



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 30 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

RODGERS WANJALA WAFULA.....ACCUSED

J U D G M E N T

The accused **RODGERS WANJALA WAFULA** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the offence are that **RODGERS WANJALA WAFULA** on the 13th and 14th day of July, 2020 at Masiero village in Bumula Su-County within Bungoma County murdered **GODFREY SIMIYU WEKESA**.

The case for the prosecution is that on 13.7.2020 **PW1 Martin Wanjala Wamalwa** invited his friends to his home. Those who came were 1. Juma Wanyama, 2 Khisa Wanyama, 3 Muchai Wanyama, 4 Barasa Matayo, 5 Godfrey Simiyu (the deceased). He bought them changaa. At 6 p.m. Juma Wanyama and Barasa Matayo left the home. Khisa Wanyama and Godfrey Simiyu (the deceased) stayed up to 8 p.m. and left. At 11 p.m. he was called and informed by Jackline that there was a person injured at his gate. He went there and found it was the deceased. He observed him and saw he had injuries on the head. Also saw a stick that was blood stained near him. He called the relatives who took him to hospital. The next day he received information that he had died.

PW2 Jackline Nafula Wanyama was in her house at 11 p.m. when she heard noise as of people fighting. She took her torch and went to the road where the noise was from. On arrival she flashed her torch and saw a person running away with the slippers making noise. She went closer and saw deceased lying down with injuries on the head, ears and hands. She went and informed Martin (PW1) and neighbours who came. Near the deceased they found a stick, cap and slippers. In cross examination she stated she did not know who killed the deceased.

PW3 Joseph Juma Wanyama testified that on material day at 5 p.m. he was at the home of Martin (PW1) where they drunk changaa. He was with Barasa Matayo, Linus Muchule and Wekesa Masinde. He left at 6 p.m. leaving the deceased behind. At 12.40 a.m. he was informed deceased had been injured. He went and found deceased lying down on the road. He had injuries on the head. They took him to hospital where he died while undergoing treatment. In cross examination he stated he did not know who killed the deceased.

PW5 PC Kipngetch Yator attached to Miyamba patrol base received a report of murder on 14.7.2020 at the scene 500 meters from the patrol base. He went to the scene where they received a small piece of wood and a cap. They received information that accused had been seen at the scene. They looked for accused whom they found dressed in black T-shirt and long trouser which were blood stained. They asked him to change and took the clothes he was wearing as exhibits.

PW6 Richard Kimutai Langat a Government analyst received a piece of liver of Godfrey Simiyu the deceased (marked A) blood sample of accused (marked B) Black T-shirt (marked C) long trouser (marked C2) small piece of wood (marked E) and small panga (marked F). He subjected the items to DNA Analysis which showed that blood stains on the T shirt, long trouser, small piece of wood and long piece of wood matched that of the deceased. He also found that the blood stains on the T-shirt and long trouser did not match his DNA, which meant that the stains of blood in the clothes recovered from accused did not belong to him.

PW7 Linus Muchele Wanyama was at his home at 12 a.m. on night of 13-14 July 2020 when one Wanjala Daudi came and informed him that he had cut Wekesa on the left hand and head. He was holding a stick. He went to the scene and found deceased lying down with injuries. He found him about 20 meters from where they had been drinking earlier. Deceased was taken to Saboti dispensary where he was referred to Bungoma County Referral Hospital but died on the way.

PW8 Fredrick Wakasiala Simiyu the village elder received information from the chief about the murder. He went to the scene where they found deceased injured and blood stained stick nearby. He received information that the accused was a suspect. They looked for him and found him wearing blood stained clothes. They took him to the chief.

PW10 Dr. Haron Ombangi who produced the post mortem report prepared by Dr. Ochieng who performed the post mortem testified that the deceased had cut wound on left side of the head, with a skull fracture, on the left side of the head. He formed opinion that cause of death was due to fracture of the head caused by a sharp object.

The accused gave sworn evidence in his defence. He testified that he knew the deceased. On 13th July 2020 he met the deceased at 5 p.m. when deceased asked accused for shs 50 to go and buy alcohol. Accused gave him. Later he met Martin and Kennedy and they went to drink. The next day he went to Mashelo where he arrived at 7 a.m. He denied that he did meet the deceased and assaulted him.

On the blood stains on his clothes he testified that they were from a previous injury he had sustained. He admitted he knew Jackline but denied ever quarrelling with the deceased.

On being cross examined by M/s Omondi for state, he confirmed police took away his long trouser and T-shirt and that the blood stains on them were his and not that of the deceased.

Mr. Wekesa for the accused submitted that none of the prosecution witnesses was an eye-witness to the murder. Counsel submitted that the only evidence to connect the accused with the murder according to the prosecution is the blood-stains found on his long trouser and T-shirt. He submits that there were contradictions in the evidence of the witnesses as to the colour of the clothes.

