



**Republic v Wainaina (Criminal Case 19 of 2020)
[2022] KEHC 12672 (KLR) (29 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL CASE 19 OF 2020
K KIMONDO, J
AUGUST 29, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

SIMON NDUNG’U WAINAINA ACCUSED

JUDGMENT

1. On the morning of August 19, 2020, Dennis Wanjiri Mbugua (hereafter the deceased) was knifed to death. According to the pathologist, there was a penetrating oblique chest wound caused by a sharp object.
2. The accused is a cousin of the deceased. He is a minor in conflict with the law. The Republic brought information to the High Court charging him with murder contrary to section 203 as read with section 204 of the *Penal Code*.
3. The particulars are that on August 19, 2020 at Rokoroi village, Gatanga Sub-County within Murang’a County, he murdered the deceased.
4. The prosecution called ten witnesses. The first was Mary Nyambura (PW1). That morning, she was out gathering cattle feed when she heard a distress call from her granddaughter, Mary Waringa (PW2). The latter was calling out loudly. When PW1 went to the road, she found the deceased bleeding in the stomach area.
5. PW2 is a cousin of both the accused and the deceased. She had left her house to go to the shops. She then saw the accused and the deceased standing on the road about 8 metres away from each other. She reached the accused first who asked her whether he could join her. When they met the deceased, she saw the two greet each other with “a fist-bump” or in her lingo, *kungoteana*. She left them and proceeded towards the shops.



6. She went on for about 8 metres when she “heard someone fall down. It was Denis [deceased]. Ndung’u [accused] had a knife”. She went back and found that the deceased was “stabbed above the stomach”. She ran to call a sister of the accused, Nyambura telling her to “come see what Ndung’u has done”.

7. The witness said that the accused ran away with the knife immediately the deceased fell. She said the accused and deceased did not exchange any words that morning. She could not tell the motive for the attack.

8. In cross examination, she stated as follows-

At first, I never saw accused with a knife. I did not see him attack deceased. I walked briefly with accused towards deceased. I thought they did a fist-bump greetings. I never heard them say anything. I then heard something fall behind me. It was Dennis. I can’t tell who had the knife before the attack. I saw accused running towards a pathway. I saw him return the knife to its sheath and run away. He was holding the knife.

9. PW7 was Bernard Kaungi. When he arrived at the scene, the deceased was still alive. He said he “tried to fan air to him; his heart was still beating”. PW3, James Kimuyu Warui, saw the lifeless body of the deceased. The wound had now been tied with a lessa provided by another witness, Jane Nduta (PW5). He and other boys were tasked with looking for the accused but they were not successful.

10. PW6, Henry Muhoro, provided a vehicle to ferry the deceased to hospital. He was assisted by Peter Kimani (PW8). They found the nearby clinic closed. They took the deceased to Thika Level 5 Hospital where he was pronounced dead. PW6 had also been instructed by the assistant chief to first report the matter at Kiunyu Police Post.

11. The deceased’s father, Peter Mbugua (PW4) was at work when the incident occurred. By the time he reached home, the body had been removed from the scene. He later attended the postmortem examination at General Kago Funeral Home. He said the knife had perforated the lungs of the deceased.

12. According to the pathologist, Dr John Mathaiya (PW10) the death resulted from “chest injury due to a single penetrating sharp force trauma to the chest”.

13. The accused was arrested on August 19, 2020 at about 4:00 pm by members of the public and taken to Kihumbuini Police Station. He was re-arrested by PC Maina (PW9) and Inspector Ikiara. PW9 testified as follows-

Inspector Ikiara interrogated the suspect who disclosed where he had hidden a knife. He took us to a roadside in Rugaita. The knife was 30 metres from the road on a small bush. He showed us the knife and I recovered it. This is the knife (MFI 2). It is a knife and with a black sheath. It was blood stained. I wish to produce the knife (exhibit 2).

14. When the accused was placed on his defence, he said that the deceased had threatened him not to go to the shops unless he repaid some money. He denied owing him any debt. He informed his father about the threats but the latter still asked him to go to the shops. He testified that when he met the deceased that the fateful morning, the deceased had a knife and threatened to cut him. He then threw him off and he (accused) took away the knife.



15. In cross-examination, he said-

I picked the knife when he fell because I feared he may fall. I was not injured. I did not see any injuries on Dennis. I kept the knife as I went on with my duties. When the police arrested me I was still with the knife. I never hid the knife in a bush or led police to it.

16. The accused called one witness, his father, Daniel Wainaina (DW2). He was not at home on the day of the murder. He said that the accused told him about the threats from the deceased two days before the incident, but he (DW2) did not think they were serious.

17. Leaned defence counsel, Mr T Kariuki, filed final submissions on July 13, 2022. He submitted that the Republic failed to prove the charge beyond reasonable doubt. In particular, he argued that the accused acted in self-defence and did not stab the deceased.

