



**Republic v Wandera (Criminal Case E012 of 2022)  
[2023] KEHC 25881 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25881 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL CASE E012 OF 2022  
WM MUSYOKA, J  
NOVEMBER 27, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**SYLVESTER ODUORI WANDERA ..... ACCUSED**

**JUDGMENT**

1. The accused herein, Sylvester Oduori Wandera, is charged with murder, contrary to section 203, as read with section 204, of the [Penal Code](#), Cap 63, Laws of Kenya, the particulars being that on the night of 23<sup>rd</sup> August 2022, at Navivu village, Esirisia, Bugeng'i Sub-Location, Bukhayo West Location, Matayos Sub-County, within Busia County, he murdered Harriet Amoit.
2. 6 witnesses testified for the Republic.
3. PW1, KV, a minor of 13 years, and a child of the accused and the deceased, was at home at the material time, when the deceased came home drunk, carrying some alcohol, and started a quarrel with the accused. She picked a knife and hid it on her waist, saying that someone was going to die that day, but the accused walked away from her. She then picked a piece of wood, and hit the accused on the forehead with it, and he sustained an injury. The 2 then went outside, still quarrelling. The deceased picked a hoe, and hit the accused with it, who, in turn, picked the same hoe, and fatally hit the deceased with it. PW2, Wandera Peter, a brother of the accused, responded to screams from the home of the accused and the deceased. He found the deceased on the ground, writhing in pain, with the accused standing there holding a hoe. The accused told him that he was defending himself, from the deceased, who had attacked and injured him, and wanted to kill him. The children of the 2 were at the scene. The deceased died as they tried to make arrangements to take her to hospital. He said that it was habitual for the accused and the deceased to fight, with the deceased being the aggressor. He found the accused bleeding from the head and nose. PW3, Erick Wandera, was another brother of the accused. He went with PW2 to the home of the accused. They found the deceased lying within the compound, with injuries,



- while the accused was inside their house. The accused came out, bleeding from his head and arm. He explained that after he got home, the deceased had confronted him. PW3 stated that the deceased died while they were making arrangements to take her to hospital. He expressed the opinion that the 2 had fought.
4. PW4, No. 67564 Police Sergeant Geoffrey Lang'at, went to the scene, to answer to a report of assault. He found a crowd wailing, and the deceased lying within the compound. They spoke to PW1, who informed them of a dispute between the accused and the deceased, and that the accused hit the deceased with a hoe. They removed the body from the scene, and carried the hoe with them. PW5, Dr. Mike Odhiambo, was the pathologist who conducted post-mortem on the body of the deceased. The body had bruises on the face and wrist; wounds on the perineal area of the lateral labia hymen and lower left thigh, and right knee, a deep cut on the skull, and a fracture of the femur. He opined that the blunt head injury caused the death, and was probably caused by a piece of wood. PW6, No. 89127 Police Corporal Ursula Cherotich, was the investigating officer. She visited the scene shortly after the incident, and found the body of the deceased lying outside. When she enquired, she was informed that the accused and the deceased had a quarrel, which escalated into a fight, and the accused had hit the deceased with a wooden hoe stick, injuring her on the legs and feet. They removed the body to the mortuary, and the accused was handed over to the police by members of the public.
  5. I found the accused to have a case to answer, and I put him on his defence, in a ruling that I delivered on 27<sup>th</sup> July 2023. The defence hearing happened on 9<sup>th</sup> October 2023, before me.
  6. The accused testified as DW1. He was the lone defence witness. He testified that on the material day he was at home, with the children, when the deceased arrived, at 9.00 PM, drunk. She found him on the bed, and began to beat him. She cut him on the head with a cutlass, and on the left shoulder with a knife. She grabbed his private parts, with intent to remove them by cutting them off. She then ran away. As he sought to enter the house, he met her near the entrance, and she was holding a hoe, she raised it as if to strike him with it, but it hit the roof of the house. The children restrained him. He wrestled the stick from her, and she ran off, and fell near the gate, where she died. He went back to the house, thinking that she was only drunk, and would get up. He later went out to check on her, and found that she had died. He then informed his parents, who directed him to the police, which he did, and the police went and collected the body. He said that he was not drunk at that time, and that the deceased was the aggressor. He described her as violent, throughout their marriage. He denied hitting her with the hoe stick, saying that he only wrestled the same from her. He asserted that he was the one who got hurt. During cross-examination, he said he hit the deceased after he got angry after she had attacked him with a knife and cutlass. He said that he removed the hoe from its handle stick, and threw the stick at her, and it hit her on the neck. He insisted that he was attacked, and that he only fought back in self-defence. He said that he was scared, so he hid, and then reported to the police.
  7. Both sides submitted in writing.
  8. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, it was with malice aforethought.
  9. On whether the deceased died, I have the evidence of PW1, PW2 and PW3, who were all relatives, and the accused himself. They all stated that she died, and they saw her dead body at the scene. PW5 was the pathologist, who conducted post-mortem on the body. He noted numerous injuries externally; and internally, a penetrating wound on the genito-urinary region, haematoma on the right frontal area of the skull, and contusion to the nervous system. He opined that the blunt head injury caused the death.
  10. Did the accused inflict injury on the deceased, and, if so, did that injury cause the death? From the evidence, the deceased was in good health when she came home that fateful evening, when she allegedly