The accused is charged with the offence of murder contrary to Section 203 of the Penal Code. Section 203 provides:

“Any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder.”

The prosecution must in an offence of murder prove:

- a) The fact and cause of death***
- b) The unlawful act or omission that caused the death***
- c) That it is accused who occasion the unlawful act or omission or inflicted the injuries that caused the death***
- d) That the accused had the intention of causing death or malice aforethought.***

That the accused died as a result of injuries sustained was confirmed by PW10 Dr. Haron Ombangi. The prosecution called their witnesses, PW1 Martin, PW2 Jackline, PW3 Joseph, PW5 PC Kipngetich who also stated that they did not see who inflicted the injuries on the deceased. PW7 Linus testified that it is accused who told him that he had cut the deceased but did not see him doing so.

There being no direct evidence the prosecution sought to prove the charge against the accused by way of circumstantial evidence. **R-vs Kipkering arap Koskei & Another 16 EACA 135** where it held, inter alia, that:-

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

What are the pieces of circumstantial evidence that the prosecution seeks to rely on. The prosecution established that the accused and deceased knew each other. That the accused and deceased met on the material day which fact is admitted by the accused.

The prosecution sought by the evidence of PW5 PC Kipngetich Yator, PW8 Fredrick Wakasiala and PW8 PC Richard Ongera, that the deceased was injured in the head and bled. They also testified that when accused who was a suspect was arrested the clothes he was wearing had blood stains. They took the clothes for analysis and that the blood stains on the clothes matched on DNA analysis that of the deceased.

In **George Kamau Wambai –vs R (2020)eKLR Criminal Appeal No. 180 of 2016(R)**

We entirely agree with the submissions of counsel for the appellant that his conviction turned solely on circumstantial evidence.

While considering how to test circumstantial evidence, this court in the case of Republic V Kipkering Arap Koskei & Another 16

EACA 135 stated “In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt...”

In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”.

The accused's explanation:

“DW1 RODGERS WANJALA WAFULA ADULT SWORN STATES IN KISWAHILI.

“I stay at Mashelo where I was working as a labourer with Stephen Juma as a herdsman. I know the charge against me. I deny the charge. I know the deceased as we used to meet when herding cattle. On 13 -14th of July 2020 I met the deceased. I met him on 13.7.2020 at 5 p.m. and he told me we go to drink alcohol. I gave him Kshs 50. I did not accompany him to the drinking. I went to watch football. After the football, I met Martin and Kennedy from Mayanja. We went to another place I don't know to drink alcohol at Mikiki. I slept there. The next day I left in the morning arriving at Mashelo at about 7 a.m. The blood stains clothes were from a previous injury I had sustained. It was not from injuries on that day. I did not meet deceased that night and beat him with a stick. I tried to wash the clothes but blood did not come clean. I don't know how his blood got into my clothes. I was arrested from Kewa. I don't know who killed deceased. It is not true that we were fighting over a woman. I was only having Jackline Kwoba. I had not even quarreled with the deceased.

Cross examined by M/s Omondi: Police took away my long trouser and T-shirt. It was black and white long trouser.”

The accused assertion that the blood stains on his clothes belonged to him out of a previous injury was displaced by evidence of the Government Analyst (PW6) who testified that DNA analysis of accused blood was not detected on the clothes that were submitted. It is therefore not true that it was his blood. I therefore find that the blood found on accused's clothes a day after the murder of the deceased belonged to deceased, and accused has offered no explanation on how the deceased's blood found its way on to his clothes. This leaves this court with a finding that the blood found its way into the clothes of deceased when he assaulted deceased.

From these circumstantial evidence adduced by the prosecution, I am satisfied that the fact proved are incapable of any other explanation, upon any other hypothesis except that of guilt of the accused. All the facts proved taken cumulatively point irresistibly to the accused and no other as the person who inflicted the injuries that led to the death of the deceased.

The prosecution is under obligation to prove that accused in committing the unlawful act and inflicting the injuries on deceased did so with malice aforethought. Section 206 Penal Code defines malice aforethought as:

Section 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.***

From the evidence of the doctors the injuries inflicted on the deceased were concentrated on the head a crucial and vulnerable part of the body. These injuries on the head were therefore intended to cause grievous harm or death as it did in this case. I am therefore satisfied that accused had the requisite malice aforethought when he committed the offence.

Upon considering all the evidence in totality, I am satisfied the prosecution has proved a charge of murder against the accused person Rogers Wanjala Wafula. I therefore find accused guilty of the offence of murder contrary to Section 203 as read with section 204 of the Penal Code and convict him accordingly.

DATED AT BUNGOMA THIS 30TH DAY OF MARCH, 2022

S.N RIECHI

JUDGE