



**Republic v Wanjala (Criminal Case E023 of 2022)  
[2023] KEHC 24275 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24275 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE E023 OF 2022**

**DK KEMEL, J**

**OCTOBER 27, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ERICK LUBAO WANJALA ..... ACCUSED**

**JUDGMENT**

1. The accused herein Erick Lubao Wanjala has been charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on the 20<sup>th</sup> day of July 2022 at Namilama Village, Mihuu Sub-Location, and Chetambe location in Webuye East Sub-County within Bungoma County, he murdered Amos Munialo Biketi.
2. The accused denied the charge and thus a trial commenced wherein the prosecution called six witnesses in support of its case. Briefly, the evidence was as follows;
3. PW1 was Leonard Wafula who testified that he passed by the deceased's home who had leased him a sugarcane farm only to find him lying down with a huge stone lying on top of him. He rushed to the deceased's brother but did not find him and alerted other relatives who accompanied him to the scene. He stated that the deceased used to live with the accused in the past before the accused demolished his house. He also stated that blood oozed from the deceased's mouth and nose.
4. On cross examination, he stated that he did not find the accused at the scene where the accused had lived with the deceased for three years. He stated that he had heard rumours that the deceased had a love affair with the accused's wife prompting him to demolish the deceased's house as well as his and thereafter relocated elsewhere.
5. PW2 was Mary Makuti John, the village elder for Namilango village. She stated that on the material date at around 9:00am, she enquired from the accused about the welfare of his wife and children since his wife had deserted him to which the accused confirmed the same but promised to bring them back



- but will rent them a place as he did not want to see his grandfather near them and whom he accused of making love to his wife whenever he was out of his home.
6. She testified that she later learnt that the deceased had been killed. She further stated that the accused had earlier demolished the deceased's house over the love affair allegations. She identified the flat stone found on the chest of the deceased.
  7. On cross-examination, she confirmed meeting the accused around 9:00am on the material date and had a chat with him and that he informed her that he did not wish to live with the deceased or even see him again. She added that she was present during the arrest of the accused and that she is the one who pointed him out to the police officers. That he did not resist the arrest.
  8. PW3 was Wekesa Biketi, a brother to the deceased and who testified that the accused used to live in the same compound with the deceased but that he latter demolished his house as well as that of the deceased following claims that the deceased was having a love affair with accused's wife and relocated elsewhere. He stated that he rushed to the scene and found the deceased lying down with a huge stone on his chest. He maintained that the accused and his son had earlier in the day passed near his house. He led in the arrest of the accused.
  9. On cross examination, he stated that the accused informed him that the deceased was having an affair with his wife. He also confirmed having not heard of any commotion at the deceased's compound. He confirmed having seen the accused passing by his compound around 9:00am.
  10. PW4 was Caren Wanyama who testified that the accused is her grandson while the deceased was her brother in law. She stated that the accused sometimes in May 2022 called her and informed her that the deceased was having a love affair with his (accused's) wife and that he threatened to cut the deceased into pieces and throw them into River Nzoia. She stated that soon thereafter, the accused demolished his house as well as that of the deceased and relocated elsewhere.
  11. She stated that after a while in June 2022, she heard somebody screaming that he was being killed and that she rushed to the deceased's compound where she met the accused armed with a metal rod. She found the deceased had been injured on the waist but that the deceased did not go to hospital as they managed the injured part by washing it with warm water since there was no money with which to take him to hospital. She added that on 20/07/22, she was alerted by one of the grandchildren of the incident and she visited the house of the deceased and found that he had been killed.
  12. On cross examination, she stated that she had heard about the love affair between deceased and accused's wife and that the accused's wife did confirm that the deceased had seduced her only once. She finally stated that she did not witness the incident.
  13. PW5 was Dr. Edward Wafula Simiyu based at Webuye District Hospital. He produced a postmortem report form of an autopsy conducted on the body of the deceased by his colleague Dr. Brian Inima who no longer worked at the hospital facility. His testimony was that on external appearance, there were bruises on the chest wall (anterior) and that there were signs of air on the skin. There were fractured ribs on both sides of the chest cavity (numbers 6-10 on both sides). There was a collapsed left lung. There was massive hematoma on the head with fractured parietal skull. There was also bleeding on top of the brain. The other systems were normal. He opined that the cause of the death was severe head injury with respiratory failure due to blunt trauma with a heavy object.
  14. PW6 was No.236144 IP Patrick Wafula who testified that he was the investigating officer in the case. He stated that he visited the scene and found the body of the deceased lying on the floor with a huge flat stone lying on his chest. He also saw injuries on the head. He picked up the body and later arrested the accused herein.