engaged in a fight with the deceased. She had no prior injuries. Only 2 of those who were present testified, PW1 and the accused. What emerged was that the deceased allegedly armed herself, invariably, with a knife, a piece of wood and a cutlass, and finally a hoe. She attacked the accused with these items, and finally, in anger, the accused wrestled the hoe from her, and assaulted her with it. It is not clear whether he used the hoe or the handle stick. The testimonies of PW1 and the accused align in material particulars. The fight was just between the 2 of them, the accused and the deceased. Both sustained some injuries, although those sustained by the accused were not documented, for no medical report or treatment notes relating to his injuries was placed on record. As the fight was between the accused and the deceased, the injuries noted by the pathologist must have inflicted on the deceased in that fight, and must have been inflicted by the person that she was fighting with, the accused herein. Out of the many injuries inflicted on her, or sustained by her in that fight, that to the head caused her death, according to the pathologist. There is no evidence that she had injuries prior to that fight, and it should follow that the injuries noted by PW5 were inflicted by the accused, inclusive of the one that caused her death, and, therefore, the accused caused that death.

11. The next consideration is whether the death was caused with malice aforethought. What constitutes malice aforethought is defined in section 206 of the [Penal Code](#). It would be a direct intention to cause death; or an intention to cause grievous harm, which results in the death; or an intent to commit a felony; or an act done with the knowledge that it could cause death, or grievous harm, which could result in death.
12. The position taken by the accused, in his defence, was that there was provocation, and that he acted in self-defence.
13. Let me start with provocation. Its elements are in sections 207 and 208 of the [Penal Code](#), and it operates to reduce a murder into a manslaughter. The 3 elements are that there must be a heat of passion, suddenness and no time to cool off. It was stated, in *Uganda v. Mbululi* (1975) HCB 225 (Ssekandi. Ag J), the common law identified the elements as there being an act of provocation, in terms of something done or said by the victim before the act causing death; loss of self-control and the accused acting on impulse; and the proportionality of the provocation to the retaliatory act. Heat of passion suggests that the events must happen in quick succession, without a hiatus allowing for cooling off. The suddenness suggests acting at the heat of the moment, without time to cool off, or think rationally. It should also be an act done in the presence of the accused. See *Gaboye s/o Parmat v. Rex* (1946) 16 EACA 140 (Sir Barclay Nihill CJ, Sir G Graham Paul CJ & Bourke J). Provocation must consist of a wrongful act. See *Rex v. Muruma s/o Nyaboba* (1945) 12 EACA 80 (Sir Joseph Sheridan CJ, Sir Norman Whitley CJ & Sir John Gray CJ).
14. So, are the 3 elements, and the other factors, present, in the instant case, to justify the defence of provocation? On heat of passion, it would appear that the incident happened within a fairly short duration of time. The deceased is said to have arrived home, and found the accused and the children, then a quarrel erupted between the accused and the deceased. In the estimation of PW1, the deceased was the aggressor, probably because the quarrel began after she came back, and she was the one who bore arms. According to the accused, he had given her money to buy food, she did not buy what the money was meant for, she bought alcohol instead. In the midst of the quarrel, the deceased armed herself with a knife, a piece of wood and a hoe according to PW1; and according to the accused, she variously armed herself with a knife, cutlass and hoe. She hit the accused with the piece of wood on the face, and there was evidence that the accused had an injury, according to the witnesses. According to PW1, the accused walked away from the deceased, who would then grab another implement as a weapon and follow the accused. It would appear that it was upon arming himself with the hoe, and hitting him with it, that the accused snapped, and took the hoe from her, and fatally attacked her.



