



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Wabule (Criminal Case E027 of 2022)
[2025] KEHC 405 (KLR) (21 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 405 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E027 OF 2022
REA OUGO, J
JANUARY 21, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

KEVIN MARANGO WABULE ACCUSED

JUDGMENT

1. Kevin Marango Wabule, herein referred to as the accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on 17th August 2022 at [Particulars withheld] village in Kimilili Sub-County within Bungoma County, jointly with another before the court murdered BNM.
2. The accused pleaded not guilty to the charge. The prosecution called thirteen (13) witnesses to establish its case against the accused who gave sworn testimony denying any involvement in the death of the victim.
3. In summary, the prosecution case involved the accused living in the Church of God compound with Ayub Wafula Naptola. On the night of 17/08/2022, the deceased was found injured and raped and taken to hospital. There were drops of blood that led to the church and the house occupied by the accused and Ayub Wafula Naptola. The deceased skirt and petticoat stained with blood were found in the church compound and the accused's clothes had blood stains.
4. Jaflet Omusonga (Pw8) testified that he was the treasurer of the Church of God and that he knew the accused person. He gave the accused a room in the church with instructions to keep the place clean and guard the premises. On 17/08/2022 he received a call that the deceased had been raped and injured within the church compound. He was informed to go to the scene and open the door and he complied and found 3 police officers in the compound. Pw8 testified that he did not know Ayub Wafula Naptola.



5. Christopher Wanyonyi Fota (Pw1) testified that he is a taxi driver and the deceased was his neighbor. On 16/08/2022 a boy told him that the deceased was lying beside the house near the Napier grass. Pw3 shining a torch went to the house and found the deceased talking to herself and thought that she was drunk. He also saw Ayub Wafula Naptola leaning on a car parked outside the compound. At the time he did not know Ayub Wafula Naptola's name. On the following day, he saw that Ayub Wafula Naptola had been beaten, sustained a head injury and had been accused of beastly acts. On cross-examination, he testified that the accused was not leaning on the vehicle.
6. PW (Pw2) was the deceased's husband and worked as a night guard. On 17/08/2022 at 5:00 a.m. he found the deceased lying outside by the tree crying and seriously injured. The deceased was not able to talk and he took her to the hospital where she died at 3:00 p.m. Pw2 testified that he was present when the postmortem was done and saw that the deceased had injuries on the head and the left side.
7. Harriet Okwaro (Pw3) a village elder testified that she received a call from Pw2 informing her that he had found the deceased lying down. Pw3 went to the scene and shone a torch over the deceased who was still alive. She called a motorbike and took the deceased to the hospital. Pw3 left when the deceased was receiving treatment.
8. Consolata Juma (Pw10) testified that on the material night, she heard the deceased crying out calling the name of her child. She testified that the deceased was in the habit of crying at night and shouting. At 6:00 a.m. when Pw10 woke up, she saw a crowd in her compound through her window. Pw10 saw the deceased lying down near a tree in her boma and bleeding. She called a boda boda and the deceased was taken to hospital.
9. Jackson Shiundu Wasike (Pw4) testified that Pw3 knocked at his door and led him to the deceased who was still alive and covered with a blanket. He called Japheth Omuchere Emende (Pw5) and Daniel Wekesa Machimbo (Pw6). They followed the traces of blood from the boma which led them to the Church of God. The church had a house in the compound and from the blood marks, it was clear that the deceased was dragged from that house. There was a boy in the house but the accused was not in the house. The accused was later brought from the stage. They also found the deceased's clothes outside the Church of God and took them to the Assistant Chief.
10. Pw5 testified that he received a call from Pw4 and went to the Church of God. At the gate, he saw a skirt and petticoat. The petticoat had blood stains on it. There were also marks showing the deceased was dragged from the house in the church compound. Pw6 also received a call from Pw4 and went to the home of Mzee Juma and found the deceased covered in a blanket. The deceased was taken to hospital and they arrested Ayub Wafula Naptola and the accused.
11. The Assistant Chief, Abduhamid Mukanaa (Pw7), testified that the accused and Ayub Wafula Naptola were brought to him by village elders on suspicion of raping the deceased who at the time had been taken to hospital. Pw7 interrogated them and released them on the condition that they would be summoned if needed. On 18/08/2022 the DCIO Kimilili asked Pw7 to help them look for the 2 suspects. Francis Tsalwa Machinji (Pw11) testified that he received a call from Pw7 to assist the suspects as the people wanted to subject them to mob justice. Pw11 asked the people not to beat the two and took them to Pw7.
12. The post-mortem was done by Dr. Graham Masika Makokha (Pw9). He testified that he studied for a bachelor's degree in Medicine and Surgery at the University of Nairobi. He works for the county government of Bungoma in Bumala. The post-mortem was conducted on 20/8/2022. The deceased was 66 years old and on external appearance, there were bruises on the right hip joint, right knee, and right ankle joint. The left arm had a deep bruise measuring 6cm by 5 cm. There was blood from the