15. He stated that after recording statements of witnesses, he established that the accused had been having quarrels with the deceased over claims that the deceased had been having a love affair with accused's wife and that the accused had threatened to finish the deceased. He also established that the accused had been seen emerging from the deceased's house. He produced the recovered flat store as exhibit 1.
16. On cross examination, he stated that the accused had earlier issued threats to finish the deceased and that he was spotted emerging from the deceased's house. He also confirmed that none of the witnesses saw the accused hitting the deceased with a stone. He also confirmed that upon interviewing accused's wife, she confirmed having a love affair with the deceased.
17. At the close of the prosecution's case, the court found the accused had a case to answer and put him on his defence. The accused elected to give sworn statement as follows; that the deceased herein was his maternal grandfather whom he had not lived together. That on the material day, he was at his work place within Webuye town working as a security guard at a private firm.
18. That while at his work place, police apprehended him and placed in the cells from where he learnt of the deceased's death. That he informed the DCIO that he had been making ballast from near the waterfalls and got shocked by the death. He denied any involvement in the incident and denied existence of any love affair between the deceased and his wife.
19. On cross examination, he stated that he lived far from the deceased and could rarely go the deceased's area. That his mother had been given land by the deceased and whenever he visited his mother, he could see the deceased. He denied having told Biketi (PW-3) about the lover affair and finally that he had no grudge against the deceased.

#### **Analysis And Determination.**

20. In a charge of murder, the prosecution is required by section 203 as read with section 204 of the [Penal Code](#) to establish the following ingredients;
  - i. That there was death,
  - ii. That the death was caused due to malice aforethought,
  - iii. That accused is the one who caused the death,
21. On the question of whether there was death, the evidence on record shows that Leonard Wafula (PW-1) found the deceased's body lying at his homestead with a huge stone on his chest. He immediately alerted the neighbours and relatives. This evidence is in consonance with that of PW-3 and PW-4 who all visited the scene and found the deceased body lying and a huge stone placed on his body. Further corroboration is found in the evidence of PW-5, who conducted the autopsy and his report which was produced in court. There was thus no doubt that the deceased had died.
22. The investigating officer (PW-6) also visited the scene and saw the body lying with a stone placed on it and he indeed participated in picking the body.
23. From the above, I find that the first element constituting the offence has been proved.
24. The second element is that the death was caused by malice aforethought. The [Blacks Law Dictionary](#) 8<sup>th</sup> edition defines the term as;

The requisite mental state for common-law murder, encompassing any one of the following: (1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life (the so-called abandoned and malignant heart), or