15. Was there suddenness? The witnesses did not talk of timings. PW1 talked of the deceased taking a knife and saying that someone would die, but the accused walked away from her. She then picked a piece of wood and hit the accused with it on the head. The accused apparently kept his cool, for he did not retaliate, but, according to PW1, the deceased then picked a hoe, and hit the accused with it, whereupon he was angered, and grabbed it from her and fatally wounded her with it. During cross-examination, the accused said that the deceased hit her with the hoe, and that was when he got angry, and hit back. I am persuaded that the element of suddenness was established. The deceased was depicted by PW1 and the accused, as rapidly arming herself with different weapons – knife, cutlass, stick and hoe – despite the accused avoiding her, by walking away from her, but she kept coming back to him, armed with something or other. The suddenness of these events must have acted as the spur that sparked off the retaliation.
16. Was there time for cooling off? It would appear that there was not. Initially, the deceased armed herself with a knife. Then there was talk of a cutlass. Then a stick. Finally the hoe. According to PW1, the accused was hit twice, with the piece of wood, and finally with the hoe. According to the accused, he was hit with a cutlass, and the hoe. These events apparently happened in quick succession, and it would appear that the accused person did not have a chance to cool off, before he struck out, after snapping.
17. Was there an act of provocation? There was. The issue was not some much the matter of the money that the deceased allegedly misused, but her reaction after that. The evidence that emerges is that she armed herself with assorted weapons, in fairly quick succession, and went after the accused, hitting him at various stages. It would appear that the accused kept walking away from her, until he was finally hit with the hoe, whereupon he lost self-control, and wrestled the hoe from her, and hit her with it. There is no evidence that he had ever armed himself with anything at any stage, or sought to hit at the deceased, either with a weapon or with his bare hands. The evidence is that the deceased was the aggressor. She was the one in pursuit of the accused, hitting him, time after time, with different weapons, until, he lost self-control, and acted on impulse, in grabbing the hoe from her, after she hit him with it, and striking at her.
18. Was the retaliation proportionate to the provocation? The accused was not armed all through, but the deceased variously handled a knife, a piece of wood and a cutlass, which he trained on the accused. PW1 talked of the accused being hit 2 times, with a piece of wood, and the hoe, before he retaliated. The accused himself, mentioned being cut with the cutlass on the arm and shoulder, and being hit with the hoe, before he grabbed it and hit back. It was suggested, in *Rex v. Hussein s/o Mohamed* (1942) 9 EACA 52 (Sir Joseph Sheridan CJ, Sir Norman Whitley CJ & Hayden J), that the offence of manslaughter would be established, once legal provocation is proved, irrespective of whether a lethal weapon is used, or whether it is used several times or whether the retaliation is disproportionate to the provocation. Indeed, any disproportion between the retaliation and the provocation could be indicative of the degree of loss of self-control, when it is considered that the accused had acted in quite some restraint, despite being hit several times with arms.
19. Was the provocative act done in the presence of the accused? Yes, of course. All the acts of arming herself, and striking at the accused, were aimed at the accused himself. Did it constitute a wrongful act? Yes, it did. The deceased armed herself, with intent to cause injury to the accused. She struck out at the accused with the arms, and witnesses testified that the accused sustained some injury. Being hit with a weapon, which is capable of inflicting serious physical harm, constitutes a wrongful act. PW1 testified that when the deceased picked a knife, she verbalised that someone was going to die, an indication of an intention to kill, meaning that she had an intention to cause a wrongful act, and her conduct towards the accused appears to have been geared towards actualising that intention.



