



**Republic v Wafula & another (Criminal Case E004 of 2021)
[2022] KEHC 10811 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10811 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E004 OF 2021**

SN RIECHI, J

MAY 31, 2022

BETWEEN

REPUBLIC PROSECUTOR

AND

SIMON WAFULA 1ST ACCUSED

ROSE WANYONYI WAFULA 2ND ACCUSED

JUDGMENT

1. The accused Simon Wafula(accused 1) and Rose Wanyonyi Wafula(accused 2) are charged with offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The particulars of the offence are that on the 25th day of December 2020 at Neema village Lutacho sub-location, Webuye East Sub-County within Bungoma County murdered Susan Nanjala alias Sussy.
3. The case for prosecution is that on 25.12.2020 at 3 p.m. PW2 Emmanuel Simiyu Waswa was with his wife the deceased Susan Nanjala alias Sussy when they decided to go and pick pork they had paid for from Wanyama Tongowe. On the way the deceased went ahead of him and he was behind her. He then saw about 5-6 people standing on the road. He recognized them as Margaret Nyongesa with children Mariam and another child. He also saw accused 2 Rose Wanyonyi also present. He saw the deceased and accused 2 Rose and another child. When he reached where they were he saw the deceased bleeding from the nose. Rose (accused 2) then told the deceased “Let me show you.”. Accused 2 Rose then ran and called her husband Simon (accused 1) and children who came armed with a panga. He advised the deceased to run away. She went with Margaret to her ho use. Accused 1 Simon then aimed to cut witness with axe and they started struggling. Isaac came and separated them and he went to his home. He then went and reported the incident to police. They told him to remain at the police station while they went to the scene. He was later informed by his son that deceased had been taken to hospital where she died.



4. On being cross-examined by M/s Chungu for accused, he stated that neither he nor the deceased cut accused 1 Simon nor did he see him being taken to hospital.
5. PW2 Margaret Nasambu testified that the deceased was a wife to her in law. On 25.12.2020 was on the road when she saw Rose (accused 2) walking ahead of her. She then saw the deceased coming from the opposite direction and were going to meet. When they met she saw Rose (accused 2) hit the deceased on the nose. She went closer and saw deceased was bleeding. She asked what the cause of the fracas and Rose (accused 2) said deceased was defaming her. While there Emmanuel (PW2) the husband of deceased came. Accused 1 Simon also came and they started fighting. Isaac came and separated them and disarmed Emmanuel who had a panga. She then saw the deceased cut accused 1 Simon on the shoulder with a knife and accused 2 Rose on the hand. The deceased then escaped. Accused 1 Simon and Accused 2 Rose chased deceased who ran into her kitchen house. Accused 1 Simon and accused 2 Rose entered the house. After a short time accused 1 came out and fell down. His clothes were blood stained. He was taken to hospital. Deceased was also taken to hospital where she died.
6. On being cross-examined by M/s Chungu for accused, she stated she saw deceased stab accused 1 Simon and accused 2 Rose. She confirmed she saw accused 2 Rose assault deceased. She stated that she saw accused 1 Simon and accused 2 Rose follow the deceased to her kitchen where she had run to.
7. PW4 EKN a minor aged 17 years was at their home with her sister Ruth when she heard screams and ran there. She found accused 2 – Rose and deceased fighting using fists. She then saw Emmanuel (PW2) armed with a stick and accused 2 Rose armed with an axe. Emmanuel (PW2) then cut accused 1 Simon with a panga on the forehead. She screamed and Isaac came and disarmed them. Deceased then stabbed accused 1 Simon on the head and accused 2 Rose on the arm. Deceased ran to their (witness) house. Accused 1 Simon and accused 2 Rose followed deceased there. Accused 1 Simon came out and fell down. She confirmed that the people who chased deceased were accused 1 Simon and accused 2 Rose.
8. PW6 No. 64752 Sgt Adan Ali Karani the Investigating officer attached to DCI Webuye received information of people fighting at Nema village. They were Simon (accused 1) and Rose (accused 2) on one side and Emmanuel (PW2) and deceased on the other side. They visited the scene and found deceased had been taken to hospital. They received information that deceased had been attacked at the home of Nyongesa. They found 4 people had been taken to hospital. He received the exhibits from another officer which he forwarded to Government analyst Kisumu for analysis. From the investigations he learnt the cause of the fight was that deceased was telling accused 2 Rose to stop having affair with her (deceased's) son.
9. PW7 Dr. Nyongesa Reuben performed the post mortem report on deceased on 4.1.2021. he found injuries on chest and fracture of the 5th rib, both lungs had collapsed and there was accumulation of blood in the lungs. He formed opinion that the cause of death was due to penetrating injury to the lungs leading to lung collapse. He took a piece of hair.
 - a. A piece of hair of deceased.
 - b. 2 finger nails
 - c. Rib cartilage
 - d. Muscle of anterior chest wall which were taken for further investigations.
10. PW5 George Lawrence Oguda the deputy Government Analyst Kisumu received the specimen for analysis which included:

A1- Scrapping from door No. 1



- 2 – Scrapping from 2nd door.
- 3 - scrapping from door No. 3
- 4 – scrapping from door 4.
- 5 - scrapping from Bedroom door 2.
- 6 – Knife with fren plastic handle
- 7 - Axe marked C
- 8 - Wooden stick marked D.
- 9 - Piece of muscle from Susan Wanjala E1.
- 10 - Hair sample from Susan Wanjala marked E2.
- 11 – Finger nails from Susan Wanjala marked A3.
- 12 – Swap from Simon Wafula F
- 13 - Swap from Rose Wafula marked G.