ears and nose. Internally, the head had a scalp hematoma on the left temporal region and there was also blood in the brain i.e. subdural hematoma on the left temporal lobe. Pw9 formed the opinion that the cause of death was severe head injury second to blunt head injury.

13. Polycarp Lutta Kweyu (Pw12) testified that he works at Kisumu Government Chemist as an analyst. He has held the position for 12 years and has also a master's in Science (Chemistry) from Jomo Kenyatta University of Agriculture and Technology. He testified that on 28/08/2022 inspector Richard Gathoro and No. 119093 PC Geoffrey Onyancha (Pw13) submitted the following samples:
 1. Fingernails from BN (deceased) in a vacutainer tube marked "A".
 2. A vaginal swab from BN (deceased) marked "B".
 3. Loose pubic hairs from BN (deceased) marked as "C".
 4. A brown skirt for BN (deceased) in an envelope marked "D".
 5. A cream/white petty coat for BN (deceased) in a brown envelope marked "E".
 6. A long pair of grey trousers in a brown envelope marked "F".
 7. A maroon short-sleeved shirt in a brown envelope marked "G".
 8. A red short-sleeved t-shirt (with hood) in a brown envelope marked "H".
 9. A pair of black socks in a brown envelope marked "H".
 10. Buccal swab sample from Kevin Marango Wabule (accused) marked "J".
 11. Buccal swab sample from Ayub Wafula Naptola (accused) marked "K".
14. Pw12 found that the stains on the vaginal swab (item "B") and trousers (item "F") tested positive for seminal fluid. Stain on the skirt (item "D") and petty coat (item "E") tested positive for human origin.
15. Pw12 testified that the DNA profile generated from the seminal fluid in the vaginal swab (item "B") belongs to a single unknown person. The DNA profile generated from the seminal fluid on the trouser (item "F") matches the DNA profile of the accused. The female DNA profiles generated from the vaginal swab (item "B") and from the blood stains on the skirt (item "D") and petty coat (item "E") are identical and match the DNA profile of the deceased.
16. Pw12 testified that the DNA profile of Ayub Wafula Naptola did not match any of the items. The DNA profiles generated from items G, H and I were partial and inconclusive. The dots or spots on the clothes were not from human blood from a human being. They could have been dirt or sweat from a human being.
17. Pw13 testified that he was the investigating officer. He testified that Pw2 made a report that he came home from work at 6:00 a.m. and found the deceased lying on the ground. She had sustained injuries and they took her to the hospital where she died. Pw13 went to the hospital and found the deceased lying on a bed. They took the deceased to Delight Mortuary and on 18/8/2022 they went to the scene of crime, i.e. Church of God. In the compound, there was a house nearby and the accused pulled the deceased from that house to the road. They arrested the accused and Ayub Wafula Naptola. They collected some of the clothes from the house as exhibits as they had blood spots. On 20/08/2022 he attended the deceased's post-mortem and took the exhibits collected to the government chemist after preparing an exhibit memo.



18. Pw3 testified that Ayub Wafula Naptola escaped from police custody on 29/08/2022. On cross-examination, he testified that the deceased's clothes were found along the road.
19. The accused testified as (Dw1) when placed on his defence. He testified that he is a conductor at Kimilili stage. On 16/08/2022 he went to Kitale and returned. They then arrested him and took him to the chief but released him. On 17/08/2022 he was arrested. He denied knowing Ayub Wafula Naptola. He testified that he was at work when the deceased's body was found near his house. Dw1 denied committing the offence.