20. Who bears the burden of proof of provocation? The burden is not on the accused to establish that he acted under provocation, instead, it is on the prosecution to prove beyond reasonable doubt that the accused did not act under legal provocation. See *Kenga v. Republic* [1999] 1 EA 145 (Akiwumi, Tunoi & O’Kubasu, JJA), *Langat v. Republic* [2002] 2 KLR 191 (Chunga CJ, Shah & Bosire, JJA) and *Joseph Kimanzi Munywoki v. Republic* [2006] eKLR (Tunoi, Waki & Onyango-Otieno, JJA). The possibility of provocation could come out of the evidence presented by both sides. Indeed, in *Rex v. Wayaga Nagugu* (1948) 15 EACA 74 (Sir Barclay Nihill CJ, Pearson & Ainley, JJ), it was stated that it could arise even where the defence does not raise it, so long as the court is satisfied that that possibility appears from the evidence, and is reasonable. In *Kenga v. Republic* [1999] 1 EA 145 (Akiwumi, Tunoi & O’Kubasu, JJA), it was said that the accused could raise a reasonable doubt as to its existence.
21. In the instant case, the evidence, emerging from the case presented by the prosecution, points most definitely to provocation. PW1 was clear in his testimony, that the deceased was the aggressor. She armed herself with various implements, and struck at the accused with them, the accused walked away from her, but she still followed him. It was his evidence that the accused got angry after he was hit with the hoe, and that was when he struck at her. PW6, the investigating officer, did not seek to establish that the defence of provocation was not available to the accused, or the facts did not establish it. If anything she made statements which pointed to its existence. She conceded that the accused had injuries on various parts of his body, at the time the police arrested him, and that it was the deceased who first armed herself with the hoe.
22. Regarding the defence of self-defence, it may be pointed out that the same does often coincide with the defence of provocation, and both would be available, where there is evidence that the accused acted both under self-defence and the stress of provocation. See *Hau s/o Akonaay v. Reginam* (1954) 21 EACA 276 (Sir Newnham Worley Ag P, Sir Enoch Jenkins VP & Briggs JA) and *Mungai v. Republic* [1976-1985] EA 318 [1982-88] 1 KAR 611 [1984] KLR 85 (Kneller, Hancox JJA & Nyarangi Ag JA). There was evidence that the accused and the deceased quarrelled. The deceased armed herself, at various stages of the quarrel, with a knife, a cutlass, a stick and a hoe, and struck the accused several times with the said arms. The accused tried to avoid the deceased by walking away, but she followed him. When she struck him, at the last stages, with the hoe, he wrestled it from her, and in apparent self-defence, struck her with it, apparently on grounds that she wanted to kill him with the arms that she bore at the various stages of the quarrel. I am persuaded that provocation coincided with self-defence. The burden of proof of the defence of self does not lie with the accused, but with the prosecution, to establish that the same was not available to the accused. See *Chan Kau alias Chan Kai v. Reginam* (1955) AC 206, (1955) 1 All ER 266 (Lord Oaksey, Lord Tucker and Mr LMD de Silva) and *Langat v. Republic* (2002) 2 KLR 191 (Chunga CJ, Shah and Bosire, JJA). The prosecution did not seek to establish that the same was not available to the accused. Indeed, the evidence, tendered by the prosecution, pointed to the deceased relentlessly pursuing the accused while armed, and that the accused reacted at the tail end, in apparent self-defence.
23. In his written submissions, the accused cites *Stephen Kipketer Cheboi v. Republic* [2002] eKLR (Shah, O’Kubasu & Keiwua, JJA) and *State v. Truphena Ndonga Aswani* [2021] eKLR (Aburili, J), to invite me to consider the defence of cumulative provocation, where a person is subjected to insults and mistreatment by another over a period of time. See also *Sukusamakindo s/o Mwamakosi v. R* [1958] EA 776 (Sir Kenneth O’Connor P, Forbes VP & Gould JA), *Republic v. Johali Ismail* (1974) LRT 79 (Mfalila, Ag J) and *Joseph Kimanzi Munywoki v. Republic* [2006] eKLR (Tunoi, Waki & Onyango-Otieno, JJA). Cumulative provocation is of no application here. The prosecution did not adduce any evidence pointing to cumulative provocation of the accused by the deceased. Not much evidence was adduced on how the accused and the deceased lived their lives, prior to the incident the subject of



these proceedings. The prosecution concentrated on evidence around the events of 23<sup>rd</sup> August 2022. Neither did the accused, in his defence, lead evidence that pointed to anything of that kind, save that he mentioned that the deceased was violent throughout the marriage. The only evidence placed on record, by the prosecution, through PW2 and PW3, was that the accused and the deceased were always quarrelling and normally had a habit of fighting. Those statements did not suggest, in any way, that the deceased was in the habit of beating the accused, or had normalised insulting and ill-treating him, from which it could be surmised that there was incidence of cumulative provocation. Some concrete evidence should have been adduced, to lay a basis for a conclusion that the incidence of cumulative provocation existed. Isolated statements about frequent quarrels, violence and fights between a couple, in the course of their marriage, without more, would not do. It should be demonstrated that the alleged quarrels, violence and fights were at the instance of the deceased, and were directed at the accused. It should be evidence that demonstrates that the deceased consistently and frequently ill-treated the accused, so much so that the accused was cumulatively pushed to the extreme, causing the latter to snap, and to do the unthinkable to the former.

24. It is my finding that the accused person acted both under the stress of provocation and in self-defence. The presence of either defence has the effect of diminishing or mitigating malice aforethought, thereby reducing the offence from that of murder to manslaughter. Consequently, under section 179 of the Criminal Procedure Code, Cap 75, Laws of Kenya, I do hereby find the accused herein, Sylvester Oduori Wandera, guilty of the manslaughter of Harriet Amoiti, contrary to section 202 of the Penal Code, as read with section 205 thereof, and I, accordingly, convict him, under section 322 of the Criminal Procedure Code. For the purpose of sentencing, the Busia County Director of Probation and Aftercare Services shall compile a pre-sentence report, and file it herein, within 14 days. The accused person has a right to make a statement in mitigation, before sentence, a chance shall be availed for that purpose, once the pre-sentence report is placed on record. He shall be sentenced thereafter. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA  
THIS.....27<sup>TH</sup>.....DAY OF.....NOVEMBER.....2023**

**WM MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Mayaba and Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Oreda and Mr. Oketch, Advocates for the accused person.

