



**Republic v Wafula (Criminal Case 6 of 2020)  
[2023] KEHC 24126 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24126 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL CASE 6 OF 2020  
AC MRIMA, J  
OCTOBER 26, 2023**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**WYCLIFFE LIALI WAFULA ..... ACCUSED**

**JUDGMENT**

**Background**

1. Wycliffe Liali Wafula, the accused 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 offence were that on 8<sup>th</sup> January, 2020 at Sinoko village within Trans Nzoia East Sub-County within Trans Nzoia County, the accused murdered Gitraf Asiji (hereinafter referred to as ‘the deceased’).
2. When the accused was arraigned before Court, he pleaded not guilty to the offence. After the close of the prosecution’s case, this Court found that a prima facie case had been established to place the accused on her defence.

**The Trial:**

3. The prosecution called eleven witnesses in its bid to establish the charges drawn against the accused. The trial was conducted by two Judges. Hon. Kimaru, J (as he then was) recorded the prosecution’s evidence. The defence was handled by yours truly after compliance with Section 200(3) of the *Criminal Procedure Code*, Cap. 75 of the Laws of Kenya.
4. The accused was the husband to one Linda Engefu Mwangi who testified as PW1. When they married, PW1 had had a boy with one Briva Asiji who testified as PW2. The boy is the deceased in this case.



5. PW3 was a village elder from Motosiet location. He was one Andrew Chepsiror Chepses. Dr. Fred Mwanikeh produced a Post Mortem Report which was prepared by Dr. Okumu. He testified as PW4. Dr Okumu was by then undertaking further studies.
6. The accused's Aunt one Catherine Khaemba testified as PW5. Janet Jumba was a neighbour to the accused and PW1. She testified as PW6. PW7 was one Lilian Nafula Khaemba. She was a neighbour to PW5. The Landlord to the accused testified as PW8. He was one Victor Kiptanui. The Assistant Chief for Motosiet Sub-location one Jackline Cheptoek Wandiswa testified as PW9.
7. A Scenes of Crime officer testified as PW10. He was No. 85551 PC Caleb Simbiri and was attached to the DCI Trans Nzoia County Headquarters. The investigation officer was No. 69458 Cpl. Tom Ogaro testified as PW11.
8. The prosecution had it that on the 8<sup>th</sup> January, 2020 at around 9pm, the accused returned home after he had fought with PW1 during the day. It was alleged that the accused has assaulted PW1 with a 6kg cooking gas grill on her neck. Both PW1 and the accused had sustained injuries out of the fight.
9. On his said return, the accused was still vengeful. He again quarreled PW1. He picked a black kitchen knife, but PW1 successfully disarmed him. He picked another knife, a blue one in colour, and again PW1 was lucky to disarm him. PW1 was, however, cut on her fingers in the process. During this scuffle, the deceased was asleep on their bed.
10. Suddenly, the accused picked the deceased and dropped him inside a large basin that contained water to the brim. He then stepped on his neck. PW1 struggled to free her son in vain. By then the accused was armed with another knife and threatened to burn the deceased with the gas if PW1 persisted in her efforts to free the deceased. PW1 was eventually overwhelmed by the accused. She was laid under siege for the whole night by the accused who remained armed and was always at the door. The deceased was lifeless. PW1 knew that her son had died. The accused then warned PW1 of her life if she would tell anyone of what had happened to the deceased. The accused then left in the early morning and after PW1 was certain that the accused was not within her vicinity, she raised alarm.
11. People gathered. They included PW2, PW5, PW1's mother (not a witness), PW8, PW9 among many others. PW1 then realized that the accused had returned home. Still under the grip of the fear of her life, PW1 informed the gathering that they just found the deceased dead in the morning. The crowd was not convinced of the explanation. They planned to attack the accused. PW9 learnt of the plan and whisked the accused away into his office. He then called the police.
12. The police eventually arrived at the scene. They called PW9 and asked him to take the accused to the scene. PW9 obliged. The scene was processed by PW10 and PW11 and the body was removed. The police arrested both the accused and PW1 for further interrogation.
13. PW11 managed to unravel the ordeal that led to the death of the deceased. It was PW1 who disclosed the unfortunate events of the night after she was sure that the accused was under police custody. PW1 also informed PW11 that, on the command of the accused, they had cleaned the house as well as the deceased in order to rule out any iota of evidence that may have pointed to foul play.
14. PW11 then returned to the scene and retrieved the basin, the knives, hammer among other items that were suspected to have been used in the killing of the deceased. The items, which were initially inside the accused's house, were removed by PW5 on instructions of PW8 who feared that the crowd might burn the room (his house). The items had been taken to the house of PW5 who was a close relative of the accused. PW6 and PW7 witnessed the retrieval of the items by the police from PW5's house.