From conducting the DNA analysis and found that

- a. DNA profiles from the doors A1, A2, A3, A4, A5 matched the DNA profile of Susan Wanjala.
 - b. The blood form knife B and wooden stick matched the DNA of Simon Wafula, buccal swap Exh.12
 - c. The blood stains on Axe D generated mixed DNA profile with Finger Nails of Susan Wanjala and Buccal swap of Rose Wafula.
11. I prepared the report and wish to produce it as Exh.4.
 12. The accused upon being put on their defence gave sworn evidence. Accused 1 Simon Wafula Wanyonyi testified that accused 2 Rose Wanyama Wafula is his wife. On 25.12.2020 he was at home when his daughter Susan Wafula informed him that his wife accused 2 had been stabbed. He ran to the road when he saw the deceased and Emmanuel who was her husband. He did not see Rose accused 2. He asked Emmanuel what the p robele was and Emmanuel cut him on the head. They started struggling and they fell down. That is when deceased stabbed him with a knife on the neck. Isaack came and separated them. He became unconscious and when he came to he found himself at Misikhu hospital. He produced treatment notes as exhibit.
 13. On being cross-examined by M/s Omondi, for stat he stated he did not see deceased stab accused 2 Rose and that she had run to a neighbours house.
 14. Accused 2 Rose Wanyonyi Wafula testified that on the material day she was at her home washing clothes at 3 p.m. when deceased went there and accused her that accused 2 Rose was sleeping with deceased's son called David. She held deceased and directed her to the road. On the road deceased called her husband Emmanuel and the deceased stabbed her on the neck. She ran to the home of Isaac. From there she saw Simon (accused 1) go to the road and saw deceased stab accused 1 on the neck. She ran there to assist him and deceased cut her on the left hand. She then saw people chasing her to the home of Nyongesa. She was taken to hospital where she was treated and discharged but was not given treatment notes.
 15. DW3 Susan Mutonyi Wafula the daughter of accused 1 and accused 2 testified that she was with accused 2 Rose at their home when deceased came and started ab using her mother Rose (accused 2).



- Rose then pushed to accused out of their compound to the road. She then saw deceased stab accused 2 with a knife. She screamed and accused 1 Simon came and went there. She then saw Emmanuel the husband of deceased cut accused 1 Simon. Accused 2 Rose went there to assist Simon (accused 1). Deceased then stabbed accused 2 on the arm and deceased run away to a neighbours house with people following her.
16. DW4 Isaac Juma Mahero testified a bodaboda rider received a telephone call to go and take a person who had been injured to hospital. He went and found accused 2 Rose with injuries. He took her to Lugulu hospital. While at the hospital a patient was brought and accused 2 told him it was the deceased.
 17. M/s Change for accused filed written submissions. Counsel submitted that from the evidence, both accused 1 Simon and accused 2 Rose had been injured by deceased and were bleeding and had no energy to follow the deceased to where she ran to to inflict injuries. Counsel submitted that the evidence of accused in their defence is consistent with that of their witnesses. Counsel urged the court to find prosecution has not proved charge against accused persons.
 18. M/s Omondi prosecuting counsel filed written submissions too.
 19. Counsel submitted that though accused denied inflicting injuries on the deceased, they were seen following the deceased to the neighbours house and entered the house. They were then seen coming out with axe and knife which were blood stained. The same were examined by the Government Analyst and found to contain deceased's blood. Counsel submitted that the actions of the accused during the incident confirmed that they had malice aforethought as stipulated in Section 206 of the Penal Code. Counsel submitted that any discrepancies in evidence in relation to the role of Isaac is minor and not material. Finally, counsel submits that the prosecution has proved its case beyond reasonable doubt.
 20. The accused are 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 an unlawful act or omission is guilty of murder.”
 21. The element of the offence of murder which the prosecution is supposed to prove beyond reasonable doubt against the accused are:
 - a. The fact and cause of death.
 - b. The unlawful act or omission causing the death
 - c. That it is accused who caused the unlawful act or omission or inflicted the injuries that caused the death of deceased.
 - d. That the accused committed the unlawful act with malice aforethought.
 22. PW7 Dr. Nyongesa Reuben who performed the post mortem on body of the deceased found that the deceased had injuries on the chest, anterior wall, fracture of the 5th rib, collapse of right and left lung and accumulation of blood in the lungs. He formed opinion that the cause of death was due to lung collapse caused by a penetrating lung injury. He issued death certificate No....This witness therefore confirmed the fact of death. He also confirmed the cause of death as being due to a penetrating injury to the lungs causing both lung collapse. Who inflicted the injuries from which the deceased died?
 23. PW2 Emmanuel Simiyu Waswa the husband of the deceased testified that he went to the road and saw deceased had been injured. He was informed by Margaret that it is accused 2 Rose who had injured her. He then saw accused 1 Simon with his children come to the scene armed with panga and axe. He