18. Learned prosecution counsel, Ms A Gakumu, filed final submissions on July 27, 2022. In her opinion, the State established that the accused killed the deceased with malice aforethought; and, that the claim he was acting in self-defence was not supported by evidence.

19. I take the following view of the matter. Section 203 of the *Penal Code* provides that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

20. The prosecution must prove beyond reasonable doubt three key elements: Firstly, the death of the deceased and the cause of that death; secondly, that the accused committed the unlawful act that led to the death; and, thirdly, that the accused was of malice aforethought.

21. The death has been proved. Doubt is completely erased by the post mortem report. The cause of death is also established. In the opinion of the pathologist, it resulted from “chest injury due to a single penetrating sharp force trauma to the chest”.

22. From that evidence, I find that the death was unlawful. The next question then is whether the Republic has proved beyond reasonable doubt that the accused, of malice aforethought, killed the deceased. The burden of proof rests entirely with the prosecution. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] EA 332.

23. The prosecution’s case is built on both direct and circumstantial evidence. I have kept in mind that to convict on circumstantial evidence, the entire chain must be complete and point to the guilt of the accused “incapable of explanation upon any other reasonable hypothesis than that of his guilt”. *R v Kipkering arap Koske & another* 16 EACA 135 (1949).

24. On the fateful morning, there were only three people on that stretch of the road: the accused, the deceased and Mary Waringa (PW2). PW2 is a cousin to the accused and the deceased. It was during daylight. I thus readily find that PW2 positively identified the accused as the person she found on the road; and, who requested to accompany her towards the shops.

25. When the two reached where the deceased was standing, she saw the two greet each other with “a fist-bump” or in her jargon, kungoteana. She left them and proceeded towards the shops. In her evidence in chief, she said that she walked for about 8 metres when she “heard someone fall down. It was Denis [deceased]. Ndung’u [accused] had a knife”. She went back and found that the deceased was “stabbed above the stomach”.



26. Under cross-examination she stated-

I then heard something fall behind me. It was Dennis. I can't tell who had the knife before the attack. I saw accused running towards a pathway. I saw him return the knife to its sheath and run away. He was holding the knife.

27. The witness said that the accused and deceased did not exchange any words save for the “fist-bump” greeting. She had barely walked for 8 metres when the deceased fell to the ground. The accused’s version of events is that it is the deceased who had the knife and who threatened to cut him. He then threw him off and he (accused) took away the knife.

28. So was the accused acting in self-defence? The accused claimed that the deceased was demanding some money from him and that he had told his parents about the threats that morning. That was discounted by his father (DW2) who testified that the accused informed him of the threats two days earlier and he (DW2) “did not think they were serious”.

29. Secondly, if there was a scuffle or argument, surely Mary Waringa (PW2) would have heard it: She was barely 8 metres away. Thirdly, the accused took the knife, put it back into its sheath and disappeared. According to PW9, the accused hid the knife but disclosed its location to the police.

30. But according to the accused, he “did not see any injuries on Dennis. [He] kept the knife as [he] went on with [his] duties. When the police arrested [him] I was still with the knife. From the evidence by PW1, PW2, PW7 and the pathologist (PW10) the knife had penetrated the deceased’s chest wall. Why the accused would comfortably “go on with his duties” while keeping a bloodstained knife is difficult to comprehend.

31. From my analysis of the evidence, I have reached the conclusion that the accused was untruthful. I studied his demeanor very closely under cross-examination. I have no doubt that he carried the knife and stabbed the deceased which, as stated by the pathologist, is “consistent with homicide”. I have already stated that PW2 who was only 8 metres away did not witness any scuffle or fight between the accused and deceased.

32. The *corpus* of direct and circumstantial evidence shows that the accused planned and stabbed the deceased with the knife. Paraphrased, I find that the accused was not acting in self-defence; and, that the force applied is completely inconsistent with such a defence.

33. The accused also had a clear motive. He had told his father (DW2) two days earlier that the deceased had issued threats to him not to venture into the shops unless he repaid him some monies. Although DW2 did not take it seriously, the accused did. That is why he armed himself with a sharp knife on his outing. The attack was thus clearly pre-meditated.

34. Malice aforethought is further established by the use of a sharp knife delivered forcefully to the chest and into vital organs. Death resulted from a “single penetrating sharp force trauma to the chest”. He thus had malice aforethought as defined in section 206 (b) of the *Penal Code*.

35. For all those reasons, I find that the conduct of the accused is inconsistent with his plea of innocence. I find no defence or hypothesis that exonerates him.

36. The upshot is that the prosecution has proved the charge beyond reasonable doubt. The accused, of malice aforethought caused the death of the deceased by an unlawful act. I accordingly enter a finding of guilty and convict him accordingly.

It is so ordered.



DATED, SIGNED AND DELIVERED AT MURANG'A THIS 29TH DAY OF AUGUST 2022.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Accused person.

Ms AP Gakumu for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms Susan Waiganjo, Court Assistant.