15. The body had been taken to the Kitale County Referral Hospital Mortuary where a post mortem examination was conducted on 14<sup>th</sup> January, 2020. The body was identified by PW1, PW2 and the accused. The post mortem examination was conducted by Dr. Okumu.
16. The Post Mortem Report was, however, produced in Court by PW4. According to the Report, the deceased was found to be in good nutrition and physique. Externally, he had bruises on the face mostly on the nose, left cheek and upper lip of the mouth. Further bruises were on the right shoulder, right knee joint and at the back of the head.
17. Internally, his head suffered a scalp hematoma on the occipital area. The trachea was constricted and the lungs suffered hypoxia with fluid collecting in the left chest cavity. The heart was also cyanosed. There were pearl white intestines that was indicative of hypoxia. The conclusion was that the deceased died due to hypoxia and asphyxia due to trauma, strangulation and possible drowning in a pool or collection of water.
18. The injuries on the deceased, which were identified during the post mortem, were in line with the various photographs which were produced by PW10.
19. On conclusion of the investigations, PW11 charged the accused accordingly. He also produced the items suspected to have been used in the killing of the deceased as exhibits.
20. After the close of the prosecution's case, the Court found that the accused had a case to answer. He was placed on his defence. His sworn defence was to the effect that he had left his house in the morning when all was well and proceeded to his work place. He, as usual, returned at around 8am to take the deceased to school using his motor cycle only to be told by PW1 that the deceased had died and that PW1 had placed him under their bed.
21. The accused stated that he raised alarm and people gathered. He explained to them what PW1 told him and the police were called. He vehemently denied taking part in the killing of the deceased.
22. It was also the accused's position that he never differed with PW1 or at all and their relationship was a smooth-sailing one. He blamed PW1 and PW11 for framing him up. According to the accused, PW11 demanded money from both himself and PW1 as to secure their release. The relatives to PW1 managed to raise the required money and PW1 was treated as a State witness. Since he could not raise the money, he was told, in no uncertain terms, that he will rot in jail, hence, the charges against him.
23. After close of the defence case, both parties filed written submissions. They argued their cases in extenso and referred to several decisions in pursuit of their rival positions.

### **Analysis:**

24. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 *Anthony Ndegwa Ngari v. Republic* [2014] eKLR, summed up the elements of the offence of murder as follows: -
  - (a) the death of the deceased occurred;
  - (b) that the accused committed the unlawful act which caused the death of the deceased; and
  - (c) that the accused had malice aforethought.
25. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.



### **The death of the deceased:**

26. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).
27. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there are several witnesses who vouched that they saw the lifeless body of the deceased. Some even witnessed a Post Mortem examination conducted on the body of the deceased. The body was later released to its relatives and was subsequently buried.
28. The second way in which the death of the deceased was proved was through the evidence of the Medical Doctor who conducted the autopsy on the body of the deceased.
29. During the autopsy, it was observed that the deceased had injuries both externally and internally. It was concluded that the deceased died due to hypoxia and asphyxia due to trauma, strangulation and possible drowning in a pool or collection of water.
30. This Court, therefore, finds and hold that the death of the deceased in this case was proved to the required standard.