Analysis and Determination

20. I have considered the evidence adduced herein by both the prosecution witnesses and the defence proffered by the accused person. In a case of murder, the prosecution is required to prove the following:
 - a. Proof of the fact and the cause of death of the deceased.
 - b. That the cause of the deceased's death was a result of the direct consequence of the accused/accused's unlawful act or omission.
 - c. Proof that the unlawful act or omission was committed with malice aforethought as defined by section 206 of the Penal Code.
21. The prosecution proved the death of the deceased. Pw2 testified that he took the deceased to the hospital and she died while receiving treatment. Pw13 also confirmed that after Pw2 made the report he went to the hospital and confirmed that the deceased had died and took her to the mortuary. The doctor who performed the post-mortem confirmed that the deceased sustained internal and external injuries and formed the opinion that the cause of death was severe head injury secondary to blunt head trauma.
22. On whether it is the accused persons who cause the death of the deceased persons. There was no direct evidence adduced showing that any of the witnesses saw the accused person kill the deceased. The prosecution case was solely based on circumstantial evidence. In *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990 the Court of Appeal set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

 - i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
 - ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
 - iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”
23. In this case, it is the prosecution case that the deceased was found lying next to a tree in Pw10's compound which was near the Church of God. Pw5 testified that he saw the deceased's skirt and petticoat at the church compound. The two items were collected by the prosecution as presented as exhibits. According to forensic evidence presented by Pw12, the blood stains in the skirt and the petticoat were that of the deceased. Therefore, there was evidence that the attack against the deceased may have occurred within the church compound.



24. Pw8 testified that there was a house in the church compound and he had allowed the accused person to stay in that house. When Pw5, Pw6 and Pw7 went to the scene they saw a trail of blood that led to the house that was in the church. They opened the door and found Ayub Wafula Naptola asleep in the house. Pw1 also testified that before the deceased was assaulted, he saw her lying down near the Napier grass drunk. He also saw Ayub Wafula Naptola outside her compound leaning on a vehicle.
25. None of the prosecution witnesses placed the accused at the scene. Although Pw5 alleged that the accused and the deceased lived together in the house, the accused in his defence testified that he did not know Ayub Wafula Naptola. The deceased's neighbour Pw1 also testified that he had never seen Ayub Wafula Naptola but only recognized him after his arrest as the man he previously saw leaning on the vehicle which was parked outside the deceased's home. Pw8 who let the accused use the house in the church as his dwelling place also testified that he did not know Ayub Wafula Naptola. It is therefore not clear whether the accused and the said Ayub Wafula Naptola worked together to harm the deceased.
26. The prosecution case was that the deceased had been raped and a high vaginal swab was done. However, the DNA profile generated from the seminal fluid on the vaginal swab belonged to an unknown male person. Pw13 testified that they went to the accused's house and collected clothes with blood stains, however, Pw12 confirmed that the DNA profiles generated from the accused's shirt, t-shirt and socks were partial and inconclusive. Pw12 explained that the spots on the clothes were not human blood but were dirt or sweat. There was semen in the accused's trousers but the same was retrieved from his house and merely confirmed that the trousers belonged to him
27. I have carefully considered the prosecution evidence against the accused and the accused person's defence. I find that the prosecution evidence was inadequate to prove beyond reasonable doubt the accused caused the death of the deceased. There is no evidence that the accused was in the locus in quo and the prosecution further failed to show that the accused worked together with Ayub Wafula Naptola to kill the deceased.
28. The upshot is that the prosecution has not proved the charge against the accused to the required standard, beyond reasonable doubt. I find the accused person, Kevin Marango Wabule, not guilty of the offence of murder and acquit him accordingly under section 215 of the Criminal Procedure Code. The accused is free to go unless lawfully held.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 21ST DAY OF JANUARY 2025

R.E. OUGO

JUDGE

In the presence of:

Kevin Marango Wabule/ Accused - present

Miss Nekesa h/b Mr.Kundu -For the Accused

Miss Matere -For the State

Mr.Kizito - C/A