- (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).
25. Locally, the term is defined under section 206 of the [Penal Code](#) as;
- (a) An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
  - (b) Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.
  - (c) An intent to commit a felony.
  - (d). An intention to facilitate the escape from custody of a person who has committed a felony.
26. The intent to kill can be seen from the circumstances herein, that upon finding the deceased's body, PW-1, PW-3, PW-4 and PW-6 all found the body and a huge stone placed over it. PW-5 upon conducting post mortem found that the deceased died due to severe head injury with respiratory failure due to blunt trauma with a heavy object.
27. The following two authorities on the topic go to explain what the court ought to take into consideration in determining that there was indeed malice aforethought. In [Rex v Tubere s/o Ochen](#) {1945} 1Z EACA 63, the Eastern Court of Appeal observed:
- “In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”
28. In the case of [Hyam v DPP](#) {1974} A.C. the Court held that:
- “Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another, the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”
29. PW-5's examination of the body yielded the following observations; bruises on the chest wall (anterior), fractured ribs on both sides of the chest cavity (numbers 6-10 on both sides), collapsed left lung and massive hematoma on the head with fractured parietal skull as well as bleeding on top of the brain.
30. From the above observations and findings, I am of the firm view that the person who killed the deceased must have had the intention to kill him. I thus find that the element was sufficiently proved.
31. The last element to be proved is that it is the accused who caused the deceased's death.
32. The evidence on record is that the accused had been seen with the deceased earlier that day. That there was a sour relationship between the accused and the deceased over a love affair between the deceased and the accused's wife. That the accused had indeed expressed his displeasure over affair to PW-2, PW-3 and PW-4. And that he had vowed to cut his body into pieces and throw them into River Nzoia. It also transpired that the accused had earlier on demolished the deceased's house following the illicit love affair between the deceased and accused's wife.
33. Indeed, PW-4 stated that the deceased had called her and informing her that he would cut the deceased and throw his body into Nzoia river. She maintained that she had seen the accused pass by her homestead earlier that day.



34. As it is, there is no single witness who testified as to seeing the accused killing the deceased and thus the evidence on record borders on circumstantial evidence. By this, it means that the evidence adduced when taken as a whole points to the accused's guilt which cannot be explained by any other hypothesis other than that of guilt. The court in *Simon Musoke v R* 1 EA 715 observed that:
- “In a case depending exclusively upon circumstantial evidence, he (the Judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt.”
35. Similarly, in *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal stated:
- “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.’”
36. The issue then is whether the evidence tendered taken in light of the accused's defence suffices to make an inference of guilty safe.
37. All the witnesses save PW-1, PW-2 and PW-5 attested to the fact that the accused had informed them of the existing love relation between the deceased and accused's wife. In fact, the witnesses testified that the accused had at some point demolished the deceased's house and relocated elsewhere. There can never be doubt there was bad blood between the accused and the deceased.
38. Similarly, the statement by PW-3 that he had met the accused that morning in the area is plausible and I have every reason to believe the witness indeed saw the accused. There is no explanation why the accused could be seen in the area and shortly thereafter, the deceased is found dead. In any event, the accused had earlier made it known that he was planning to cut the deceased into pieces and throw them into River Nzoia following revelation that the deceased was having an affair with the accused's wife. It is also instructive that the accused had earlier demolished a house the deceased lived in over the said allegations. There was therefore sufficient circumstantial evidence linking the accused with the crime and placing him at the scene of crime.
39. Having reviewed the evidence on the issue, it is my finding that the evidence on record supports the finding that it is indeed the accused who killed the deceased. It became obvious that the accused had become so pissed off by the deceased sneaking on his wife and making love to her whenever he was away and thus planned to get rid of him.
40. Turning to the defence tendered, I note that the accused merely denied killing the deceased. His defence is a mere denial and I have reason to believe that the same is an afterthought. He did not adduce evidence over his whereabouts on the date and time the deceased was murdered. Indeed, his presence in the area that morning goes to show that he is the one who killed the deceased. I find that the defence evidence has



not shaken that of the prosecution. The possibility that another person was involved is quite remote. Consequently, it is my finding that the evidence adduced by the prosecution met the threshold of pf proof beyond reasonable doubt against the accused herein.

41. Consequently, I find the accused herein Erick Lubao Wanjala guilty of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* and is convicted accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023.**

**D.KEMEI**

**JUDGE**

In the presence of :

Eric Lubao Wanjala Accused

Lunani for Accused

Miss Mwaniki for Prosecution

Kizito Court Assistant