### **Whether the Accused committed the unlawful act which caused the death of the deceased:**

31. There was only one witness who testified on the identity of the accused as the perpetrator of the offence. That was PW1. As such, the evidence of a single evidence ought to be carefully treated.
32. In *R v Turnbull & others* (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said thus: -

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

33. The Court of Appeal in *Wamunga v Republic* (1989) KLR 426 stated as follows: -

.... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

34. The Court of Appeal further held in *Nzaro v Republic* (1991) KAR 212 and *Kiarie v Republic* (1984) KLR 739 that evidence of identification/recognition at night must be absolutely watertight to justify conviction.



35. Still the Court of Appeal in *Peter Musau Mwanzia v. Republic* (2008) eKLR dealt with the distinction between recognition and identification of a suspect. The Court stated as under: -

We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.

36. Before addressing the issue further, it is worth noting that PW1 and the accused were spouses. Their marriage was blessed with one child since PW1 moved into the marriage with the deceased from a previous relationship with PW2. Therefore, the deceased was a child born of PW1 and PW2 and the accused seemed to have, maybe, acquired parental responsibility by virtue of the marriage with PW1. That aside, there is no contention that the deceased was a son of PW1.
37. The issue of the marriage between PW1 and the accused was not contested. They both vouched it. Be that as it may, suffice to buttress the law in Section 127 of the *Evidence Act*, Cap. 80 of the Laws of Kenya on competency of parties and spouses. Whereas in civil proceedings, a husband or wife of any party to the suit is treated as a competent witness, the position changes in criminal proceedings.
38. Section 127(2) and (3) states as follows: -
- (2) In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:
- Provided that—
- (i) the person charged shall not be called as a witness except upon his own application;
- (ii) save as provided in subsection (3) of this section, the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;
- (iii) the failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.
- (3) In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged—
- (a) with the offence of bigamy; or
- (b) with offences under the *Sexual Offences Act* (No. 3 of 2006);
- (c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.



39. Back to the matter at hand, Section 127(2)(c) makes PW1 both a competent and compellable witness for the prosecution since it is alleged that the acts of the accused affected PW1's son. PW1, therefore, rightly testified against the accused in this matter.
40. On the issue of the weight and veracity of the evidence of PW1, there seems to be no doubt that PW1 and the accused knew each other quite well. They lived together as a couple. Their relationship was, however, marred with acts of violence. Several prosecution witnesses testified to that end and when the accused denied any fight between PW1 and himself in the afternoon of the day the deceased was killed, police records were produced as well as medical records. That was when the accused admitted, through Counsel, that indeed both himself and PW1 had injuries prior to the unfortunate incident.
41. The narration of the events given by PW1 matched the nature of the injuries found on the deceased during the autopsy. The post mortem examination confirmed that indeed the deceased had been, among other things, been immersed in a pool of water. That was consistent with him being immersed in a basin full of water. The rest of the injuries were also consistent with the resultant struggle by the deceased to free himself until he lost it.
42. There is also no doubt that the exhibits were removed from the house of the accused by his Aunt (PW5) on the directions of PW8, the Landlord, as to save the house from being torched by the angry members of public. They were recovered by PW11 from the house of PW5 and in the presence of PW6 and PW7.
43. The accused gave his defence. He dissociated himself from the allegation. His defence was two-pronged. He blamed PW1 and the police for his arrest and subsequent arraignment before Court.
44. On the aspect of PW1, the position that the accused left the deceased well and only found him dead on return when weighed against the rest of the evidence seems not to hold. The accused opted to take up an evasive approach. He denied everything that seemed not to favour him. For instance, he even denied fighting with PW1 until it was proved otherwise by both the police and through medical evidence.
45. The allegation against the police was appalling, to say the least. It was a hollow allegation. The accused was represented by Counsel throughout. That issue was never raised either at plea-taking stage or at all for the Court to deal with it. It only arose at the very tail-end of the proceedings; at defence hearing. It is also to be noted that none of the witnesses were examined on the matter. The amount of money allegedly solicited from the accused was also not disclosed. The issue, serious as it was, was casually dealt with, hence, casting extremely serious aspersions on its genuinity. This Court finds the allegation unfounded.
46. The witnesses testified before Court. Their demeanors were observed. The Court made no adverse reference on any of them thereby believing their testimonies.
47. Having carefully considered the defence, this Court is not persuaded that it is a holding one. As stated, the defence comprises of outright denials and unproved allegations. It ought to be treated as such. The upshot is that the defence is for rejection.
48. Conversely, PW1's evidence was consistent and withstood examination. It was even corroborated by the findings from the post mortem examination. PW1 further explained why she had declined to disclose what had happened initially. It was due to the fear of the accused for the threats he made on her. PW1 having helplessly witnessed her son being killed in her presence, would definitely keep within the threats. However, when she was certain that the accused was securely behind bars, she disclosed the events. She even went ahead and recorded a statement to that end. The statement was used in opposition to the accused's application for bond pending trial. The Court agreed with the PW1's position and declined to place the accused on bond pending trial.