- advised deceased to go away. She went to the house of Margaret. He confirmed he did not see either accused 1 Simon or accused 2 Rose assault the deceased.
24. PW3 Margaret Nasambu testified that she saw accused 2 Rose hit the deceased with a fist on the nose. When deceased husband Emmanuel (PW2) came, accused 1 Simon the husband of accused 2 also came and they started fighting. She then continued stating in her evidence:
- “The deceased then cut accused 1 on the shoulder with a knife. This is the knife PMF1 1. It is deceased who had the knife. She then left. Deceased then stabbed accused 2 on the hand. The deceased then escaped. Accused 1 and 2 chased her. Deceased run to my farm. I told my child to call the chief and I spoke to him and informed him. They entered my home and were chasing each other. Deceased entered my kitchen house. The accused 1 and accused 2 also entered the house. I did not follow them there. After a short time accused 1 came out and fell down. His clothes were blood stained.”
25. PW5 George Lawrence Ogunda who performed DNA analysis on the blood stains on the door of the house where deceased was attacked confirmed that the blood belonged to the deceased. He also found that the DNA profiles on blood-stains on the axe marked D generated mixed DNA profile of deceased that the buccal swap of Rose Wafula (accused 2). He also found that the blood stains on the knife matched to the profile of accused 1 Simon. From this analysis therefore the axe which contained the DNA profiles of both deceased and accused was likely to be the murder weapon. The accused’s explanation on this matching profile is that they had been injured and therefore explaining the presence of their blood on the items.
26. The analysis however confirmed that the deceased sustained injuries from the axe Exh.1.
27. From the evidence of both the prosecution witnesses and the accused, it is evident that there was a fight between accused 1 Simon, accused 2 Rose on one hand and PW2 Emmanuel and deceased Susan on the other hand. The cause of the fight was the deceased allegation that accused 2 Rose was having a love affair with her son David. During this fight, the accused 1, Simon, accused 2 and deceased sustained injuries. After they were separated by Isaac deceased ran to the house of Margaret and accused 1 and accused 2 followed her, entered the house and attacked her. PW3 Margaret in whose house the deceased ran to confirm that both accused 1 Simon, accused 2 Rose chased deceased to and entered the house. Shortly later they came out and she noticed accused 1 Simon with injury and fell down. I find that it is in the house that the accused 1 Simon and Accused 2 Rose inflicted on the deceased the fatal injuries from which she died. The accused 1 and 2’s defence that it is not them who inflicted the injuries cannot be true and I reject the same.
28. The accused’s defence is that they were attacked by the deceased and her husband and that they also sustained injuries from which they received treatment. Indeed, there is evidence that they too sustained injuries. Accused 1 Simon Wafula produced a discharge summary as Defence Exh.1 and Accused 2 Rose produced receipt for payment of hospital services E-Dexh 2. Although she was unable to produce the treatment notes were the action of the accused in self defence can be available as a defence to an accused who has been affected, the court will assign criminal responsibility for the use of force according to English Common law. Section 17 Penal Code provides:
- Sec. 17: Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.
29. In thedecision of *Palmer v Republic* [1971] AC 814 and *Republic v Mcinnes* 55 Cr. Appeal 551 where the Privy Council and the Court of Appeal respectively stated as follows: “It is both good law



and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury”. *Republic vs James Njengi Njoroge* 2019 eKLR.

30. In this case the attack on the deceased was done in the house she had escaped to. The accused actually chased her and entered the house and were seen by witnesses entering and coming out. When the deceased ran away from the road, accused were not in any imminent doubt to themselves and that chasing her moved from self defence to a revenge mission. The plea of self defence cannot be available to accused as a defence.
31. What distills out from the evidence is that accused inflicted the injuries on accused after provocation, occasioned by deceased and her husband’s assault on them. Provocation is defined in Section 208 of the Penal Code as:

Section 208.

1. The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
2. When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
3. A lawful act is not provocation to any person for an assault.
4. An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.
5. An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.



32. Where a person kills another on or in circumstances of provocation. Section. 207 provides:

207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

33. After considering all the evidence, I find that the prosecution has proved a charge of manslaughter against accused 1 Simona and Accused 2 Rose beyond reasonable doubt.

34. I therefore find Simon Wafula (accused 1) and Rose Wanyonyi Wafula (accused 2) guilty of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and convict each one of them accordingly.

DATED AT BUNGOMA THIS 31ST DAY OF MAY, 2022

S.N RIECHI

JUDGE

