at Runyu while he was staying in Bangladesh. That when Catherine told him the village elder was not picking her calls, he decided to go to Runyu and Catherine told him that when she opened the door after Samuel had knocked for long, he entered while wearing only the inner wear.
28. That she raised alarm and members of the public responded and started pursuing Samuel. That he took his wife and children to Mikindani Police Post where they were advised to go and tell the village elder to take Samuel to the post. The accused saw the village elder started looking for the suspect and he was found near a church and his leg was fractured. Accused said he suggested to the village elder



that Samuel should be taken to hospital but Samuel declined as they had differed with accused person's wife. That accused person's wife went to Changamwe Police Station and reported on 14/05/2018. The accused said he recorded a statement and reiterated what his wife told him.

29. In submissions, Mr. Gakuhi Advocate for the accused urged the court to acquit accused as there was no witness who said the accused beat him. It was the village elder who said the deceased told him the accused person's children including Victor beat the deceased. It was submitted that the treatment notes indicated the deceased was beaten by a mob & not the accused.

Analysis and Determination

30. In consideration of the evidence of 5 prosecution witnesses and in consideration of the accused person's sworn statement, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the Penal Code Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.

31. Section 203 of the Penal Code Chapter 63 of the Laws of Kenya under which the accused person was charged provides as follows: -

'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'

32. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of Anthony Ndegwa Ngari v Republic [2014] eKLR to include: -

- i. That the deceased died;
- ii. That the death was caused by an unlawful act or omission;
- iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
- iv. That there was malice aforethought.

Death of the deceased

33. The death of the deceased is not disputed by accused person.

Death was caused by an unlawful act or omission

34. PW1, PW2 and PW3 found the deceased in the sewage in a bush in Mkupe area and his head and leg were bleeding. He told them that he was beaten by Victor and Wesonga's other children as Wesonga held a torch which was shone on him as he was being beaten. It took the assistance of Kevin and Joshua for PW1 to pull the deceased from the sewage in the bush. PW2, Joshua Oduor Ochieng' the brother of the deceased said that the deceased had an injury on his knee which looked like a nail had been hit/driven on his knee. That he also had an injury on his shin. PW3, the uncle to the deceased said he saw a cut on the deceased's head and also had stab wounds on the ribs and chest.

35. The postmortem report also indicates that the deceased had multiple bruises on lip, right, left arm, fore arm and hand, anterior right and left chest wall and anterior abdominal wall, there was a sharp incision mark on the left upper quadrant of the abdomen, there was a stitched incision wound 6.5 cm on the left frontal bone, there were also multiple bruises on the left lower limb with a fracture of the left tibia and fibula, with two stitched wounds above the left knee and above left tibial tuberosity. The pathologist



was of the opinion that the death was caused by hemorrhagic shock secondary to massive epidural hematoma and open left tibial fibula fracture following assault. From the nature of the injuries, and observations by the doctor as well as other prosecution witnesses, the injuries were not self-inflicted and they were not accidental. It is not in doubt therefore that the cause of death of the deceased was through an unlawful act.

Participation of the accused in the commission of the alleged offence

36. PW3 said that by the time he closed his shop by 9.30 pm and went to sleep, the quarrel between the deceased and the accused person's wife had ended and at 10.00 pm, he heard the deceased speaking to some neighbours at the verandah. He did not say the deceased was quarreling with the accused person's wife.
37. When PW1, the village elder, received a phone call from the wife of the accused at 1.00 am to go and take the deceased to the administration police post, he went to the deceased's house but did not find the deceased. He found the house was in disarray with household items scattered. The accused person's wife received a phone call from the son known as Victor who told her the deceased was at Mkupe near a baobab tree. When PW1 and PW2 found the deceased in a sewage in the bush, he told them that the accused person's son known as Victor and other children had beaten him up while the accused was shining a torch on him. For that reason, when the accused suggested that Samuel should be assisted to go to hospital, the deceased declined because the accused was one of those who beat him. PW2 was present when the deceased told PW1 that the accused person and his children beat him up. PW3 testified that the accused, his wife Catherine, his son Victor and the brother-in-law Obama were directly involved in the murder of the deceased and that he relocates to Busia because of threats by the accused person.
38. From the evidence of PW1, PW2 and PW3, it is obvious that the accused person was directly involved in the murder of the deceased. Allegations that the deceased created disturbance or went to Catherine's wear in only an underwear are not corroborated as neighbours could have heard and intervened. If it is true that the deceased caused disturbance, the lawful course of action would have been for the accused and his family members to restrain him with minimal force and to call PW1, the village elder, and the administration police to arrest him. They however chose to take the law into their hands and to use excessive force that caused the death of the deceased with the active participation of the accused person.

Malice aforethought

39. Section 206 of the Penal Code defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

40. On the element of malice aforethought in respect to Section 206 of the Penal Code, the court held as follows in the case of Isaac Kimathi Kanuachobi -vs- R (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

41. The elements to prove malice aforethought were settled in the case of Ernest Asami Bwire Abanga alias Onyango v R (CACRA No. 32 of 1990) where the Court held:

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

42. He had a left temporal and frontal scalp hematoma, he had left temporal bone fracture, left epidural hematoma with depression of the brain as well as brain edema with dilated vessels on the left temporal lobe extending to the occipital lobe. He also had multiple bruises, sharp incision marks on the abdomen and left frontal lobe, multiple bruises on the left lower limb. He also had open fracture on left fibula and tibia with two stitched wounds above the left knee which the witnesses said appeared to be nails that were hammered. The deceased had a nail hammered into his knee.

43. There express malice exhibited by the manner of execution of the injuries as well as the nature and seriousness of the injuries inflicted on the deceased. The accused and his accomplices obviously intended to kill the deceased considering the areas of the body that were targeted and the gravity of the force used by the several assailants.

44. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused person is found guilty of the offence of murder and is convicted accordingly under Section 322(1) of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 28TH DAY OF SEPTEMBER 2023.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