49. To this Court, the reason given by PW1 as to why she took time before she revealed what had transpired is highly persuasive and acceptable. It was an honest and genuine one. The Court cannot read any change of goalposts by PW1 neither can it treat PW1 as an unreliable witness.
50. The totality of it all is that this Court finds it safe to accept the evidence of PW1, as a sole identifying witness, as truthful. The accused was, therefore, and without any shred of doubt, properly identified by recognition as the one who caused the fatal injuries to the deceased. In other words, the evidence of PW1, in the circumstances of this case, is favourable and free from possibility of error. It can be a sound basis of a conviction.
51. This Court, therefore, finds and hold that there is ample evidence to establish that it was the accused who committed the unlawful act which caused the death of the deceased.

**Whether there was malice aforethought:**

52. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.
53. Section 206 of the *Penal Code* defines 'malice aforethought' as follows: -
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.
54. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.
55. In *Joseph Kimani Njau v Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki v Republic* (1993) KLR 171, 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 accused; -

- 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.



It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman v. Director of Public Prosecutions* (1975) AC 55". (emphasis added).

56. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. The East African Court of Appeal explicated the circumstances in which malice aforethought can be inferred in the case of *Republic v. Tubere s/o Ochen* [1945] 12 EACA 63 as follows: -
  - a. The nature of the weapon used; whether lethal or not;
  - b. The part of the body targeted; whether vulnerable or not;
  - c. The manner in which the weapon is used; whether repeatedly or not;
  - d. The conduct of the accused before, during and after the attack.
57. The deceased was a child aged 4 years old. He sustained several injuries around the neck and the respiratory system. He was not only drowned into water, but the trachea was also constricted.
58. The respiratory system is such a critical part of the human anatomy. It goes beyond any peradventure that once that system is obstructed, death is obvious. Inflicting such injuries on someone's respiratory system confirms nothing, but a clear intention to deprive one's life.
59. The accused must have, therefore, purposed to do harm to the deceased. The manner of execution of the mission was very deliberate and targeted. The accused aimed the respiratory system; a vital and delicate system, with all his might. He caused multiple injuries thereto.
60. By considering the cumulative actions of the accused in the manner he executed the killing, it is without any shred of doubt that the accused purposed to kill the deceased.
61. The prosecution case proved malice aforethought in this case.
62. In the premises therefore, this Court finds and hold that the prosecution proved its case on the charge of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
63. The accused herein, Wycliffe Liali Wafula, is accordingly convicted of murder pursuant to Section 322(2) of the [Criminal Procedure Code](#).
64. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered in open Court in the presence of:

Mr. Karani, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Regina/Chemutai – Court Assistants.

